ORAL ARGUMENT HAS NOT BEEN SCHEDULED

Docket No. 14-1192

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Appeal from the Environmental Protection Agency
EPA-HQ-OAR-2013-0491

PETITIONER OOIDA'S OPENING BRIEF

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February 3, 2015

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. PARTIES

The parties appearing thus far in this proceeding are:

Petitioner: Owner-Operator Independent Drivers Association, Inc.
P.O. Box 1000
1 NW OOIDA Drive
Grain Valley, Missouri 64029
www.ooida.com

Respondents: United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.,
Washington, D.C. 20460

California Air Resources Board
1001 I Street, PO Box 2815
Sacramento, California 95812

B. RULINGS UNDER REVIEW

The ruling at issue in this Petition is the final action of the Respondent United States Environmental Protection Agency entitled "California State Motor Vehicle Pollution Control Standards; Heavy Duty Tractor-Trailer Greenhouse Gas Regulations; Notice of Decision," 79 Fed. Reg. 46256 (August 7, 2014).

C. RELATED CASES

The case on review was not previously before this Court, or any other court.

D. RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioner Owner Operator Independent Drivers Association, Inc. states that it has no parent

companies, subsidiaries (including wholly-owned subsidiaries), or affiliates that have issued shares to the public.

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JURISDICTIONAL STATEMENT

Petitioner, Owner-Operator Independent Drivers Association ("OOIDA") challenges the constitutionality of California Air Resources Board's ("CARB") Heavy-Duty Tractor-Trailer Greenhouse Gas Regulations ("HD GHG Regulations") that became effective following the Environmental Protection Agency's ("EPA") August 7, 2014, Decision ("California State Motor Vehicle Pollution Control Standards; Heavy Duty Tractor-Trailer Greenhouse Gas Regulations; Notice of Decision," 79 Fed. Reg. 46256 (August 7, 2014)("EPA Decision"), granting CARB's request for a waiver from federal preemption under Section 209(a) the Clean Air Act ("CAA"), 42 U.S.C. § 7543(a), pursuant to EPA's authority to grant such waivers under Section 209(b) of the CAA, 42 U.S.C. § 7543(b).

The United States Court of Appeals for the District of Columbia Circuit has jurisdiction to review the EPA Administrator's final action granting a Section 209 waiver pursuant to 42 U.S.C. § 7607(b). The EPA Decision appeared in the Federal Register on August 7, 2014. *See* 79 Fed. Reg. 46256. OOIDA's Petition for Review was timely filed on October 3, 2014, pursuant to 42 U.S.C. § 7607(b)(1).

This Circuit has jurisdiction to address constitutional challenges on a petition for review of the Administrator's decision even where the Administrator has disclaimed authority to consider them. *See Motor and Equip. Mfrs Assoc. v. EPA*, 627 F.2d 1095, 1115 (D.C. Cir. 1979) ("*MEMA I*")("[P]etitioners are assured

through a petition for review here that their [constitutional] contentions will get a hearing."); *Elgin v. Department of Treasury*, 132 S.Ct. 2126, 2137 n. 8 (2012)("[i]t is not unusual for an appellate court reviewing the decision of an administrative agency to consider a constitutional challenge to a federal statute that the agency concluded it lacked authority to decide.").

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether this Circuit has plenary authority to review Petitioner's constitutional challenge to California State environmental regulations which have been granted a waiver from federal preemption by the EPA under Section 209(b) of the CAA, where the EPA disclaimed authority to address the constitutional implications of granting the waiver.

2. Whether California's HD GHG Regulations violate the Commerce Clause of the U.S. Constitution, Article I, Section 8, clause 3, by burdening interstate commerce and discriminating against out-of-state motor carriers.

STATEMENT OF THE CASE

This appeal arises out of EPA's decision granting CARB's request for a waiver from federal preemption under Section 209(a) of the CAA, 42 U.S.C. § 7543(a), for California's HD GHG Regulations. EPA's authority to grant such waivers is found in Section 209(b) of the CAA, 42 U.S.C. § 7543(b). Add. 1.

OOIDA filed Comments before the EPA objecting to CARB's request for a

waiver contending, *inter alia*, that the HD GHG Regulations violated the Commerce Clause of the United States Constitution by discriminating against, and imposing an undue burden on, out-of-state trucking interests. (JA __). OOIDA demonstrated that the HD GHG Regulations carved out numerous exemptions which insulated California "in-state" truckers from compliance, but required interstate long-haul truckers to shoulder the full burden and expense of regulatory compliance - even though they drive significantly fewer miles on California roads than in-state truckers. This is a quintessential form of discrimination which the Supreme Court has consistently held to be unconstitutional under the Commerce Clause. Notably, the EPA found that "[a] disproportionate impact on out-of-state carriers *is supported by CARB's data as well.*" *See EPA Decision*, 79 Fed. Reg. at 46264 n. 103 ("Thus, over 90% of the cost impact of California's Regulations is expected to occur outside of California.").

In response to OOIDA's Comments, the EPA Administrator disavowed authority to address constitutional issues in considering CARB's waiver request, concluding that OOIDA's challenges "are more appropriately addressed by a legal challenge directly against the state." *See EPA Decision*, 79 Fed. Reg. at 46264. CARB *also* urged EPA to disregard OOIDA's constitutional challenge, stating that EPA "should not and need not address such assertions in this forum." (JA __).

Controlling decisions by both the Supreme Court and this Circuit hold that

authority to review constitutional challenges to Section 209 waiver requests resides with this Circuit. *See MEMA I*, 627 F.2d 1095, 1115 ("[p]etitioners are assured through a petition for review here that their [constitutional] contentions will get a hearing."); *Elgin*, 132 S.Ct. 2126, 2137 n. 8 ("[i]t is not unusual for an appellate court reviewing the decision of an administrative agency to consider a constitutional challenge to a federal statute that the agency concluded it lacked authority to decide."). Accordingly, OOIDA requests that this Court: (1) grant the Petition; (2) declare that the HD GHG Regulations violate the Commerce Clause of the U.S. Constitution; and, (3) vacate the EPA Decision to the extent it grants waiver of federal preemption to the GHG Regulations in their current unconstitutional form.

STATEMENT OF FACTS

This Statement of Facts is based upon the record made by OOIDA and other commenters before EPA respecting the impact of CARB's HD GHG Regulations on interstate commerce.

A. Scope of the HD GHG Regulations

The HD GHG Regulations are applicable to new 2011 through 2013 model year (MY) Class 8 tractors equipped with integrated sleeper berths (sleeper-cab tractors) and to new 2011 and subsequent MY dry-van and refrigerated-van trailers that are pulled by such tractors on California highways. *See EPA Decision*, 79 Fed. Reg. 46256 *et seq*..

The HD GHG Regulations are set forth at title 17, California Code of Regulations (CCR), sections 95300 through 95312. Add. 3. The HD GHG Regulations apply to new and in-use 53-foot or longer trailers and the new and in-use tractors that pull them. California limited the scope of its waiver request only to new MY2011-MY2013 tractors and MY2011 and later trailers "that together are considered to operate as an integrated vehicle." *See EPA Decision*, 79 Fed. Reg. at 46257.

OOIDA filed Comments objecting to CARB's waiver request, contending that the HD GHG Regulations violate the Commerce Clause of the United States Constitution, Article I, Section 8, clause 3. In its Decision, however, EPA declined to address OOIDA's comments, stating:

> [C]ommerce clause issues are beyond the scope of this review. As stated in MEMA I, "[t]he waiver proceeding produces a forum ill-suited to the resolution of constitutional claims." [footnote omitted] Constitutional challenges to the HD GHG Regulations are more appropriately addressed by a legal challenge directly against the state. Moreover, EPA has consistently refrained from reviewing California's requests for waivers based on criteria that extend beyond those set forth in section 209(b) of the CAA [footnote omitted], and courts have confirmed that EPA could not deny a waiver based on such additional criteria. "If EPA concludes that California's standards [meet section 209(b)], it is obligated to approve California's waiver application" [footnote omitted]. Therefore, EPA cannot find this issue to be a proper ground for denial of California's waiver request.

See EPA Decision, 79 Fed. Reg. at 46264.

CARB also refused to respond to OOIDA's objections, stating: "With court approval, EPA has consistently refrained from declining California's requests for waivers and authorizations based on criteria that extend beyond the criteria of section 209(b) of the CAA, and therefore should not and need not address such assertions in this forum."[1] (JA __).

B. The Record Demonstrates that CARB's HD GHG Regulations Have a Disparate Impact on Interstate Truckers

1. The GHG Regulations Burden Interstate Commerce, and Favor In-State Trucking Interests

The stated purpose of the GHG Regulations is to "reduce greenhouse gas emissions from heavy-duty (HD) tractors and 53-foot or longer box-type semitrailers (trailers) that transport freight on a highway within California." *See* OOIDA Comments, (JA __), *citing* GHG Regulation, § 95300. To achieve this goal, the Regulations purport to apply to owners and drivers of the regulated tractors and/or trailers "when driven on a highway within California, as well as motor carriers, California-based brokers, and California-based shippers that use, or cause to be used, the [covered equipment]. *Id*. at § 95301(a). Thus, the Regulations apply broadly to covered equipment whenever it enters California.

OOIDA demonstrated, however, that these seemingly broad statements of

[1] In a footnote, CARB stated that it had addressed certain of OOIDA's comments three years earlier in a CARB rulemaking proceeding. (JA __ at 20 n. 68).

purpose and applicability are gutted by exemptions that effectively exclude from the scope of the Regulations a significant number of motor carriers who operate only in California. Specifically, the Regulations do not apply to:

(1) local-haul trailers and the tractors pulling local-haul trailers,

(2) local-haul tractors and the trailers pulled by local-haul tractors,

(3) short-haul tractors and the trailers pulled by short-haul tractors, and

(4) drayage tractors and the trailers pulled by drayage tractors

(5) storage trailers and the tractors pulling storage trailers;

(6) empty 53-foot and longer box-type trailers pulled by HD tractors

Id. at §§ 95301(c) & 95305(a)-(d). Local-haul tractors and trailers are defined as those that travel exclusively within a 100-mile radius of their local-haul base. *Id*. at § 95302(34)-(36). A short-haul tractor is defined as a heavy-duty tractor that travels less than 50,000 miles per year, and the mileage limit includes "all miles accrued both inside and outside of California." *Id*. at § 95302(52). Finally, drayage tractors are those that operate on or through ports or intermodal rail-yards to load or unload freight. *Id*. at § 95302(5).

The local-haul and drayage exemptions are directed to in-state truckers. The short-haul exemption, while not limited on its face to local interests, would in practice exempt virtually all otherwise covered trucks and trailers that operate predominantly within the state. Data collected by the International Registration Plan

("IRP") – which is the mandatory vehicle registration program for commercial motor vehicles operating in interstate commerce including heavy-duty trucks – shows that California-based IRP-registered interstate motor carriers average 42,243 miles in California, an amount that might qualify them for the short-haul exemption when only their miles operated in California were factored in. *See* OOIDA Comments (JA __).

Based on the foregoing, it is primarily motor carriers operating in interstate commerce that would actually be burdened by the Regulations. Indeed, CARB made it clear that this was precisely its intent. As explained in CARB's press release accompanying adoption of both its Truck and Bus Regulation and the GHG Regulations in December, 2008:

> Also adopted today, the Heavy Duty Vehicle Greenhouse Gas Emission Reduction measure *requires long-haul truckers* to install fuel efficient tires and aerodynamic devices on their trailers that lower greenhouse gas emissions and improve fuel economy.

See www. arb.ca.gov/newsrel/nr121208.htm (emphasis added).

In its December 12, 2008 Resolution 08-44 proposing adoption of the GHG Regulation, CARB also noted that "most long-haul heavy-duty trucks" are not using available technologies that improve fuel efficiency.[2] Accordingly, it designed a set

[2] *Available at*: http://www.arb.ca.gov/regact/2008/ghghdv08/res0844.pdf

of rules aimed at those long-haul truckers, with no meaningful exemptions.[3] The justification for the local and short-haul exemptions is fundamentally flawed. CARB ignored the fact that the tens of thousands of in-state heavy-duty trucks being exempted from the Regulations - like their long-haul counterparts - are also generally not using the technologies that CARB claims improve fuel efficiency.

Further, a study performed for CARB placed accountability for only 30 percent of annual heavy-duty vehicle miles traveled in California on out-of-state trucks. *See* OOIDA Comments (JA __), *citing Assessment of Out-of State Heavy Duty Truck Activity Trends in California*, UC Davis, Institute of Transportation Studies (2008).[4] However, any model must account for the in-state vehicles that are responsible for the bulk of the annual vehicle miles traveled inside California. *Id.*

In addition, CARB exempted this wide swath of in-state heavy-duty vehicles on an assumption that they do not operate a sufficient amount of time at highway speeds to justify being required to meet the same stringent requirements placed on motor carriers operating in interstate commerce.[5] While it is true that "the technologies required by the regulation are most effective at highway speeds. . .," there is no conclusive evidence, as CARB contended, that the exempted tractors and

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[3] 17 CCR § 95305(h), which purported to provide relief through "temporary" exemptions, expired January 1, 2015. *Id.*

[4] *Available at*: http://www.its.ucdavis.edu/wp-content/themes/ucdavis/pubs/download_pdf.php?id=1176

[5] http://www.arb.ca.gov/regact/2010/truckbus10/truckbusappf.pdf

trailers have "limited operation at highway speeds. . ." *Id.* As far as OOIDA is aware, CARB did not conduct any studies to demonstrate that local or short-haul tractors are not operating at highway speeds. *See* OOIDA Comments (JA __). That assumption was based upon pure conjecture about the nature of the movement of goods within California. *Id.* But California has many highways with truck-only 55 mile-per-hour speed limits, located in urban, suburban, and rural areas. *Id.* There is no evidence that these highways are not used on a regular basis by those same motor carriers operating heavy-duty vehicles driving less than 50,000 miles per year who qualify for the short-haul exemption, as well as those going short distances from their urban local bases. *Id.*

Moreover, to the extent that the short and local-haul exemptions are also justified by their "limited overall annual mileage," the California highway mileage accrued by exempt trucks will be higher for these exempted operations than for interstate long-haul motor carriers who drive relatively fewer miles in California. *Id.* A cursory examination of that IRP data for 28 geographically scattered states shows that, with the exception of vehicles from states that border or are close to California, the average mileage in California is quite low and gets lower as the base state gets further away.

Alabama	2,891	Arizona	32,143	California	42,243	Delaware	910
Georgia	2,388	Idaho	6,658	Iowa	1,956	Illinois	2,985
Kentucky	980	Maryland	424	Massachusetts	231	Michigan	2,016
Montana	5,184	Mississippi	4,718	Missouri	3,323	Nebraska	3,379
Nevada	8,568	New Jersey	2,160	New Mexico	4,446	New York	944
N. Carolina	2,177	Oregon	15,404	Ohio	2,005	Oklahoma	7,386
S. Dakota	3,344	Tennessee	3,092	Vermont	2,496	Washington	15,041

See OOIDA Comments (JA____) (*Source:* IRP Estimated mileage/distance charts from each jurisdiction's respective motor carrier licensing division).

In addition to the foregoing, CARB failed to take into account the effect its new rules would have on interstate motor carrier operations to compromise fuel efficiency and to reduce driver compensation. *See* OOIDA Comments (JA __). With regard to fuel-efficient tires, they are fuel-efficient because they are designed to encounter low friction with the road. *Id.* In other words, they have less traction with the road. *Id.* These tires have a shorter life span (and will need to be replaced more frequently) than normal tires. *Id.* They are less effective in the rain or snow – compromising highway safety. *Id.* Drivers encountering bad weather must put chains on fuel-efficient tires sooner and leave then on for longer periods of time until poor road conditions abate. *Id.* Tire chains cause more mechanical inefficiency and a greater use of fuel than would have been experienced with normal tires. *Id.* When the weather conditions make a narrow or mountainous stretch of road impassible to a vehicle with fuel efficient tires, the resulting traffic backup of idling cars and trucks will result in a greater, inefficient use of fuel. *Id.* Long-haul interstate drivers must

be able to efficiently operate their trucks in any terrain and weather condition they find travelling across the United States. *Id.*

The weight of the newly required equipment would also have a profound negative economic impact on the long haul interstate trucking industry. *Id.* The new equipment would add weight to the vehicle, thereby reducing the amount of freight that a truck can carry under truck weight-limit rules. *Id.* For this reason, it will take more trucks on the highways travelling more miles, and burning more fuel, to haul the same amount of freight. *Id.* The lost freight capacity will also reduce the revenue or compensation earned by many interstate truck drivers. *Id.* In short, the inefficiencies and increased costs on interstate commercial motor vehicle operations overwhelm the purported efficiencies.

2. The Costs Which CARB's Regulations Impose on Interstate Truckers Are Staggering.

By CARB's own figures, the average capital cost of compliance with its HD GHG Regulations, *in 2008 dollars*, would be $2,100 per tractor. *See EPA Decision*, 79 Fed. Reg. at 46263. CARB's figures further show that the Regulations could extend to as many as 398,677 out-of-state tractors. *Id*. at n. 103. Therefore, the total economic burden on out-of-state carriers for tractors alone would be $837,221,700. In addition to tractor costs, the average cost of compliance for out-of-state trailers would be $2,890,409,700. *Id*. at 46263, n. 103. (398,677 trailers x $2,900 per trailer). Thus the total cost of compliance for out-of-state truckers approaches

$4 billion. Again, this is based on CARB's own data, which vastly understates the true costs, particularly when measured in current dollar values - as opposed to 2008 dollar values.

Importantly, this is not the only set of costly regulations that CARB is currently enforcing against interstate truckers through the auspices of having had such regulations "approved" by the EPA. In other pending litigation challenging the constitutionality of CARB's requirement that every interstate truck in the country comply with its "Truck and Bus" Regulation, the price-tag of $18,000 per truck for 6.2 million interstate trucks exceeds ***$111 billion***. *See OOIDA v. Nichols*, 2014 WL 5486699 *1 (E.D. Cal. Oct. 29, 2014)(6,208,000 trucks); *California Dump Truck Owners Ass'n. v. Nichols*, 924 F. Supp. 2d 1126, 1134 (E.D. Cal. 2012)(cost of compliance - $18,000).

Finally, EPA conducted no cost/benefit analysis demonstrating that the costs imposed on interstate truckers are outweighed by the purported environmental benefits, based on a reliable measurement of the "footprint" from interstate and intrastate trucks. EPA overlooked OOIDA's demonstration that the HD GHG Regulations unfairly burden out-of-state carriers who contribute less in emissions than exempted in-state motor carriers. As stated by EPA, for purposes of obtaining a 209 waiver, "the relevant question is whether California needs its own motor vehicle pollution program to meet compelling and extraordinary conditions, *and not*

whether the specific standards that are the subject of this waiver request are necessary to meet such conditions." *See EPA Decision*, 79 Fed. Reg. at 46262 (emphasis added). While CARB purported to show summary "projections" regarding overall GHG reductions, *id*., it did not segregate the proportion of such projected reductions between intrastate and interstate carriers - certainly not by any empirically verifiable data. Even if it had done so, it would still have been required to account for the following disparities: (1) the numerous exemptions granted to intrastate carriers; and (2) OOIDA's demonstration that the average mileage driven by interstate trucks in California is quite low and gets lower as the base state gets further away.

3. EPA Found that CARB's Own Data Demonstrated a Disparate Impact on Interstate Commerce

Even though EPA declined to reach any legal conclusions regarding OOIDA's Commerce Clause challenge to the HD GHG Regulations, it nonetheless acknowledged that the evidence submitted by OOIDA, and other commenters, demonstrated their disparate impact on interstate truckers, as follows:

> Some of the commenters, including the CCTA and OOIDA, argue that the HD GHG Regulations violate the commerce clause of the U.S. Constitution in that the HD GHG Regulations will have the effect of disproportionately and unfairly burdening out-of-state carriers [footnote omitted]. For example, CCTA argues that exemptions in the HD GHG Regulations for local-haul, drayage, and short-haul tractors and trailers will result in the exemption of most California in-state motor carriers, but virtually no out-of-state motor carriers. The comments further point out that the uneven impact does not correlate

> closely, if at all, with expected GHG emissions from the respective vehicles [footnote omitted]. OOIDA argues that the HD GHG Regulations unfairly burden out-of-state carriers who contribute less in emissions than exempted in-state motor carriers [footnote omitted].

79 Fed. Reg. at 46264.[6]

More significantly, EPA concluded that CARB's *own data* demonstrated that over ***90%*** of the cost impact of California's Regulations was expected to occur outside of California, specifically observing that while the Regulations would affect 37,009 in-state tractors and 92,523 in-state trailers, they would also impact 398,677 tractors and 996,693 trailers *outside* of California, as follows:

> A disproportionate impact on out-of-state carriers is supported by CARB's data as well. See, e.g., ISOR, at 12-15 (projecting only 37,009 impacted MY 2010 tractors and 92,523 impacted MY 2010 trailers in California, versus 398,677 impacted MY 2010 tractors and 996,693 impacted MY 2010 trailers outside of California. Thus, over 90% of the cost impact of California's Regulations is expected to occur outside of California).

79 Fed. Reg. at 46264 n. 103.

The foregoing "disproportionate impact" of the Regulations, as found by the EPA, in addition to their discriminatory impact, and their stratospheric costs, demonstrate that the Regulations cannot withstand constitutional scrutiny.

[6] CCTA is the California Construction Trucking Association, whose Comments are located at JA___.

OOIDA HAS STANDING

OOIDA has standing to bring this Petition under the associational standing doctrine. An organization has standing to seek relief if at least one of its members would have standing, and if the issue is germane to the organization's purpose. *See Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 342–43 (1977).

OOIDA is a not-for-profit trade association incorporated in 1973 in Missouri with its principal place of business located at 1 NW OOIDA Drive, Grain Valley, Missouri 64029. *See* OOIDA Comments (JA __). The approximately 150,000 owner-operators, small-business motor carriers, and professional truck drivers ("small-business truckers") that make up OOIDA's membership, including more than 5,000 members in California alone, operate approximately 200,000 trucks in all 50 states and Canada. *Id.* OOIDA is the largest international trade association representing the interests of these small business truckers on all issues affecting their operations. *Id.* OOIDA actively promotes their views in a broad variety of forums – including federal, state, and provincial agencies, legislatures, courts, other trade associations, private businesses, and committees on the local, state, national, and international level. *Id.* Small-business truckers, like those belonging to OOIDA, have a significant presence in the trucking industry. *Id.* Indeed, one-truck motor carriers represent nearly half of all active motor carriers operating in the United

States while approximately 93 percent of active motor carriers operate 20 or fewer trucks. *Id.*[7] OOIDA's interest in CARB's request for waiver is particularly acute in this case given the extraordinary discriminatory impact the GHG Regulations will have on OOIDA's members. *Id.* Neither EPA nor CARB have questioned OOIDA's standing.

Several courts, including this Circuit, have recognized OOIDA's standing in similar matters in which its members have been adversely impacted by regulatory action. *See Int'l. Broth. Teamsters v. U.S. Dept. of Transp.*, 724 F. 3d 206, 212 (D.C. Cir. 2013)("[OOIDA]… ha[s] organizational standing. An organization has standing to seek injunctive relief if at least one of its members would have standing and if the issue is germane to the organization's purpose."). OOIDA meets these criteria here as well.

The Seventh Circuit also recognized OOIDA's associational standing in *Owner-Operator Independent Drivers Association, Inc. v. Federal Motor Carrier Safety Administration*, 656 F.3d 580, 585-86 (7th Cir. 2011). Much like the facts presented by OOIDA's petition before the EPA here, its challenge in that case involved a rule requiring the installation of costly equipment required by federal regulations. The Seventh Circuit concluded:

> It is truck drivers who will be required to install EOBRs should they work for a carrier subject to a remedial directive, and the central

[7] http://www.trailways.com/resources/docs/GAO%20CSA%20Audit.pdf.

> purpose of the rule is to increase their compliance with HOS regulations. * * * As a trade association that includes truckers and represents their interests, OOIDA meets the requirements of associational standing; it has Article III standing because the individual truckers do. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C.Cir.2002).

656 F.3d 580, 585-86.

In sum, OOIDA has, again, met all criteria establishing its standing here.

SUMMARY OF THE ARGUMENT

Although a state has the power to regulate commercial matters of local concern, a state's regulations violate the Commerce Clause if they are discriminatory in nature or impose an undue burden on interstate commerce. The purpose of the Commerce Clause is to protect the nation against economic Balkanization. It protects against inconsistent legislation arising from the projection of one state's regulatory regime into the jurisdiction of another state. Here, California's requirement that every truck - from every other state in the country – must comply with its Regulations for the privilege of crossing its borders in order to engage in interstate commerce strikes at the core of these constitutional principles. While California *may* be entitled to seek a waiver of federal preemption from the EPA in regulating its own citizens, it *may not* exploit that procedure to undermine the sovereignty of the 49 other states, by mandating that every interstate trucker in the nation comply with the onerous and exorbitant demands of its environmental

regulatory agency. Moreover, by granting numerous exemptions to California carriers, and no meaningful exemptions to interstate carriers, CARB has engaged in the most blatant form of discrimination, necessitating that the Regulations be stricken - without further inquiry.

In response to OOIDA's challenge in the EPA proceeding, both EPA and CARB insisted that EPA had no authority to consider any constitutional concerns, essentially concluding that EPA could grant CARB's request for waiver from federal preemption under Section 209(b) of the CAA, *regardless* of whether CARB's enforcement of the Regulations against interstate truckers would violate their constitutional rights. Such a proposition intolerably subverts the protections afforded by the Commerce Clause.

This Court has plenary authority to adjudicate OOIDA's Commerce Clause challenge, even if the EPA Administrator lacked such authority. *MEMA I*, 627 F. 2d 1095, 1127 ("[P]etitioners are assured through a petition for review here that their [constitutional law] contentions will get a hearing."). *Accord Elgin*, 132 S. Ct. 2126, 2137 n. 8 ("[i]t is not unusual for an appellate court reviewing the decision of an administrative agency to consider a constitutional challenge to a federal statute that the agency concluded it lacked authority to decide.").

STANDARD OF REVIEW

This Court may vacate an EPA Decision under section 706 of the Administrative Procedure Act, 5 U.S.C. § 706 (1976), if it finds that it "*fails to meet . . . constitutional requirements.*" *MEMA I*, 627 F. 2d 1095, 1105. *Quoting Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971) (quoting 5 U.S.C. § 706). "[W]e apply the same standard of review under the Clean Air Act as we do under the Administrative Procedure Act …." *Catawba County, N.C. v. EPA*, 571 F. 3d 20, 41 (D.C. Cir. 2009). "When the constitutionality of an agency's action and not the rationality of its findings is challenged [the court] must … determine for itself whether the agency based its decision on the appropriate constitutional standard." *United Space Alliance, LLC v. Solis*, 824 F. Supp. 2d 68, 78 (D.D.C. 2011). *Citing Crowell v. Benson*, 285 U.S. 22, 60 (1932)("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions … of … law necessary to the performance of that supreme function.").

ARGUMENT

I. THIS COURT HAS PLENARY AUTHORITY TO ADJUDICATE OOIDA's CONSTITUTIONAL CHALLENGE

OOIDA challenged the constitutionality of CARB's HD GHG Regulations under the Commerce Clause in its Comments submitted to EPA. EPA, however, disclaimed authority to consider the constitutional implications of granting a Section

209 preemption waiver to CARB, stating: "[c]onstitutional challenges to the HD GHG regulations are more appropriately addressed by a legal challenge directly against the state." *EPA Decision*, 79 Fed. Reg. at 46264. Nevertheless, this Court has jurisdiction under 42 U.S.C. § 7607 to review EPA's final Section 209 waiver decisions, and the Supreme Court's and this Circuit's precedents make it clear that this Court has plenary authority to adjudicate OOIDA's constitutional challenge.

In *Elgin*, the Supreme Court recognized that direct appellate review is available for legal issues that an agency declined to address as beyond its authority or discretion. *Id.*, 132 S.Ct. 2126, 2137. The Court stated: "[i]t is not unusual for an appellate court reviewing the decision of an administrative agency to consider a constitutional challenge to a federal statute that the agency concluded it lacked authority to decide." *Id.* at n. 8. The *Elgin* Court reasoned that a circuit court's jurisdiction "to decide particular legal questions" is not derivative of the limits of an agency's authority. *Id*. Similarly here, because this Court has jurisdiction to review the EPA Decision under 42 U.S.C. §7607(b), it also has jurisdiction to adjudicate challenges regarding its constitutional implications.

This Court reached a similar conclusion in its *MEMA I* decision, stating:

> It is generally considered that the constitutionality of Congressional enactments is beyond the jurisdiction of administrative agencies. * * * Although petitioners' objections are not directed at the Clean Air Act, the rationale underlying the cases dealing with administrative power to consider challenges to statutes is useful in this context as well. The waiver proceeding produces a forum ill-suited to the resolution of

> constitutional claims. While nothing in section 209 categorically forbids the Administrator from listening to constitutionally-based challenges, *petitioners are assured through a petition for review here that their contentions will get a hearing*.

Id., 627 F.2d 1095, 1115 (emphasis added).

Even though both EPA and CARB declined to engage OOIDA's constitutional issues – they both disclaimed EPA's authority to do so – a sufficient administrative record was made for this Court to decide OOIDA's constitutional challenge. However, if the Court believes the record is insufficient, this does not rob the Court of authority to act. As *Elgin* instructs, "the court may take judicial notice of facts relevant to the constitutional question." *Elgin*, 132 S.Ct. at 2138. And if the resolution of a constitutional claim requires the development of facts beyond those as to which the court may take judicial notice, the agency has authority to assemble a record for the court's review. *Id*. The fact-finding powers of the agency in *Elgin* may have been more akin to a trial court than the powers EPA may have under Section 209 of the CAA. But if the Court considers it necessary, a further hearing at EPA would provide a sufficient forum for the parties to submit evidence for this Court's further consideration on this issue.

II. CARB'S HD GHG REGULATIONS VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

A. The Commerce Clause Prohibits States From Discriminating Against Out-Of-State Interests, or Burdening Interstate Commerce

CARB's HD GHG Regulations violate the Commerce Clause of the United States Constitution in the following respects. First, California has purposefully reached beyond its own boundaries to regulate transportation outside of the state by interstate motor carriers. Second, the Regulations favor in-state carriers, and discriminate against out-of state motor carriers. Third, the Regulations unduly burden interstate commerce.

While the Regulations had no legitimate force and effect before CARB obtained a waiver of federal preemption by EPA, now that EPA has granted a waiver, CARB has now ostensibly been authorized (by EPA) to enforce the Regulations against hundreds of thousands of interstate truckers - in contravention of the Commerce Clause. Adding to this aberrational result, EPA maintained –rightly or not - that it had no authority to consider the constitutional implications of its decision. Such an extraordinary outcome cannot withstand constitutional scrutiny.

In addition to being an affirmative grant of congressional authority, the Commerce Clause, which authorizes Congress "[t]o regulate Commerce ... among the several states," U.S. Const. art. I, § 8, cl. 3, is in its negative aspect also a limitation on the regulatory authority of the states. See *Oregon Waste Sys. v.*

Department of Envtl. Quality, 511 U.S. 93, 98 (1994). It is well settled that a state and its agencies may only regulate conduct within the state's own boundaries. Laws or regulations that impose liability upon, or otherwise regulate conduct occurring wholly outside of the state go beyond the inherent limits on the state's authority and may not be allowed to stand. As the Supreme Court observed in *Healy v. Beer Inst. Inc*., 491 U.S. 324, 336 (1989):

> [T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.

Id. See also Edgar v. MITE Corp., 457 U.S. 624, 642-643 (1982).

The purpose of the Commerce Clause is to protect the nation against economic Balkanization. *Wardair Canada v. Florida Dep't of Revenue*, 477 U.S. 1, 7 (1986). In *Dennis v. Higgins*, 498 U.S. 439, 449-50 (1991), the Supreme Court stated:

> Our system, fostered by the Commerce Clause is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Id.

In this case, CARB's requirement that every trucker in the nation must comply with its GHG Regulations in order to conduct business in California resembles the regulatory regime struck down by the Supreme Court in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), where the Court held that an Illinois law requiring trucks to have unique mudguards was unconstitutional under the Commerce Clause. The Illinois statute required curved mud guards, instead of straight mudflaps which were legal in at least 45 states. The Illinois legislature asserted that the unique curved mudguards would be more useful in preventing stones and other debris to be kicked up from the back of trucks, thus preventing more accidents than other types of mudflaps. The plaintiffs were trucking companies who drove through Illinois and would have to use one form of mudflap equipment while in Illinois, but other mudflap equipment while in other states. The Supreme Court held that the Illinois law was unconstitutional under the Commerce Clause, concluding:

> A State which insists on a design out of line with the requirements of almost all the other States may sometimes place a great burden of delay and inconvenience on those interstate motor carriers entering or crossing its territory. Such a new safety device-out of line with the requirements of the other States-may be so compelling that the innovating State need not be the one to give way. But the present showing-balanced against the clear burden on commerce-is far too inconclusive to make this mudguard meet that test.

Id. at 529.

In *Raymond Motor Trans., Inc. v. Rice*, 434 U.S. 429 (1978), the Supreme Court struck down on Commerce Clause grounds a state statute that prohibited

trucks longer than 55 feet with one trailer and trucks pulling more than one trailer to be operated within that state without a permit, based upon the finding that it substantially interfered with the movement of goods in interstate commerce without a meaningful contribution to highway safety. *See also Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (invalidating state statute banning trucks over 60 feet); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) (invalidating state law restricting length of trains). Although discrimination against out-of-state interests was not the decisive factor in the *Raymond Motor* case, the Court did note that the numerous exemptions from the general rule, some of which were found to discriminate in favor of local industry, raised additional doubts about the validity of the regulation. *Raymond Motor*, 434 U.S. at 446-447.

Express discrimination against out-of-state interests is, by itself, a *per se* violation of the Interstate Commerce Clause. *Brown-Forman Distillers Corp.* 476 U.S. at 573-579. State regulation is also problematic where discrimination is not entirely clear based upon statutory language, if its provisions, in practice, favor in-state over out-of-state economic interests, and as a result, the cost of doing business for out-of-state interests, but not their in-state counterparts, is raised. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350-351 (1977). When in-state versus out-of-state discrimination is demonstrated, the burden falls on the state to justify it both in terms

of the local benefits flowing from the regulation and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake. *Hunt*, at 353.

Although a state has power to regulate commercial matters of local concern, a state's regulations violate the Commerce Clause if they are discriminatory in nature or impose an undue burden on interstate commerce, either because they are not necessary to further the state's legitimate interests or because they "unreasonably favor[ ] local producers at the expense of competitors from other States." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 154 (1963) (citations omitted). If a state's laws are found to be nothing more than "economic protectionism" in disguise, they will be invalidated as a matter of course. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981).

Under the "two-tiered approach" adopted by the Supreme Court,

> [w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the [s]tate's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Brown–Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986) (citations omitted).

Laws that are applied evenhandedly and impose only an incidental burden

on interstate commerce can be unconstitutional if the burden on commerce is "excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

In *Union Pac. R.R. v. Cal. Pub. Utils. Comm'n*, 346 F.3d 851, 871 (9th Cir. 2003), the Ninth Circuit struck down California regulations having an extraterritorial impact similar to that presented by CARB's HD GHG Regulations here, reasoning:

> While CPUC does not regulate conduct outside of California, the extra-territorial effect of its regulation is undisputed. Both parties concede that trains are not re-configured during transit, so, for example, a train leaving Nebraska and traveling to Los Angeles would be initially configured so as to meet the most stringent standards on its trip. Thus, any rule regarding the make-up of a train will have extra-territorial effects in a number of different states. While the extra-territorial effects of only one state regulatory regime are relatively minor, if California can require the Railroads to develop and to implement performance-based standards, so can every other state, and there is no guarantee that the standards will be similar. The effect of such a patch-work regulatory scheme would be immense. *See Mich. S. R.R. Co.*, 251 F.3d at 1155. As the district court found, because there is no universal standard, "subjecting plaintiffs to the extensive amount of inconsistent state regulation California's rule would necessarily permit, would undermine the need for substantial uniformity in this area and interfere with interstate commerce." *Union Pac. R.R.*, 109 F.Supp.2d at 1217.

Id.

B. The GHG Regulations Are Unconstitutionally Burdensome and Discriminatory

Based on the foregoing authorities, CARB's GHG Regulations cannot withstand any test under the Commerce Clause. First, EPA concluded that CARB's

own data demonstrated that over ***90%*** of the cost impact of California's Regulations was expected to occur outside of California, specifically observing that while the Regulations would affect 37,009 tractors and 92,523 trailers inside California, they would also impact 398,677 tractors, and 996, 693 trailers outside California, concluding: "Thus, over 90% of the cost impact of California's Regulations is expected to occur outside of California." *See* EPA Decision, 79 Fed. Reg. at 46264 n. 103. This hardly constitutes an "incidental," "evenhanded," or "indirect" impact on interstate commerce. *Pike, Brown–Forman Distillers Corp.*.

Second, the costs CARB seeks to impose on interstate truckers are inherently overreaching, and are not offset by any empirically supported proof of local benefits corresponding to the miles driven on California roads by interstate truckers. By CARB's own figures, the cost of compliance for out-of-state truckers approaches ***$4 billion***. EPA conducted no constitutional cost/benefit analysis whatsoever, stating that for purposes of granting a 209 waiver, "the relevant question is whether California needs its own motor vehicle pollution program to meet compelling and extraordinary conditions, *and not whether the specific standards that are the subject of this waiver request are necessary to meet such conditions*." *See* 79 Fed. Reg. at 46262 (emphasis added). As demonstrated above, while CARB purported to show summary "projections" regarding GHG reductions, *id.*, it did not segregate the proportion of such projected reductions between intrastate and interstate carriers.

Even if it had, it would still have been required to account for these additional disparities: (1) the numerous exemptions granted to intrastate carriers; and (2) OOIDA's demonstration that interstate carriers drive variably fewer miles on California roads than intrastate truckers. Considering all of these deficiencies, CARB's GHG Regulations fail to pass any credible muster under the *Pike* balancing test, even if they were imposed in an even handed manner, and had only an incidental effect on interstate commerce - which they clearly do not. *Pike*, 397 U.S. 137, 142 (1970)(balancing approach applied where "the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental.").

Third, California is intentionally attempting to reach beyond its own boundaries to regulate transportation that is provided totally outside of the state by motor carriers. The OOIDA Foundation surveys OOIDA membership and those results indicate that its members who are primarily long-haul truckers average 108,072 miles per year. OOIDA Comments (JA __) (Owner Operator member Profile Survey, OOIDA Foundation (2010)). Thus - as CARB intended - they do not qualify for either the short or local-haul exemptions. This means that they will need to equip the tractors and trailers they use with the requisite aerodynamic equipment and low-rolling resistance tires for the miles operated outside of California transporting freight for shippers and receivers also located outside of

California. They are forced to comply with the Regulations if they want to hold themselves out to provide even intermittent and irregular transportation services in California with the same equipment. California's regulatory regime is therefore improperly being projected into other states. See *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *Edgar v. MITE Corp.*, 457 U.S. 624, 642-643 (1982). Motor carriers operating in interstate commerce must either avoid California altogether or expend substantial funds to purchase new compliant equipment or retrofit old equipment. *See* OOIDA Comments (JA __). CARB has ignored the difficulty that financially stressed small-business motor carriers will experience in coming up with thousands of dollars in the upfront capital for the required technologies. *Id*. Further, many small-business motor carriers are acutely aware of their fuel mileage and, since fuel represents their single largest cost, they are already operating their equipment as efficiently as practicable. *Id*. Indeed, many have made large investments in anti-idle technology. *Id*. Thus, the hypothesized payback for the capital investment required by this Regulation may well be illusory and overstated. *Id*. That expense is also difficult to justify for those motor carriers who only occasionally make trips into California. *Id*. As shown in the table of IRP data above, once vehicles from states near California are eliminated, the average mileage in California is quite low and gets lower as the base state gets further away. *Id*.

Accordingly, the expenditures for the equipment required by the GHG

Regulation cannot be justified based upon the mileage traveled in the state. More distant motor carriers are likely to avoid California altogether. On the other hand, the benefit to California, in terms of reduced greenhouse gas emissions, will be minimal if the Regulations keep out only those truck operators who are not likely to drive many miles or consume much fuel in the State. Thus, as with the various cases invalidating state laws banning certain trucks on safety grounds, the ban here on certain tractors and trailers places a burden on interstate commerce that outweighs any demonstrable local benefits. *See Raymond Motor v. Rice,* 434 U.S. at 429; *Kassel v. Consolidated Freightways*, 450 U.S. at 662.

Fourth, the GHG Regulations clearly discriminate against out-of state motor carriers. As discussed above, CARB has gone to great lengths to minimize the burden imposed on California-based carriers. The Regulations are therefore discriminatory, and violative of the Commerce Clause. *Raymond Motor* at 429; *New Energy v. Limbach*, 486 U.S. 269, 273 (1988); *United Haulers Ass'n, Inc. v. Oneida-Herkimer*, 550 U.S. at 330, 339 (2007). Because of its focus on regulating long-haul truckers, CARB did not provide any meaningful exemptions from the Regulations for them, even those who drive relatively few miles in California and, accordingly, do not individually make a meaningful contribution to the greenhouse gas emissions problem in the state. In fact, the current regulations have *no exemptions* that directly address the needs of those out-of-

state motor carriers. The lack of any meaningful opportunity for a long-haul interstate trucker to come into California without first complying with the GHG Regulation raises the costs for out-of-state motor carriers who want to do business in the state, while many in-state motor carriers are exempted from the Regulations' requirements. This creates an unlevel playing field which the Commerce Clause prohibits. *See Hughes v. Oklahoma*, 441 U.S. 322, 336; *Hunt v. Washington State*, 432 U.S. 333, 350-351. Whether the discrimination is express or simply the effect of the numerous one-sided exemptions for in-state interests without any corresponding exemptions for out- of-state motor carriers, it is clearly discriminatory. As such, it is unconstitutional.

Fifth, and finally, the Court must consider the "practicable and cumulative impact" this sort of runaway state regulation will cause if every one of the other 49 states also promulgated their own separate regulatory regime requiring interstate truckers to retrofit their trucks, at enormous expense, in order to meet the individual mandate of each state before crossing its border. As this Court aptly observed in *CSX Transp. v. Williams*, 406 F. 3d 667, 673 (D.C. Cir. 2005), such a scenario would "wreak havoc" on the nation's interstate transportation system:

> [I]t appears the D.C. Act does "unreasonably burden interstate commerce." In assessing the burden, it is appropriate for us to consider the practical and cumulative impact were other States to enact legislation similar to the D.C. Act. *See S. Pac. v. Arizona*, 325 U.S. 761, 774–75, 65 S.Ct. 1515, 89 L.Ed.2d 1915 (1945) (focusing on impact of similar state legislation in striking down Arizona statute limiting train

> lengths as unconstitutional burden on interstate commerce). This is not a speculative exercise. The California Senate currently is considering a bill that would ban hazardous shipments within three miles of the city hall of any "[u]rban region," defined as any city of over 50,000 people. *See* California Senate Bill No. SB 419 Amended (Mar. 31, 2005), *cited in* U.S. Mem. at 17. As the United States asserts, "[i]t would not take many similar bans to wreak havoc with the national system of hazardous materials shipment."

So it is here. If every state, in addition to California, were permitted to promulgate its own regulatory agenda, the interstate transportation system of this nation would be placed in a logistical and economic stranglehold. There would also be no restraint against the expansion of such a confederacy of state regulations to other transportation sectors, and ultimately, to *every* interstate industry. This is precisely the type of Balkanization the Commerce Clause was designed to foreclose.

In sum, while EPA may have found it unnecessary to consider the deleterious impact CARB's Regulations have on interstate commerce, as demonstrated herein, those Regulations cannot be upheld when viewed under the exacting lens of Constitution.

CONCLUSION

For the foregoing reasons, this Court should:

(1) Grant the Petition;

(2) Declare that the HD GHG Regulations violate the Commerce Clause of the U.S. Constitution; and

(3) Vacate the EPA Decision to the extent it grants waiver of federal preemption to the GHG Regulations in their current unconstitutional form.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(C) and Cir. R. 32 (1) in that the brief contains **8,036** words excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: February 3, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February, 2015, an electronic copy of *Petitioners' Opening Brief*, was served via CM/ECF system to all parties of record. In addition, two copy of the *Petitioners' Opening Brief* will be mailed via Federal Express to the following address:

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