ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 19-1230 (and consolidated cases)

UNION OF CONCERNED SCIENTISTS, et al.,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,

Respondent,

COALITION FOR SUSTAINABLE AUTOMOTIVE REGULATION, et al.,

Intervenors for Respondent.

On Petition for Review of Final Action by the Environmental Protection Agency
and the National Highway Traffic Safety Administration
84 Fed. Reg. 51,310 (Sept. 27, 2019)

FINAL BRIEF OF THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Circuit Rule 28(a)(1), counsel for the Institute for Policy Integrity at New York University School of Law certify as follows:

1) All parties, amici, and intervenors appearing in this case are listed in Petitioners' opening briefs, except for the following *amicus curiae*:

David Dickinson Ackerly, Maximilian Auffhammer, Allen Goldstein, John Harte, David Sedlak, Scott Lewis Stephens, and LeRoy Westerling; the American Thoracic Society, American Lung Association, American Medical Association, American Public Health Association, and California Medical Association; National Parks Conservation Association and Coalition to Protect America's National Parks; National League of Cities, U.S. Conference of Mayors, and International Municipal Lawyers Association; National Parks Conservation Association and Coalition to Protect America's National Parks; Professor Leah M. Litman; Thomas C. Jorling, Michael P. Walsh, and Margo T. Oge; National Association of Clean Air Agencies; and the Institute for Policy Integrity at New York University School of Law.

2) References to the final agency action under review and related and consolidated cases appear in Petitioners' opening briefs.

RULE 26.1 DISCLOSURE STATEMENT

The Institute for Policy Integrity ("Policy Integrity") is a nonpartisan, not-for-profit organization at New York University School of Law. Policy Integrity is dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity has no parent companies. No publicly held entity owns an interest in Policy Integrity. Policy Integrity does not have any members who have issued shares or debt securities to the public.

STATEMENT REGARDING SEPARATE BRIEFING, AUTHORSHIP, AND MONETARY CONTRIBUTIONS

Because a single joint brief is not practicable in this case due to the numerous and complicated legal issues involved, the Institute for Policy Integrity ("Policy Integrity") files this separate *amicus* brief in compliance with the word limits set forth in this Court's Order of May 20, 2020. Parties consented to the filing of all amicus briefs by stipulation filed on May 26, 2020.

Under Federal Rule of Appellate Procedure 29(a)(4)(E), Policy Integrity states that no party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person—other than the *amicus curiae*, its members, or its counsel—contributed money intended to fund the preparation or submission of this brief.

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

EPA	Environmental Protection Agency
Policy Integrity	Institute for Policy Integrity at New York University School of Law
Waiver Withdrawal	84 Fed. Reg. 51,310, 51,328–52 (Sept. 27, 2019)

INTEREST OF AMICUS CURIAE AND AUTHORITY TO FILE

The Institute for Policy Integrity at New York University School of Law ("Policy Integrity")[1] submits this *amicus* brief in support of Petitioners' challenge to The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310 (Sept. 27, 2019). In that action, the Environmental Protection Agency ("EPA") withdraws the waiver of preemption that it had granted for California to enforce aspects of its Advanced Clean Cars program, 78 Fed. Reg. 2112 (Jan. 9, 2013). 84 Fed. Reg. at 51,328–52 ("Waiver Withdrawal").

Policy Integrity is a nonpartisan, not-for-profit think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy, focusing primarily on environmental issues. Its director, Professor Richard L. Revesz, has published more than 80 articles and books on environmental and administrative law, including numerous works on the scope of EPA's authority under the Clean Air Act and extensive writings on environmental federalism.[2] Policy

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[1] This brief does not purport to represent the views, if any, of New York University School of Law.

[2] A full list of Prof. Revesz's publications is available at https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=20228. His works on environmental federalism include *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 Harv. L. Rev. 555 (2001); *Federalism and Interstate Environmental Externalities*, 144 U. Penn. L. Rev. 2341 (1996); and *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. Rev. 1210

Integrity has published academic reports, submitted regulatory comments, and filed *amicus* briefs in numerous proceedings interpreting the Clean Air Act.[3]

Policy Integrity has particular expertise on the questions raised in this case through its academic research on EPA's authority to revoke a waiver issued under Section 209(b) of the Clean Air Act. Specifically, Policy Integrity published a report that it filed to the administrative record concluding that EPA lacks authority to revoke a preemption waiver under the circumstances presented here, if ever.[4] Policy Integrity advanced these arguments through regulatory comments in this action.[5]

(1992).

[3] *See, e.g.*, Briefs for the Institute for Policy Integrity as Amicus Curiae, *Am. Lung Ass'n v. EPA*, No. 19-1140 (D.C. Cir. filed Apr. 23, 2020) (opposing EPA's interpretation of Section 111(d) prohibiting consideration of flexible compliance mechanisms when regulating existing stationary sources); *Maryland v. EPA*, 958 F.3d 1185 (D.C. Cir. 2020) (critiquing EPA's cost-effectiveness analysis in denying petition to set more stringent limits on ozone-forming emissions in upwind states); *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (discussing EPA's calculation of costs and benefits in regulating mercury emissions from power plants); *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489 (2014) (supporting EPA's authority to use market mechanisms to reduce cross-state air pollution); *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014) (arguing that EPA properly determined that "modified" stationary sources must use the "best available control technology" for greenhouse gases).

[4] Denise A. Grab, Jayni Hein, Jack Lienke & Richard L. Revesz, *No Turning Back: An Analysis of EPA's Authority to Withdraw California's Preemption Waiver Under Section 209 of the Clean Air Act* (2018) ("*No Turning Back*"), https://policyintegrity.org/files/publications/No_Turning_Back.pdf. Policy Integrity attached *No Turning Back* in comments submitted into the administrative record. *See* https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0283-4213.

[5] Inst. for Policy Integrity, Comment Letter on The Safer Affordable Fuel-Efficient Vehicles Rule (Oct. 26, 2018), https://policyintegrity.org/documents/Emissions_Standards_Waiver_Comments_O

In line with Policy Integrity's previous arguments, Petitioners contend that EPA lacks authority to revoke a previously issued waiver under these circumstances, if at all. Brief for State and Local Government Petitioners and Public Interest Petitioners ("Opening Br.") 28–39. Policy Integrity's expertise in environmental and administrative law—particularly under the Clean Air Act—and experience with the Waiver Withdrawal give it a unique perspective on this argument.

SUMMARY OF ARGUMENT

While the Waiver Withdrawal is predicated on EPA's conclusion that the agency has virtually unconstrained authority to revoke a preemption waiver issued under Section 209(b)—even when, as here, the revocation is based on EPA's years-later reconsideration of its initial judgment—the agency fails to justify its conclusion, overlooking key countervailing principles and misconstruing the purpose and mechanics of the waiver provision.

For one, an agency may "reconsider[]" a prior adjudicative determination[6] only when "Congress has said it can," *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*,

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ct2018.pdf.

[6] EPA has previously recognized that "waiver proceedings and actions under section 209(b)(1) are informal adjudications." 74 Fed. Reg. 32,744, 32,781 (July 8, 2009); *see also* 78 Fed. Reg. 2112 (granting waiver revoked here via adjudication, not rule). And despite officially styling this action as a rulemaking, EPA likewise acknowledges in the Waiver Withdrawal that its waiver determination is an "adjudication," 84 Fed. Reg. at 51,337, and invokes case law from the adjudicative context in attempt to support its withdrawal authority, *id.* at 51,333.

367 U.S. 316, 322 (1961), and Section 209(b) strongly indicates that EPA may not withdraw a waiver under these circumstances. This is evidenced not only through the provision's "absence of explicit language with regard to withdrawal of a waiver," 84 Fed. Reg. at 51,331, but also through text indicating that EPA may consider Section 209(b)'s three factors only prior to the granting of a waiver. Section 209(b)'s purpose of affording California the "broadest possible discretion in selecting the best means to protect the health of its citizens," H.R. Rep. No. 95-294, at 301–02 (1977), further cuts against EPA's claim of revocation authority, which would discourage reliance and thereby render the waiver largely ineffective.

Lacking textual support, EPA invokes so-called "inherent authority"—"more accurate[ly] label[ed] … 'statutorily implicit'" authority, *HTH Corp. v. NLRB*, 823 F.3d 668, 679 (D.C. Cir. 2016)[7]—to justify its action. 84 Fed. Reg. at 51,331. But this Court is "unwilling[] to wrest a standardless and openended revocation authority from a silent statute," *Am. Methyl Corp. v. EPA*, 749 F.2d 826, 837 (D.C. Cir. 1984), and EPA fails to justify the implicit authority it claims. Most notably, EPA appears to suggest that because Section 209(b)'s third waiver prong requires consistency with Section 202(a) vehicle-pollution standards, the agency must have authority to

[7] An administrative agency lacks "inherent" authority because "[a]s a creature of statute" it has "only those powers conferred upon it by Congress." *HTH Corp.*, 823 F.3d at 679. Because "the more accurate label" for agency powers "that were not *expressly* enumerated by Congress" is "'implicit,'" *id.*—not "inherent"—this brief uses that term throughout.

revoke a waiver because it may revise those standards. But the purpose of Section 209(b) is for California to enforce standards that are "at least as [stringent] as applicable Federal standards," 42 U.S.C. § 7543(b)(1), and so, as this Court has explained, California standards do not become inconsistent with federal standards merely by virtue of being more stringent than those federal standards. In any event, EPA did not revise its Section 202(a) standards between issuing and revoking the waiver at issue, so its argument is not only misguided but also misplaced.

EPA's claim of implicit revocation authority also fails due to two well-established limits on an agency's power to reconsider a prior adjudicative determination. For one, implicit reconsideration authority must be exercised within a "reasonable time" of the initial determination, which is typically "measured in weeks, not years," *Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977), and EPA's six-year delay is plainly untimely under that standard. Additionally, detrimental and justifiable reliance by California and other states upon the waiver further weighs against EPA's claim of implicit authority.

In short, both Section 209(b) itself and applicable limits on implicit revocation authority render the Waiver Withdrawal unlawful.

ARGUMENT

Agencies must "be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers"—particularly

when, like here, they seek to preempt "areas of traditional state responsibility." *Bond v. United States*, 572 U.S. 844, 858 (2014) (internal quotation marks omitted). Yet EPA has no basis to be "certain" in its position. To the contrary, both Section 209(b) and this Court's limitations on an agency's implicit powers indicate that EPA lacks the revocation authority it asserts, and EPA's contrary arguments lack merit.

I. Section 209(b)'s Text and Purpose Do Not Support EPA's Assertion of Revocation Authority

Section 209(b)'s text and "underlying intent" to "afford California the broadest possible discretion," *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1110 (D.C. Cir. 1979) (quoting H.R. Rep. No. 95-294, at 301–02), both cut against EPA's assertion of revocation authority. This evidence of "contrary legislative intent" does not support EPA's authority to "reconsider … its final decisions" under Section 209(b) and is fatal to the Waiver Withdrawal. *See Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 229 n.9 (2d Cir. 2002) (holding that provision at issue therein precludes administrative reconsideration); *see also* Opening Br. 28–39 (explaining that Section 209(b) provides neither express nor implicit authorization for the Waiver Withdrawal).

A. Section 209(b)'s Text Is Not Simply Silent, But Suggests That EPA Lacks the Revocation Authority It Asserts

The text of Section 209(b)—which, it bears emphasizing, addresses waiver issuance, not revocation—does not support the revocation power that EPA asserts in the Waiver Withdrawal.

In addition to lacking any "explicit language" authorizing "withdrawal of a waiver," as EPA recognizes, 84 Fed. Reg. at 51,331, the provision suggests that EPA is authorized to evaluate whether a waiver request satisfies Section 209(b) only once, prior to granting the waiver, and cannot later second-guess the wisdom of legal and policy judgments made as part of that evaluation. Specifically, Section 209(b) provides that a "waiver … shall be granted" unless EPA makes one of three findings: that California's determination that its vehicle-emission standards "in the aggregate" are "at least as protective of public health and welfare as applicable Federal standards" is arbitrary and capricious; that California does not need its standards to address "compelling and extraordinary conditions"; or that California's standards are "not consistent" with Section 202(a). 42 U.S.C. § 7543(b)(1). In other words, under the statute's plain language, EPA evaluates the relevant factors only when determining whether the waiver "shall be granted," *id.*, not after granting the waiver. Through this textual restriction—indicating that the waiver decision is a one-time determination—Section 209(b) belies EPA's claim that it can, at any time, revoke a

waiver based on a reevaluation of the legal and policy reasoning underlying the initial grant.

Indeed, had Congress sought to confer the reconsideration authority that EPA asserts, it presumably would have expressly authorized EPA to consider a waiver in a manner that "imposes no temporal limit on the Administrator's authority," *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, 613 (D.C. Cir. 2013). Congress has done exactly this for other EPA-administered programs: Section 404 of the Clean Water Act, for instance, permits EPA to deny the use of an area as a disposal site "whenever [it] determines" that the relevant factors are met, 33 U.S.C. § 1344(c)—language, this Court held, that "grant[s EPA] authority to … withdraw" authorization "at *any* time," *Mingo Logan*, 714 F.3d at 613. In contrast, the limitation on EPA's authority in Section 209(b) evinces that this provision allows for a one-time determination without the same "broad veto power extending beyond the [waiver] issuance," *id*.

Yet despite the fact that Section 209(b) does not support EPA's assertion of revocation authority, EPA does not so much as acknowledge this "plain wording," which "contains the best evidence of Congress' pre-emptive intent," *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

B. EPA's Assertion of Revocation Authority Frustrates Section 209(b)'s Deferential Structure and Purpose of Facilitating Innovation

EPA's assertion of revocation power in the Waiver Withdrawal also stands in tension with the fact that Section 209(b) was "structured … to restrict and limit EPA's ability to deny a waiver," as the agency once acknowledged, affording "broad discretion" to California "in selecting the means it determined best to protect the health and welfare of its citizens," 74 Fed. Reg. at 32,745. That purpose of innovation would be frustrated if EPA could reconsider its initial judgment and revoke a waiver at any time.

Section 209(b) grants California broad deference and discretion to reduce pollution from motor vehicles, and severely restricts EPA's oversight of the waiver process. Most significantly, the section provides that California—not EPA—assesses whether its standards are "at least as protective of public health and welfare as applicable Federal standards," and that EPA may overturn this finding only when California's determination "is arbitrary and capricious." 42 U.S.C. § 7543(b)(1). Pursuant to this direction, EPA may "not overturn California's judgment lightly" and requires "clear and compelling evidence that the State acted unreasonably" to do so. H.R. Rep. No. 95-294, at 302; *see also Ford Motor Co. v. EPA*, 606 F.2d 1293, 1301 (D.C. Cir. 1979) (recognizing that Section 209(b) "does not provide for any probing substantive review of the California standards"). Accordingly, EPA has granted the overwhelming majority of California's waiver requests—fully denying

just one request, which the agency later granted, 74 Fed. Reg. at 32,745—and, until now, had never revoked a waiver.

This backdrop of "substantial deference to California's judgments," 78 Fed. Reg. at 2115, cuts sharply against EPA's assertion of authority to issue the Waiver Withdrawal. Under EPA's theory of waiver revocation, California would be reluctant to engage in regulatory programs that relied upon the waiver, jeopardizing the statute's core purpose that California serve as a "testing area for … lower [emission] standards," S. Rep. No. 90-403, at 33 (1967). EPA's assertion of revocation authority likewise threatens to "foster[] great uncertainty in the business community," *see Am. Methyl*, 749 F.2d at 840 (rejecting EPA's similar claim of implicit revocation authority under Section 211 of the Clean Air Act): Because California's standards need be at least as stringent as federal standards only "in the aggregate" and may be less stringent in some respects, 42 U.S.C. § 7543(b)(1), revocation could force manufacturers to meet a new suite of federal standards on short notice, betraying Congress's resolve that "[m]anufacturers [be] … assured adequate lead time," H.R. Rep. No. 95-294, at 310. Thus, manufacturers too would be less willing to "invest[] in technology to create more efficient, less costly, and less polluting" motor vehicles if they could not rely on the waiver, further undermining the goals of Section 209(b). *See Am. Methyl*, 749 F.2d at 839–40.

Because EPA's claim of revocation authority in the Waiver Withdrawal is inconsistent with the "primary purpose" of Section 209(b) and "lacks textual support," it cannot stand. *Gresham v. Azar*, 950 F.3d 93, 101, 102 (D.C. Cir. 2020).

II. EPA's Arguments for Implicit Revocation Authority Are Unavailing

Despite acknowledging Section 209(b)'s absence of "language with regard to withdrawal of a waiver," EPA nonetheless reads an expansive power into Section 209(b) to "reconsider [its] prior actions," arguing that this provision's "text, structure, and context … support" the agency's claims of implicit revocation authority. 84 Fed. Reg. at 51,331. But EPA's two arguments on this front hardly support its claims, particularly under the circumstances here.

As background, an agency's implicit revocation authority is at its highest when "correct[ing] inadvertent ministerial errors" and lowest when "changing previous decisions because the wisdom of those decisions appears doubtful." *See Consol. Rail Corp. v. Surface Transp. Bd.*, 93 F.3d 793, 801 (D.C. Cir. 1996) (quoting *Am. Trucking Ass'ns, Inc. v. Frisco Transp. Co.*, 358 U.S. 133, 146 (1958)). Yet here, EPA does not claim that California's waiver was issued due to "ministerial error[]" or other "inadvertence or mistake." *Howard Sober, Inc. v. ICC*, 628 F.2d 36, 41 (D.C. Cir. 1980) (internal quotation marks omitted). Rather, the agency's reversal is "for the sole purpose of applying … [a] change in administrative policy," and so its assertion of reconsideration authority must be viewed skeptically and narrowly—

just as it would be in the judicial context.[8] *Chapman v. El Paso Nat. Gas Co.*, 204 F.2d 46, 53–54 (D.C. Cir. 1953) (agency adjudication "may not be repudiated" for this reason); *accord Coteau Props. Co. v. Dep't of Interior*, 53 F.3d 1466, 1479 (8th Cir. 1995) (vacating reconsideration made "in light of changing policies").

Against this backdrop, EPA's arguments for implicit authority to issue the Waiver Withdrawal ring particularly hollow. In fact, EPA badly misreads Section 209(b), and neither of the two aspects of this provision that the agency claims "confirm[] that Congress intended" to confer "authority to withdraw a previously granted waiver under appropriate circumstances"—the provision's interaction with Section 202(a) of the Clean Air Act, or its legislative history—supports EPA's assertion of revocatory power, especially "under … [the] circumstances" here, 84 Fed. Reg. at 51,332.

A. EPA's Reading of the Third Waiver Prong Is Both Indefensibly Broad and Irrelevant to This Proceeding

EPA first claims that because Section 209(b)'s third waiver prong requires "consisten[cy] with section [202(a)]," 42 U.S.C. § 7543(b)(1)(C)—which addresses emission standards from new motor vehicles—it "necessarily follows that EPA has

[8] A federal court may revise its own prior order under Fed. R. Civ. P. 60(b) based on such reasons as inadvertence and mistake, but concern "over the proper [legal] interpretation … does not likely justify" overturning a prior decision. *Owens v. Republic of Sudan*, 864 F.3d 751, 824 n.11 (D.C. Cir. 2017) (internal quotation marks omitted), *overruled on other grounds by Opati v. Republic of Sudan*, 140 S. Ct. 1601 (2020).

authority to … withdraw a previously granted waiver" in circumstances where the agency subsequently revises its Section 202(a) standards. 84 Fed. Reg. at 51,332. Though EPA's argument here is not entirely clear, Section 209(b)'s third waiver prong is far narrower than the agency appears to suggest, and when properly understood does not support EPA's inference.

As this Court has explained, Section 209(b)'s third waiver prong is a narrow one that is not triggered merely due to a difference between California and federal standards. Rather, this prong is triggered only if California does not "allow sufficient lead time to permit manufacturers to develop and apply the necessary technology" or if its "test procedures … impose inconsistent certification requirements" with the federal standards, *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 463 (D.C. Cir. 1998) (internal quotation marks omitted)—a position that EPA itself has echoed in prior waiver grants, 78 Fed. Reg. at 2121 (recognizing agency's similar analysis for "[p]revious waivers"). In light of this Court's narrow interpretation of the third waiver prong, EPA's seemingly broader characterization falls flat.

EPA's apparent interpretation not only violates this Court's precedent but also frustrates the purpose of the waiver provision. Specifically, Section 209(b) envisions that California will impose distinct "standards … for the control of emissions from new motor vehicles" that must be "at least as protective of public health" as the federal standards. 42 U.S.C. § 7543(b)(1). Unsurprisingly, therefore, Congress

anticipated that California "standards might be more stringent than the Federal standard[s]" under Section 202(a). H.R. Rep. No. 95-294, at 302. Indeed, such is normally the case: EPA found the covered standards, as a whole, to be "more stringent than applicable Federal requirements" when it approved the waiver at issue, 78 Fed. Reg. at 2115, like it has with prior California waivers, *see, e.g.*, 55 Fed. Reg. 43,028, 43,030 (Oct. 25, 1990) (allowing standards "more stringent than the Federal standards"); 49 Fed. Reg. 18,887, 18,889 (May 3, 1984) (same). Accordingly, contrary to EPA's apparent claim, the fact that EPA may "revisit" its standards under Section 202(a) and make them even less stringent relative to California's standards than the federal standards were when the waiver was issued hardly implies that the agency can also "withdraw a previously granted waiver," 84 Fed. Reg. at 51,332.

Moreover, even if EPA's characterization of Section 209(b)'s third prong were correct, its argument would not justify revocation here. That is because EPA had "not finalized any action to amend the Federal [greenhouse gas] … standards that were promulgated" under Section 202(a) when it issued the Waiver Withdrawal, *id.* at 51,358, nor did it revoke the waiver under the third statutory prong, *id.* at 51,350 ("EPA at this time is not finalizing any determination with respect to … [S]ection 209(b)(1)(C)."). And although EPA did relax its Section 202(a) standards for greenhouse gases months after issuing the Waiver Withdrawal, 85 Fed. Reg. 24,174 (Apr. 30, 2020), it did not revise those standards while this waiver was

effective and does not claim that California's waiver is invalid due to any intervening events since it issued that waiver. Because the Waiver Withdrawal must be assessed "based on the reasons [EPA] gave when it acted," the agency's later relaxation of Section 202(a) standards is of no consequence here. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, No. 18-587, slip op. at 17 (U.S. June 18, 2020).

B. EPA's Invocation of Legislative History Is Equally Unpersuasive

EPA next cites a single line from a 1967 Senate committee report on the original provision that would later become Section 209(b), which it claims supports its assertion of implicit revocation authority. *See* 84 Fed. Reg. at 51,332 ("Implicit in this provision is the right of the [Administrator] to withdraw the waiver at any time [if] after notice and an opportunity for public hearing he finds that the State of California no longer complies with the conditions of the waiver." (quoting S. Rep. No. 90-403, at 34)). But this single, stray reference in the legislative history hardly carries the significance that EPA ascribes to it.

To begin, even assuming this line accurately reflects the current scope of EPA's revocation authority, it would indicate that EPA may withdraw a waiver only when "California no longer complies with the conditions of the waiver," S. Rep. No. 90-403, at 34, which EPA does not allege to be the case here. EPA does not claim, for instance, that California was insufficiently enforcing its Zero Emission Vehicle or greenhouse gas emission standards. Rather, EPA revokes the waiver because it

changes its mind about whether the waiver was a valid exercise of the agency's authority or was ever necessary "to meet compelling and extraordinary conditions." 84 Fed. Reg. at 51,328 (internal quotation marks omitted). Thus, this line from the 1967 Senate report actually indicates that EPA lacks revocation authority under these circumstances.

In any event, the 1967 Senate report is not an independent source of regulatory authority. "Although legislative history may give meaning to *ambiguous* statutory provisions," *Int'l Bhd. of Elec. Workers, Local Union No. 474, AFL-CIO v. NLRB.*, 814 F.2d 697, 699–700 (D.C. Cir. 1987) (emphasis added), "courts have no authority to enforce a principle gleaned solely from legislative history that has no statutory reference point," *Shannon v. United States*, 512 U.S. 573, 584 (1994) (internal quotation marks and alterations omitted). Because the cited legislative history lacks a "reference point" in Section 209(b) for any alleged revocation authority, *id.*—as EPA concedes, 84 Fed. Reg. at 51,331—that history "is, at best, of minimal persuasive force," *Nat'l Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 422 (D.C. Cir. 2009). Indeed, Congress provided such a reference point in several other provisions authorizing EPA to permit a state to enforce its own requirements in lieu of a federal plan, authorizing revocation authority under narrow and particular circumstances. *See, e.g.*, 42 U.S.C. § 7661a(i)(1) (authorizing withdrawal of state-implementation permit if state is "not adequately administering and enforcing [its] program"); 33

U.S.C. § 1342(c)(3) (authorizing withdrawal of state pollutant-discharge permitting program if state "is not … in accordance with [statute's] requirements"). Without a similar "detailed provision[] concerning reconsideration" here, EPA should not assume that this line of legislative history has any probative value. *See Civil Aeronautics Bd.*, 367 U.S. at 322.

Furthermore, even if the 1967 history could be relevant despite lacking a statutory reference point, three crucial statutory revisions in 1977 expanded California's discretion and prominence in the waiver process, rendering obsolete any earlier statements about EPA's withdrawal authority. Specifically, Congress: 1) limited EPA's authority to assess the statute's three enumerated factors to when it considers whether a waiver "shall be granted," 42 U.S.C. § 7543(b)(1), *see also supra* Sec. I.A; 2) permitted a waiver to be issued when "*the State* determines that [its] standards will be … at least as protective" as federal law, 42 U.S.C. § 7543(b)(1) (emphasis added), removing this judgment from EPA; and 3) permitted other states to adopt regulations "identical to the California standards for which a waiver has been granted," 42 U.S.C. § 7507(1).[9] Having now "afford[ed] California the broadest possible discretion," H.R. Rep. No. 95-294, at 301–02, while greatly increasing

[9] For a full comparison of the 1967 and 1977 laws, compare Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 501 (1967) with Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977).

reliance by other states on its waiver, it is highly unlikely that Congress sought to grant EPA expansive reconsideration authority *sub silentio*.

Thus, legislative history does not support EPA's assertion of reconsideration authority, but rather indicates a lack of authority under the present circumstances.

III. Timeliness and Reliance Interests Further Weigh Against EPA's Assertion of Implicit Revocation Authority

In addition to relying on a misreading of Section 209(b), as discussed above, the Waiver Withdrawal violates well-recognized, generally applicable limits on the use of implicit authority to reconsider adjudicative determinations. Simply put, EPA's revocation of a six-year-old determination that garnered considerable nationwide reliance cannot stand. For one, courts have consistently held that implicit authority to revoke an adjudicative determination must be exercised within a reasonable time period, and have vacated withdrawals as untimely that were made months or years later. Moreover, the considerable and justifiable reliance on the waiver as a means for California and other states to meet federal air-quality mandates and state climate goals further underscores the arbitrariness of EPA's withdrawal.

A. EPA's Assertion of Implicit Authority Is Severely Untimely

Even assuming that EPA has some implicit authority to revoke a waiver based on a reconsideration of the statutory factors, the agency cites no precedent for its ability to exercise that authority six years after granting the waiver. Nor can it: Under precedent from this Court and others, EPA's revocation here is plainly untimely.

Indeed, as EPA admits, appellate courts around the country—including this one—have consistently held that "reconsideration … must occur within a reasonable time after the decision being reconsidered was made." 84 Fed. Reg. at 51,335 (internal quotation marks omitted) (collecting cases); *see also id.* at 51,333 (same). "This policy balances the desirability of finality against the general public interest in attaining the correct result." *Dun & Bradstreet Corp. Found. v. U.S. Postal Serv.*, 946 F.2d 189, 193–94 (2d Cir. 1991). And to promote finality, the window that agencies have to revisit their decisions is narrow: As this Court explained, the "short and reasonable time period" when agency reconsideration is permissible usually is a matter of "weeks, not years." *Mazaleski*, 562 F.2d at 720.

Applying this principle, federal courts have vacated numerous agency withdrawals issued only a few months or years after the initial decision—well short of EPA's six-year delay here. In one case, a reconsideration just thirty-two days from the initial determination was deemed untimely. *McAllister v. United States*, 3 Cl. Ct. 394, 396, 398 (1983). In another, an eleven-month delay was deemed "contrary to fundamental notions of fairness." *Gubisch v. Brady*, No. 88-2031, 1989 WL 44083, at *10 (D.D.C. Apr. 20, 1989). Delays of five months, nine months, one year, three years, and five years have also been held too lengthy.[10] And this Court has indicated

[10] *Rosebud Sioux Tribe v. Gover*, 104 F. Supp. 2d 1194, 1202 (D.S.D. 2000) (five months), *rev'd on other grounds Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031 (8th Cir. 2002); *Prieto v. United States*, 655 F. Supp. 1187, 1192 (D.D.C. 1987)

that an agency's reconsideration authority may be limited to the period "allowed for an [administrative] appeal," *Albertson v. FCC,* 182 F.2d 397, 399 (D.C. Cir. 1950); *accord Am. Methyl*, 749 F.2d at 835—which here ended in March 2013, 78 Fed. Reg. at 2112.

EPA does not distinguish this authority, nor offer any support for its six-year delay. Instead, the agency claims that its delay was reasonable because in April 2018—more than five years after issuing the waiver and over a year after completing its original mid-term evaluation of Section 202(a) greenhouse gas emission standards—EPA "revised its [mid-term] finding on the appropriateness of the federal [model year] 2022–2025 [greenhouse gas] standards," which allegedly "provided notice of a reasonable possibility that these federal … standards would likely be changing." 84 Fed. Reg. at 51,336. Though EPA's contention here is hardly clear, any argument that it may be making is easily refuted.

To the extent EPA argues that the timeliness of withdrawal should be assessed as of when EPA revised its mid-term determination in April 2018, the withdrawal would still be severely untimely, coming more than five years after the initial waiver grant. EPA also fails to explain how its April 2018 finding on the stringency of

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(eleven months); *C. J. Langenfelder & Son, Inc. v. United States*, 341 F.2d 600, 604 (Ct. Cl. 1965) (one year); *Cabo Distrib. Co., Inc. v. Brady*, 821 F. Supp. 601, 613 (N.D. Cal. 1992) (three years); *Upjohn Co. v. Pa. R.R. Co.*, 381 F.2d 4, 5 (6th Cir. 1967) (three years); *Brooklyn Heights Ass'n v. Nat'l Park Serv.*, 818 F. Supp. 2d 564, 569 (E.D.N.Y. 2011) (five years).

federal greenhouse gas standards provided notice that the agency would withdraw the California waiver on unrelated grounds. Because Section 209(b)'s third waiver prong is narrow and waivers are regularly granted for California to enforce more stringent standards, as detailed above, a potential relaxation of federal standards under Section 202(a) hardly alerts California that its waiver to enforce already-more stringent standards may soon become invalid. *See supra* Sec. II.A. Indeed, California standards must be "at least as protective of public health and welfare as applicable Federal standards" to qualify for a waiver in the first place, 42 U.S.C. § 7543(b)(1), so a subsequent weakening of federal standards should not impact the waiver.

Alternatively, if EPA argues that the completion of the revised midterm evaluation in April 2018 reset the clock on waiver reconsideration and that the Waiver Withdrawal is timely relative to the date of that revised evaluation, that claim is equally unavailing, for similar reasons. Once again, EPA confuses the relationship between the federal standards and California waiver, since a waiver (including this one) allows California to enforce more stringent standards and thus should be unaffected by a relaxing of federal standards. In any event, the "reasonable time" that an agency may have for reconsideration is measured from when "the decision being reconsidered was made," *ConocoPhillips Co. v. EPA*, 612 F.3d 822, 832 (5th Cir. 2010)—here, January 2013—and not from a tangential determination made years later. And even if the timeliness of the Waiver Withdrawal could somehow be

measured relative to the April 2018 revision of the midterm evaluation, the 17-month delay prior to revocation is still longer than other delays deemed unreasonable. *See supra* note 10 and accompanying text.

In short, there is simply no support for EPA's revocation authority six years after the fact. EPA's unfounded claim of sweeping reconsideration authority beyond any reasonable timeframe cannot stand.

B. Considerable Reliance by California and More Than a Dozen Other States Further Undercuts EPA's Assertion of Implicit Authority

Even if EPA could somehow circumvent the "reasonable time" requirement, the fact that California and many other states have detrimentally relied on this waiver to meet federal and state air-pollution mandates resolves any lingering doubt about the lawfulness of EPA's action.

Revoking the preemption waiver does not merely prevent California from reducing greenhouse gas emissions through its Advanced Clean Cars program. It also jeopardizes the state's ability to meet federal standards for other harmful air pollutants, since the standards covered by the waiver would have reduced— directly and indirectly—nitrogen-oxide, ozone, and particulate-matter pollution. *See* 78 Fed. Reg. at 2122, 2129, 2134. Indeed, EPA recognized when granting the waiver in 2013 that California's program helped the state "meet … multiple air quality and climate goals" and would allow it to "meet federal standards" for air pollution. *Id*. at 2131. And since 2016, the state formally relied upon its waived programs to meet federal

ambient air quality standards for ozone, particulate matter, and nitrogen oxides. *See* 81 Fed. Reg. 39,424 (June 16, 2016) (including Zero Emission Vehicle program in state plan to meet federal air-quality standards). In short, California's compliance with "federal ambient air quality standards[] depends in substantial part upon its [waiver]." Cal. Air Res. Bd., Analysis in Support of Comments 60 (Oct. 26, 2018).[11]

Had EPA denied California's waiver request at the outset rather than midway through the waiver's applicability period, California might have been able to design different approaches to achieve federal air-quality mandates. If EPA is now permitted to withdraw the waiver that it issued in 2013, however, California will likely not have sufficient time to develop alternative approaches to replace the coordinated framework of strategies it had already begun implementing, and thus "would struggle to maintain compliance with … key ambient air quality standards." *Id.* This reasonable and "detrimental reliance … militate[s] against allowing [EPA] to withdraw" the preemption waiver. *See Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 418 (6th Cir. 2004).

These state reliance interests are especially significant because California's efforts "to free from pollution the very air that people breathe clearly fall[] within … the [state's] police power," *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440,

[11] *Available at* https://www.regulations.gov/document?D=NHTSA-2018-0067-11873.

442 (1960). Because EPA's revocation "threaten[s] [California's] current operations and future plans" and spells "disruptive consequences for the State and its citizens," *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 182 (1990)—curtailing the state's "great latitude under [its] police powers to legislate as to the protection of the lives, limbs, [and] health … of all persons," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)—it impermissibly infringes upon California's reliance interests.

And California is not the only state whose legitimate expectations would be upended. Thirteen other states and the District of Columbia—which collectively (with California) account for nearly 36% of the U.S. light-duty vehicle market—have also adopted California's standards pursuant to Section 177 of the Clean Air Act,[12] and many of these states have also relied on the standards in meeting public-health goals. Most notably, EPA's revocation threatens many of these states' abilities to meet federal air-quality standards. *See* State of California et al., Detailed Comments on Proposed Rule 119–20 (Oct. 26, 2018) ("States Comments").[13] In adopting California's motor-vehicle emission standards, for instance, the State of Washington concluded that the waived standards would "provide significant and

[12] Cal. Air Res. Bd., *States That Have Adopted California's Vehicle Standards under Section 177 of the Federal Clean Air Act*, https://ww2.arb.ca.gov/sites/default/files/2019-03/177-states.pdf (last visited July 2, 2020).

[13] *Available at* https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0283-5481.

necessary air quality benefits" that would allow the state to "maintain[] conformance with federal air quality standards." Wash. Rev. Code § 70.120A.010, Official Notes (6)–(7). Likewise, New York has explained that without California's waiver, it would be "difficult, if not impossible for New York to achieve and maintain its air quality goals" required by federal law. *No Turning Back* at 10–11 & n.87 (internal quotation marks omitted) (quoting letter from the director of the Division of Air Resources for the New York State Department of Environmental Conservation).

In addition, a number of states following the California waiver have also set their own state greenhouse gas emission-reduction targets in reliance on the waiver. New Jersey, for instance, has explained that it is "relying on" California's standards "to meet its near-term emission reduction goals." *Id.* at 11 n.87 (citing letter from deputy commissioner of New Jersey Department of Environmental Protection). And Massachusetts relies on California's motor-vehicle emission standards as a "key component of its strategy" to meet its own state goals. States Comments at 120 n. 347. Once again, EPA's failure to "protect[] the legitimate expectations" of states that relied on the waiver violates "basic fairness" and renders its rescission unlawful. *See Am. Methyl*, 749 F.2d at 839.

Nonetheless, EPA claims that "neither the State of California nor other parties … have reasonable reliance interests sufficient to foreclose" the agency's alleged revocation authority, mainly because "[t]he federal [greenhouse gas] standards that

EPA promulgated in 2012 included a commitment to conduct and complete a Mid-Term Evaluation … for [model years] 2022–2025." 84 Fed. Reg. at 51,334, 51,335. Once again, however, EPA confuses the relationship between the California waiver and federal Section 202(a) standards, and so the fact that EPA planned to revisit its standards does not render unreasonable any reliance on the preemption waiver. In fact, the federal government often revisits pollution standards, yet had not once revoked a preemption waiver. This makes sense: The California waiver requires the state's standards to be "at least as protective of public health and welfare as applicable Federal standards," 42 U.S.C. § 7543(b)(1), meaning that Congress fully contemplated that California's standards may be more stringent than the federal standards. And such was the case here: California's 2013 waiver extended not just to the state's greenhouse gas standards, which were similar to federal standards, but also to the state's Zero Emission Vehicle program, for which there was no federal corollary. 78 Fed. Reg. at 2139; *see also id.* at 2115 (recognizing that California's program was on the whole "more stringent than applicable Federal requirements"). Because California's standards were not required to be identical to federal standards (nor were they), knowledge of the mere possibility that EPA might, following the mid-term evaluation, weaken federal standards did not render California's reliance on its waiver any less reasonable.

EPA's rationale rings especially hollow because its stated reason for the Waiver Withdrawal is not its reconsideration of its emission standards, but rather its claim that the waiver was improperly granted in the first instance. Such an outcome—that is, EPA changing its mind about the waiver's legality more than six years after issuing it—could not have been reasonably foreseen. And even if states had uncanny foresight and never relied on the waiver, this would have undermined the waiver's purpose of providing a "testing area" for pollution-control policies, *see* S. Rep. No. 90-403, at 33, rendering the waiver largely meaningless.

In short, EPA's revocation "subject[s] the parties affected [to] undue [and] unnecessary hardships." *Nat'l Ass'n of Trailer Owners, Inc. v. Day*, 299 F.2d 137, 140 (D.C. Cir. 1962). For this reason, as well, it must be set aside.

CONCLUSION

For the foregoing reasons, this Court should grant the petitions.

DATED: July 6, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing Final Brief of the Institute for Policy Integrity at New York University School of Law as *Amicus Curiae* In Support of Petitioners contains 6,449 words, as counted by counsel's word processing system, and this complies with the applicable word limit established by the Court.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July 2020, a true and correct copy of the foregoing Final Brief of the Institute for Policy Integrity at New York University School of Law as *Amicus Curiae* in Support Petitioners was filed with the Clerk of the United States Court of Appeals for the District of Columbia Circuit via the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

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