

ORAL ARGUMENT NOT YET SCHEDULED

Case No. 22-1081 (and consolidated cases)

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATE OF OHIO, et al.,

*Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY and MICHAEL S. REGAN,

*Respondents.*

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On Petition for Review of Action by the U.S. Environmental Protection Agency

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**CORRECTED BRIEF OF CONSERVAMERICA AS AMICUS CURIAE  
IN SUPPORT OF PETITIONERS AND REMAND TO THE AGENCY**

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## **CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES**

ConservAmerica respectfully submit this Certificate as to Parties, Rulings, and Related Cases.

A. Parties. All parties, intervenors, and amici appearing in this Court are listed in the brief of the State petitioners and private petitioners.

B. Rulings Under Review. Under review is the final action of the Administrator of the United States Environmental Protection Agency, entitled California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice, published in the Federal Register at 87 Fed. Reg. 14,332 (Mar. 14, 2022).

C. Related Cases. Three consolidated cases in the U.S. Court of Appeals for the District of Columbia Circuit involve challenges to the same agency action challenged here: Iowa Soybean Assn. v. EPA, No. 22-1083; Am. Fuel & Petrochemical Mfrs. v. EPA, No. 22-1084; and Clean Fuels Dev. Coal. v. EPA, No. 22-1085.

**CORPORATE DISCLOSURE STATEMENT OF CONSERVAMERICA**

ConservAmerica Inc. is a 501(c)(3) organization focused on addressing conservation, environmental, and energy challenges through market-based solutions. ConservAmerica's mission is to advocate for sound laws and public policies that produce clean air, clean and safe water, and healthy public lands. ConservAmerica has no parent companies and no publicly traded corporation has a 10% or greater share in the ownership of ConservAmerica.

**STATEMENT OF IDENTITY, INTEREST IN CASE, AND  
SOURCE OF AUTHORITY TO FILE**

ConservAmerica is the party that has authorized the preparation and filing of this brief and its interest in this case is with the environmental impacts of a ruling and on supporting a decision that recognizes the proper role of states.

**STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS**

ConservAmerica states, in compliance with Fed. R. App. P. 29 (a)(4)(E), that counsel for ConservAmerica has authored the brief in whole, no party to the case contributed to funding the brief and no persons other than those listed on the brief and no other party contributed to the funding of the brief.

## TABLE OF AUTHORITIES

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- Jonathan Watts, *How the race for cobalt risks turning it from miracle metal to deadly chemical*, GUARDIAN, (Dec. 18, 2019, 3:00 PM), <https://www.theguardian.com/global-development/2019/dec/18/how-the-race-for-cobalt-risks-turning-it-from-miracle-metal-to-deadly-chemical> .....p. 6
- McKinsey Consulting, *Lithium and cobalt: A tale of two commodities*; June 2018 Report, <https://www.mckinsey.com/industries/metals-and-mining/our-insights/lithium-and-cobalt-a-tale-of-two-commodities> .....p. 6
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- Todd Johnston, *Slow Down: The Case for Technology Neutral Transportation Policy*, CONSERVAMERICA (Dec. 10, 2020) <https://static1.squarespace.com/static/5d0c9cc5b4fb470001e12e6d/t/5fd1580999fe644e8a504a54/1607555090612/CA+Tech+Neutral+Paper+-+12.20+%281%29.pdf> at ..... p. 3, 5

## **GLOSSARY**

EPA United States Environmental Protection Agency

NHTSA National Highway Traffic Safety Administration



**STATUTES AND REGULATIONS**

Statute

42 U.S.C. § 7543 ..... p. 1, 2, 3

## **INTEREST OF AMICUS CURIAE**

ConservAmerica Inc. is a 501(c)(3) organization focused on addressing conservation, environmental, and energy challenges through market-based solutions. Our core mission is to advocate for sound laws and public policies that produce clean air, clean and safe water, and healthy public lands. ConservAmerica promotes wise management of our nation's public lands and resources through responsible stewardship, rule of law, and holding polluters responsible for environmental pollution and degradation.

ConservAmerica promotes sound energy policies based on sound science and an understanding that policies that too narrowly focus on one goal or one market may not make sense or may be counterproductive when viewed and analyzed from a holistic environmental perspective. The most efficient way to achieve the nation's environmental goals is through policies that encourage competitive markets, private investment, and expanded trade. ConservAmerica opposes policies and approaches that impose centralized regulations that place an undue burden on the economy without delivering measurable environmental benefits.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The United States Environmental Protection Agency (“EPA”), the National Highway Traffic Safety Administration (“NHTSA”) and the State of California have worked in concert to promote a policy to engineer a wholesale shift in the nation’s vehicle fleet from traditional gas-powered vehicles to electric vehicles. ConservAmerica submits this *amicus curiae* brief to urge the Court to recognize that the approach endorsed by EPA, NHTSA and the State of California has serious and widespread implication for energy policy, environmental conditions, and the economy. When the full lifecycle of a vehicle and its energy source is taken into account — including greenhouse gas emissions during fuel production, manufacturing, operation, and disposal stages — advanced internal combustion engine vehicles and hybrid electric vehicles are actually capable of achieving comparable or better reductions in greenhouse gas emissions as similarly equipped, full battery electric vehicles. While EPA’s notice of decision supporting the California waiver is based upon the assumption that the rapid move to electric vehicles will account for greater emission reductions, that assumption is flawed, not supported by the record and not grounded in fact.

In addition to its concerns about the impacts to the environment and energy policy of the decision by EPA rescinding its 2019 waiver, ConservAmerica also

supports the arguments submitted by State Petitioners and Private Petitioners opposing the EPA decision and correctly recognizing that EPA has overstepped the authority granted to it under Section 209(b) of the Clean Air Act and upset the proper balance between federal and state governments. ConservAmerica recognizes the principles of federalism and supports the rights of states as partners in the federal scheme to carry out important goals Congress has enacted.

## ARGUMENT

### I. Electric Vehicles Do Not Provide An Advantage In Full Lifecycle Greenhouse Gas Emissions And Cannot Justify Granting California's Waiver.

As the basis for the 209(b) waiver, California contends that it “needs” the authority to regulate vehicle greenhouse gas emissions because the regulations it seeks to adopt are necessary to meet its climate change related goals. However, the available science does not show that the rapid increase in the use of electric vehicles in place of gas-powered vehicles – the goal of California’s “zero-emission” vehicle mandate – is “needed” to reduce California’s greenhouse gas emissions. The emerging consensus is that even a wholesale shift to electric vehicles will not meaningfully impact greenhouse gas emissions in the state of California, when the full lifecycle of a vehicle and its energy source is taken into account — including GHG emissions during fuel production, manufacturing, operation, and disposal stages. Moreover, advanced internal combustion engine vehicles and hybrid electric vehicles are capable of achieving comparable or better reductions in GHG emissions as similarly equipped, full battery electric vehicles.<sup>1</sup>

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<sup>1</sup> Steffen Mueller, *High Octane Low Carbon Fuels: The Bridge to Improve Both Gasoline and Electric Vehicles*, (Mar. 22, 2021), [https://erc.uic.edu/wp-content/uploads/sites/633/2021/03/UIC-Marginal-EV-HOF-Analysis-DRAFT-3\\_22\\_2021\\_UPDATE.pdf](https://erc.uic.edu/wp-content/uploads/sites/633/2021/03/UIC-Marginal-EV-HOF-Analysis-DRAFT-3_22_2021_UPDATE.pdf).

Thus, the waiver is not “needed” “to meet compelling and extraordinary conditions” as required by 42 U.S.C. § 7543(b)(1)(B).

ConservAmerica recognizes that fully electric vehicles will likely play an important role in reducing emissions and fighting climate change, but cautions that a rapid, wholesale move now away from gasoline powered vehicles to fully electric vehicles may not achieve the benefits currently being touted.<sup>2</sup> In the short term, gasoline powered vehicles achieve similar reductions to electric vehicles when the impacts of the additional emissions that occur in the production of electric vehicles is considered, as is discussed below. Additionally, by picking one technology now over all other technologies forecloses the possibility of more technological breakthroughs – through efficiency and fuels – that could have significant long-term impacts. Thus, California’s approach is arbitrary and capricious and may not be approved under 42 U.S.C. § 7543(b)(1)(A).

It is important to recognize exactly what electric vehicles are and what emissions are associated with both their use and their production. California’s use of the term “zero-emission vehicle” is a misnomer, and this vernacular has been criticized by many including the National Academy of Sciences, as “incentivizing

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<sup>2</sup> See Todd Johnston, “Slow Down: The Case for Technology Neutral Transportation Policy”, ConservAmerica (Dec. 10, 2020), <https://static1.squarespace.com/static/5d0c9cc5b4fb470001e12e6d/t/5fd1580999fe644e8a504a54/1607555090612/CA+Tech+Neutral+Paper+-+12.20+%281%29.pdf> (reviewing multiple studies).

the deployment of zero-emission vehicles but misrepresenting the actual carbon emissions.”<sup>3</sup> Indeed, electric vehicles may have zero tailpipe emissions but in fact generate significant greenhouse gas emissions over their full lifecycle – meaning the emissions generated from mining metal ores to vehicle salvage.<sup>4</sup>

A full lifecycle emissions-based approach requires reframing the comparison between gasoline and electric vehicles. *See*, National Academy of Science report, p. 12-385. As renewable resources supply only 20 percent of the country’s electricity needs and the remaining 80 percent are generated by fossil fuels such as coal and natural gas, the comparison is really between burning gasoline or a mix of coal and natural gas to move the vehicle. (*See* Mueller; Mackenzie). Such a comparison reveals that the proposed rapid electrification of the transportation sector would be a deeply flawed approach to reducing greenhouse gas emissions while shifting and imposing significant costs and impacts to other sources.

Once full life cycle emissions are considered, it becomes apparent that electric vehicles cannot justify California’s claim of “need” for independent authority to regulate vehicle greenhouse gas emissions. The findings of multiple

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<sup>3</sup> *See*, National Academy of Sciences, *Assessment of Technologies for Improving Light-Duty Vehicle Fuel Economy—2025-2035* (2021 publication copy), NAS p. 13-416.

<sup>4</sup> *See Id*; Heywood, J., MacKenzie, D. (2015). “*On the Road Toward 2050: Potential for Substantial Reduction in Light-Duty Vehicle Energy Use and Greenhouse Gas Emissions*,” Massachusetts Institute of Technology. <http://web.mit.edu/sloan-auto-lab/research/beforeh2/files/On-the-Road-toward-2050.pdf>.

lifecycle analyses by the International Energy Association, Argonne National Labs and Massachusetts Institute of Technology among others have found that vehicles powered partially or fully by gasoline internal combustion engines emit about the same or lower levels of carbon dioxide than electric vehicles. These important studies by unbiased experts comparing the full environmental profile of electric vehicles versus advanced hybrids are not adequately considered in the record below.

In fact, based on the greenhouse gas intensity of today's electric grid, hybrid vehicles often outperform all other vehicle types – including electric vehicles.<sup>5</sup> Research into alternative fuels suggests that gasoline internal combustion engines have the potential for even greater reductions in greenhouse gas emissions.<sup>6</sup> The studies show a variety of automotive technologies and powertrains deliver comparable emission reductions and demonstrate the importance of taking a technology-neutral approach in setting transportation policies to obtain the most efficient reductions in greenhouse gas emissions.

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<sup>5</sup> See Todd Johnston, "Slow Down: The Case for Technology Neutral Transportation Policy", ConservAmerica (Dec. 10, 2020). <https://static1.squarespace.com/static/5d0c9cc5b4fb470001e12e6d/t/5fd1580999fe644e8a504a54/1607555090612/CA+Tech+Neutral+Paper+-+12.20+%281%29.pdf>

<sup>6</sup> See Mueller. Finding that under the current electric grid infrastructure, ethanol-based fuels outperform electric vehicles throughout the Midwest.



Additionally, these studies reveal variables such as the geographic variation of the electric grid across the United States can have significant impacts in determining lifecycle emissions.<sup>7</sup> This means that the carbon intensity associated with charging an electric vehicle will vary depending on where the electricity used to charge the vehicle is generated, what time of year it is, and even what time of day it is charge.<sup>8</sup> Accordingly, forcing all states to adopt California's approach would be a misguided decision.

## II. A Rapid Switch To Electric Vehicles May Cause Other Serious Detrimental Environmental Impacts.

The electric vehicle mandate California seeks to pursue cannot justify granting California a waiver because the rapid adoption of electric vehicles would have detrimental environmental implications that must also be fully vetted. Evidence of the widespread environmental impacts from meeting even the current demand for electric vehicles can already be seen. An electric vehicle mandate would require sharply increasing the demand for the raw materials needed in their production which could have detrimental global environmental impacts. Lithium and cobalt, the two minerals essential for the manufacture of these batteries, are

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<sup>7</sup> See Id.

<sup>8</sup> See Id.

found in only a limited number of locations globally.<sup>9</sup> More than 65 percent of global production of cobalt is concentrated in the Democratic Republic of the Congo. However, less than 10 percent of cobalt supply occurs as a primary product, with the remainder produced as a by-product of mining primarily copper and nickel. Cobalt-production has created a host of environmental problems for the nations that produce it without laws and other protections to minimize the impacts. Countries that produce the materials without restrictions and protections are more likely to experience water pollution, contaminated crops and loss of soil fertility, and increased risks of cancer.<sup>10</sup>

China dominates the global production of lithium-ion batteries and their precursor materials, especially graphite. China's graphite production has notoriously contributed to significant pollution in the country. Pollution from graphite dust is damaging to the environment and public health whether through direct inhalation or atmospheric deposition. More pollution results from the hydrochloric acid used to process mined graphite into a usable form. Hydrochloric acid is highly corrosive and can cause great environmental damage when leaked

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<sup>9</sup> See McKinsey Consulting "Lithium and cobalt: A tale of two commodities"; June 2018 Report <https://www.mckinsey.com/industries/metals-and-mining/our-insights/lithium-and-cobalt-a-tale-of-two-commodities>.

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<sup>10</sup> See, The Guardian Wed 18 Dec 2019 03.00 EST 'How the race for cobalt risks turning it from miracle metal to deadly chemical'.

into groundwater or streams. China's Shandong province, which is responsible for 10 percent of global graphite supply, has had to suspend some of its production capacity due to environmental impacts.

The full lifecycle environmental impacts from electric vehicle production must be considered, especially when California looks to justify its zero-emissions vehicle policy on environmental grounds. The benefits of California's reduced tailpipe emissions do not justify the widespread global environmental and societal impacts that could result if the waiver to California is upheld.

The court should remand the matter to EPA for a full consideration of all the environmental impacts of California's proposal, not just tailpipe admissions.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the Federal Rule of Appellate Procedure 32(g) along with the Court's scheduling Order because it contains 2671 words and was prepared using 14 point font using a proportionally spaced typeface.

/s/ John A. Sheehan  
John A. Sheehan

**CERTIFICATE OF SERVICE**

I hereby certify that on November 8, 2022, I electronically filed the foregoing Corrected Brief of ConservAmerica as Amicus Curiae with the Clerk of the Court of the U.S. Court of Appeals for the D.C. Circuit by using the CM/ECF system. All participants in this case that are registered CM/ECF users will be served by the CM/ECF system.

/s/ John A. Sheehan  
John A. Sheehan