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 REPLY BRIEF

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Petitioner, Owner Operator Independent Drivers Association ("OOIDA") respectfully submits the following points and authorities in reply to the Brief for Respondent, Environmental Protection Agency ("EPA"), and the Brief of Intervenor-Respondent California Air Resources Board ("CARB").

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER OOIDA'S CONSTITUTIONAL CHALLENGE

A. Respondents Fail to Show That *MEMA I* Requires Dismissal

Both EPA and CARB ask this Court to dismiss OOIDA's petition for review because its constitutional challenge "focuses exclusively on the legality of the California State regulations, and not the substance of EPA's waiver action." *See* EPA Brief at 2. *See also* CARB Brief at 10 (OOIDA "is free to pursue its claim by filing an action in federal district court or the state courts of California . . . ."). While OOIDA welcomes CARB's consent to be sued in federal district court or California State court, as well as EPA's acknowledgement that it would not be a necessary or indispensible party to any such suit, this Court's decision in *Motor and Equip. Mfrs Assoc. v. EPA*, 627 F.2d 1095, 1115 (D.C. Cir. 1979) ("*MEMA I*"), clearly provides that this Court has jurisdiction to consider constitutional questions relating to state regulations that are approved by the EPA administrator in granting a Section 209 preemption waiver, as follows: "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.* at 1115 (emphasis added).

Nonetheless, both EPA and CARB assert that under *MEMA I,* this Court cannot, or should not, exercise jurisdiction when a petitioner *only* asserts a constitutional law challenge to state law regulations that have been approved by the EPA administrator in a Section 209 waiver proceeding. For example, CARB argues that in *MEMA I*, this Court "was examining only 'constitutionally based challenges *to the Administrator's waiver decision* and its consequences," including a First Amendment claim and a due process claim." CARB Brief at 14 (emphasis in original). However, CARB's position is demonstrably unsustainable. First, the constitutional challenges in *MEMA I* were directed at the underlying *state regulations* approved by the EPA, *i.e.*, not the Administrator's decision itself. As *MEMA I* thus explained:

> Petitioners' first amendment claim is that the in-use maintenance *regulations* unlawfully burden the manufacturers' right to communicate with their customers. We disagree. *The regulations* permit manufacturers to recommend maintenance reasonable and necessary to ensure the safe operation of the motor vehicle. Otherwise *the regulations* simply require manufacturers to make clear that maintenance which is required for warranty purposes and that which is merely recommended. Although commercial speech is now protected by the first amendment, regulation of such speech having a reasonable basis in a legitimate governmental policy is lawful.

Id., 627 F.2d 1095 at 1127 (emphasis added).[1] Second, CARB overlooks the final three words in the very passage it quotes from *MEMA I*: "Petitioners make two constitutionally-based challenges to the Administrator's waiver decision ***and its consequences***." *Id*. (emphasis added). Here, as in *MEMA I,* the ***consequences*** of the Administrator's waiver decision have placed the constitutionality of the regulations directly in question because - as CARB acknowledges – the regulations would not have become legally effective unless and until it obtained a Section 209 waiver. *See* CARB Brief at 8 ("California … may adopt and enforce such emission standards *but only with approval by the EPA*.")(emphasis added)(citing 42 U.S.C. § 7543(b)). Therefore, as in *MEMA I*, this Court has jurisdiction to address OOIDA's constitutional challenge because it arises as a "*consequence[]*" of the Administrator's waiver decision.[2]

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[1] CARB – but not EPA – attempts to distinguish *Elgin v. Dep't. of Treasury*, 132 S. Ct. 2126 (2012) on the ground that *Elgin* "involved the constitutionality of a federal statute." CARB brief at 15-16. This is a distinction without a difference. *Elgin* is fully applicable here to the extent it ruled that when an agency lacks authority to decide *any* constitutional questions, the reviewing court has jurisdiction to do so. *Id*. at 2139 ("Within the CSRA review scheme, the Federal Circuit has authority to consider and decide petitioners' constitutional law claims.").

[2] CARB unfairly alleges that OOIDA has improperly invoked the Court's jurisdiction under Section 307(b)(1) as a "pretense," and that OOIDA "does not argue" EPA's decision "failed to meet proper … constitutional requirements." CARB Brief at 11-13 and n. 4. Not so. OOIDA has strictly followed Section 307(b)(1) and 5 U.S.C. § 7065 (failure to meet "constitutional requirements"), as

Notably, EPA does not advance CARB's "distinctions" of *MEMA I.* Instead, EPA places chief reliance on another passage from *MEMA I* providing: "[i]f petitioners dislike the substance of the [Board's] regulations, or if they believe the procedures the [Board] used to enact them were unsatisfactory, then they are free to challenge the regulations in the state courts of California." *MEMA I,* 627 F.2d at 1105. EPA then characterizes as "dicta" *MEMA I*'s holding that "petitioners' constitutional challenges could be heard through a petition for review in the D.C. Circuit…." EPA Brief at 25.[3] OOIDA disagrees. *MEMA I's* holding that the petitioner's constitutional claims could be raised in the D.C. Circuit was not dicta because that is precisely the basis upon which the Court adjudicated the constitutional challenge in that case. *Id*., 627 F.2d at 1127. Moreover, the Court's comments that the petitioners were "free to challenge the regulations in the state courts of California," seem to fall in the category of dicta; and if not, then they are far more generalized than the Court's holding that constitutional challenges to the state regulations at issue in that case could be adjudicated in the D.C. Circuit.

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informed by *MEMA I.* The fact that CARB disagrees with *MEMA I*, does not justify its allegation of "pretense."

[3] EPA also distinguishes OOIDA's Commerce Clause challenge with the First Amendment and Due Process challenges raised in *MEMA I*, contending that this distinction "fundamentally impacts the prudential considerations at issue." EPA Brief at 25. However, this is a distinction which appears to make no difference, because each of these challenges arise under the U.S. Constitution.

It may be the case that *MEMA I* authorizes jurisdiction over constitutional challenges to state regulations that are the subject of a Section 209 waiver proceeding in *either* this Court *and/or* the state courts of California *and/or* in federal district court. That is a clarification which this Court may wish to address in this proceeding. Pending such a clarification however, OOIDA has followed *MEMA I*'s direction that: "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.* at 1115 (emphasis added).

B. Respondents Fail to Substantiate Their Demand for "Prudential" Dismissal

Both EPA and CARB argue that OOIDA's Petition should be dismissed based upon purported "prudential considerations;" however, they each fail to: (1) cite a single case supporting their position; or (2) explain how that doctrine – if applicable – could be employed here. *See* EPA Brief at 25-26; CARB Brief at 16-18.

In *American Petroleum Institute v. EPA*, 683 F.3d 382 (D.C. Cir. 2012) ("*API*"), this Court defined the prudential ripeness doctrine as follows: "[i]n assessing the prudential ripeness of a case, we focus on two aspects: the 'fitness of the issues for judicial decision' and the extent to which withholding a decision will cause 'hardship to the parties.'" *Id.* at 387. In *API*, the parties had completed

briefing on a petition from a 2008 EPA regulation, when the Agency issued a *new* notice of proposed rulemaking "that, if made final, would significantly amend EPA's 2008 decision." *Id.* at 384. The Court concluded: "As a result, we deem this controversy unripe as a prudential matter and order the case held in abeyance, subject to regular reports on the status of the proposed rulemaking." *Id.*

There is no basis for dismissal in this case because this Court has jurisdiction, as explained in *MEMA I.* Second, if this Court determines that the current record is insufficient to make a ruling, then, as explained in OOIDA's opening brief, *Elgin* authorizes this Court to remand the matter to the agency for the preparation of more complete record upon which the Court can adjudicate OOIDA's constitutional law challenge, as follows:

> 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.

See OOIDA Opening Brief at 22. CARB argues that this would result in "an abuse of the administrative process," because "EPA's expertise lies in the administration

of its environmental programs, not the Commerce Clause." CARB Brief at 17.[4] This is a plainly disingenuous argument because CARB *and* EPA have both submitted argument that the regulations at issue pass constitutional muster – based on the evidence in the current EPA record. *See* CARB Brief at 39 ("EPA argues convincingly that the significant environmental benefits of ARB's regulations 'in contributing to the attainment of the national ambient air quality standards outweigh any purported burden on interstate commerce.' … ARB agrees."). *Id.* (quoting EPA Brief at 46-47). In sum, Respondents' arguments demonstrate that EPA does not need any constitutional law expertise to further develop the *factual record* this Court may require to adjudicate the constitutional questions presented in this proceeding. Based on the foregoing, Respondents' demand for prudential

[4] It is noteworthy that CARB's position is completely inconsistent with the position it has recently taken in *OOIDA v. Corey*, 2014 WL 5486699 (E.D. Cal. Oct. 29, 2014), where it convinced the district court to dismiss OOIDA's Commerce Clause challenge to a different CARB regulation, contending that it should have been initiated in the court of appeals, not in federal district court, "because [OOIDA's] challenge to the Regulation pertains to the EPA's approval of that Regulation as part of California's SIP" (state implementation plan) which had been approved by the EPA under 42 U.S.C. § 7409(a). CARB's arguments in *Corey* underscore its duplicity here in arguing: (1) the court of appeals *does not* have jurisdiction over constitutional challenges to underlying state regulations approved by EPA; (2) OOIDA *can* directly mount a constitutional challenge in district court, and (3) the EPA *cannot* prepare an adequate record. Moreover, unlike the regulations at issue here, which *could not* have become effective without EPA approval, the regulation in *Corey did not* need EPA approval to become effective. *Id.* Finally, there is no practical difference between EPA approving a SIP, and approving a waiver of preemption. CARB cannot continue to have it both ways.

dismissal must be denied.

C. This Court Should Transfer This Action Under 28 U.S.C. § 1631 In Lieu Of Dismissing It

Should the Court accept Respondents' argument that it lacks jurisdiction over the Petition, OOIDA requests that in lieu of dismissal, the Court transfer this case to the U.S. District Court for the Eastern District of California pursuant to 28 U.S.C. § 1631, which provides:

> **Transfer to cure want of jurisdiction**
>
> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

In *Ukiah Adventist Hosp. v. FTC*, 981 F.2d 543, 549 (D.C. Cir. 1992), this Court stated: "[t]here are three elements to a section 1631 transfer: (1) there must be a lack of jurisdiction in the district court; (2) transfer must be in the interest of justice; and (3) the transfer can be made only to a court in which the action could have been brought at the time it was filed or noticed." (internal citations omitted).

In this case, OOIDA satisfies all three requirements to transfer this case to the district court. First, OOIDA's request to transfer is conditioned upon a finding

by this Court that it lacks subject matter jurisdiction over its petition, *i.e.*, the position urged by both EPA and CARB.

Second, OOIDA filed its petition within the time required under the Administrative Procedure Act to file a complaint for review of the final agency action at issue in this case. In its "Jurisdictional Statement," EPA has agreed OOIDA's Petition was timely, stating that OOIDA "timely filed its petition for review of EPA's Waiver. *See* 42 U.S.C. § 7607(b)." EPA Brief at 1. As such, OOIDA has satisfied the requirement under 28 U.S.C. § 1631 that the transfer can be made only to a court in which the action could have been brought at the time it was filed or noticed.

Third, OOIDA satisfies the requirement that the transfer be in the "interest of justice." Here, the interest of justice requires that the Court transfer this case rather than allow the case to be dismissed.

Finally, EPA and CARB both agree that OOIDA can "pursue its claim in the California federal or state courts." CARB Brief at 18; EPA Brief at 26. Thus, in the event the Court even reaches the question, in lieu of dismissal, the Court should transfer this action to the United States District Court for the Eastern District of California.[5]

[5] CARB states that "such cases are frequently filed" in the Eastern District of California, ostensibly because CARB is located there. CARB Brief at 18 n. 5.

II. THE CARB REGULATIONS VIOLATE THE COMMERCE CLAUSE

A. Congress Has Not Explicitly Authorized CARB to Burden Interstate Commerce

Both EPA and CARB argue that Congress has insulated *all* CARB vehicle emission regulations from constitutional review, either by way of blanket congressional approval given back in 1965, or whenever CARB obtains a Section 209 preemption waiver from the EPA. EPA Brief at 30-39. CARB Brief at 18-23. Once again, their arguments are untenable.

"[F]or a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear." *South–Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 91 (1984).[6] As a result, to exempt a regulation from the Commerce Clause, Congress must do more than simply authorize a State to regulate in an area, it must "affirmatively contemplate otherwise invalid state legislation," *id.,* and clearly express its intent to "remove federal Constitutional constraints." *Sporhase v. Nebraska ex rel. Douglas,* 458 U.S. 941, 960 (1982). Without this requirement, "'the risk that unrepresented interests will be adversely affected by restraints on commerce'" "unacceptably increases." *Maine v. Taylor,* 477 U.S. 131, 139 (1986)(citation omitted). "[W]hen

[6] *See also C&A Carbone v. Town Of Clarkstown, New York.*, 511 U.S. 383, 409 (1994)(O'Connor, J. concurring) (emphasizing high degree of specificity with which Congress must "explicitly" authorize state law otherwise violating the Commerce Clause.).

Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, we have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.'" *New England Power Co. v. New Hampshire,* 455 U.S. 331, 343 (1982) (citations omitted). Defendants bear the burden of "demonstrating [this] clear and unambiguous intent." *Wyoming v. Oklahoma,* 502 U.S. 437, 458 (1992).

In environmental cases in particular, a number of courts have found violations of the Commerce Clause, rejecting arguments that various federal environmental statutory regimes authorize state regulation impacting interstate commerce. *See, e.g*, *Environmental Technology Council v. Sierra Club,* 98 F. 3d 774 (4th Cir. 1996)("Neither South Carolina, nor the intervenors have come forward with any further persuasive evidence indicating that Congress intended to permit the states, *directly or by EPA authorization*, to engage in actions otherwise violative of the Commerce Clause.")(emphasis added).[7]

In light of the foregoing authorities, Respondents have not met their burden of showing explicit Congressional authorization exempting CARB from

[7] *Accord State of Alabama v. United States EPA,* 871 F.2d 1548, 1555 n. 3 (11th Cir. 1989)("Although Congress may override the commerce clause by express statutory language, it has not done so in enacting CERCLA."); *National Solid Wastes Mgmt. Ass'n. v. Alabama Dept. of Environmental Management,* 910 F.2d 713, 722 (11th Cir. 1990)("[N]othing in SARA evidences congressional authorization for each state to close its borders to wastes generated in other states … Congress has not, in our opinion, authorized Alabama to restrict the free movement of hazardous wastes across Alabama's borders.").

Commerce Clause review with respect to its extraordinary attempt to regulate every trucker in the nation seeking to engage in interstate commerce in California. Instead, they attempt to stitch together a patchwork of legislative history and inapposite case citations for the conclusion that although the legislative history and text of Section 7543 "do not specifically use the phrase "Commerce Clause," [t]he omission of that phrase is irrelevant." EPA Brief at 36.

According to Respondents, the legislative history and text of Section 7543 proves "Congress' transparent and explicit intent to give California a special seat at the table when it comes to formulating motor vehicle standards to protect the health and welfare of its own citizens …." EPA Brief at 33. As an initial matter, these assertions fall far short of satisfying the high degree of specificity with which Congress must "explicitly" authorize state law otherwise violating the Commerce Clause. *C&A Carbone*, 511 U.S. 383, 409 (1994)(O'Connor, J. concurring)). Second, Section 7543(b) applies exclusively to California's eligibility to apply for a waiver of federal *preemption.* But allowing a state to obtain a waiver from preemption *does not* constitute explicit Congressional waiver of the prohibitions of the Commerce Clause. The Supreme Court has ruled that: "A federal statute that merely exempts state law from the preemptive effect of another federal provision does not authorize a violation of the Commerce Clause." *New England Power Co. v. New Hampshire,* 455 U.S. 331, 341 (1982).

In *Rocky Mountain Farmers Union v. Corey*, 730 F. 3d 1070 (9th Cir. 2013), the Ninth Circuit rejected the substantively identical argument by CARB that Section 211(c)(4) of the Clean Air Act immunized the fuel standard at issue in that case from Commerce Clause scrutiny, concluding:

> Rejecting CARB's contention, the district court concluded that CARB "failed to establish that the savings clause [ ] demonstrate [s] express exemption from Commerce Clause scrutiny." . . . . We agree.
>
> Section 211(c)(4)(a) of the Clean Air Act preempts state laws prescribing, "for purposes of motor vehicle emission control, any control or prohibition respecting any characteristic or component of a fuel or fuel additive." . . . . The next subsection of the Act exempts California from that explicit preemption. . . . But we have previously held that "the sole purpose of [Section 211(c)(4)(B)] is to waive for California the express preemption provision found in § 7545(c)(4)(A)." . . . On this point, our precedent forecloses CARB's argument.

Id. at 1106. The Ninth Circuit's analysis in *Rocky Mountain* applies with equal force here. The fact that Congress allowed California to apply for waiver of preemption under Section 7543(b) fails to demonstrate "express exemption from Commerce Clause scrutiny."

Ironically, Respondents assert that it is this Court's ruling in *MEMA I* which supports the conclusion that Congress affirmatively and explicitly exempted CARB from the reach of the Commerce Clause. EPA Brief at 30-33; CARB Brief at 20-21. But *MEMA I* made no such ruling. In *MEMA I,* an automobile manufacturers association challenged the EPA Administrator's Section 7543

preemption waiver decision "for California regulations limiting the amount of maintenance that a manufacturer can require of motor vehicle purchasers in written instructions which accompany new motor vehicles sold in the state." *Id*., 627 F. 2d 1095 at 1100-01. Thus, as a factual matter, the facts of *MEMA I* involving only cars "sold in the state" of California are fundamentally distinguishable from the facts presented here, where CARB is attempting to impose billions of dollars in regulatory requirements *on every truck in the country*. Moreover, as a legal matter, the only relevant question presented in *MEMA I* was as follows: "does section 209(b) empower the Administrator to consider a waiver of federal preemption for the CARB's in-use maintenance regulations?" *Id*. at 1106. After discussing the text and history of the statute, *MEMA I* concluded:

> We therefore are unable to find compelling indications in the text of the statute, in its legislative history, or in its underlying intent that the Administrator's interpretation of the waiver provision is wrong. We accordingly hold that section 209(b) empowers the Administrator to consider a waiver request for in-use maintenance regulations.

Id. at 1111. In sum, *nothing* in *MEMA I* supports Respondents' conclusion that this Court found that Congress "'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause," when the only question the Court addressed was whether section 209(b) empowered the Administrator to consider a waiver of federal preemption. *New England Power Co,* 455 U.S. 331, 343. Again, this Court does not have any authority here "to rewrite [the] legislation

based on mere speculation as to what Congress 'probably had in mind.'" *Id*.

Finally, EPA's chiefly(*) relied upon authority of *American Trucking Assn's, Inc. v. EPA*, 600 F. 3d 624 (D.C. Cir. 2010)("*ATA*"), undermines its position. EPA, and CARB, repeatedly reference this Court's statement in *ATA* that "If ATA is concerned that California's rule unconstitutionally burdens interstate commerce, ATA also could attempt to bring a constitutional challenge directly to the California rule." *See* EPA Brief at 5,15, 17, 26, 30; CARB Brief at 15. But if this Court found in its 1979 *MEMA I* decision that Congress rendered California emissions regulations "invulnerable to Commerce Clause Challenge,"[8] then why would this same Court reach the contrary conclusion, 31 years later in its *ATA* decision, that a Commerce Clause challenge *could* be asserted? The answer is that *MEMA I* made no such finding, and indeed, no such finding could have been made in 1979, in 2010, or in 2015.[9] Respondents' arguments that Congress *ever* approved the overreaching regulation of interstate trucking engaged in by CARB here must be rejected outright.

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[8] EPA Brief at 35. *Quoting Western & Southern Life Ins. V. State Bd. Of Equalization of California*, 451 U.S. 648, 652-53 (1981).

[9] For these same reasons, Respondents' reliance on *Central Valley Chrysler-Jeep v. Witherspoon,* 456 F. Supp. 2d 1160 (E.D. Cal. 2006) is unavailing because that case incorrectly found that *MEMA I* supported the conclusion that Congress immunized CARB from Commerce Clause scrutiny.

B. Respondents Have Failed to Controvert OOIDA's Demonstration that the Regulations Violate the Commerce Clause

Respondents ineffectively attempt to obscure EPA's finding that the regulations have a disproportionate impact on out-of-state carriers, if they even acknowledge it at all. Again, EPA found:

> 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. EPA contends that this discriminatory impact is "incidental" and is "recouped through the payback periods through fuel savings." *See* EPA Brief at 45. In effect, EPA argues that this is a "cost-free" burden on interstate commerce. It is not. Under California's regime, every trucker in the country wishing to do business in California must pay thousands of dollars[10] just to meet *this* California requirement alone.[11] The nation's truck owner-operators

[10] Respondents allege that OOIDA uses incorrect figures in demonstrating the costs of compliance (EPA Brief at 44 n. 9); however, using EPA's figures that the "cost of compliance in 2008 [was] $2,100 per tractor, and the cost for trailers was "an estimated $1,250 per trailer," the mandatory out of pocket price for interstate truckers to enter California still imposes an inordinate burden, especially when added to the other onerous regulatory costs California imposes on them.

[11] As noted in OOIDA's opening brief, interstate owner-operators must *also* pay $18,000 to satisfy CARB's Truck and Bus" regulation. *Id.* at 13.

simply do not have the type of income needed to satisfy California's "laboratory" of "experiments." EPA Brief at 19, 21. The average compensation of an owner-operator was found to be $36,000 in 2001.[12] Even adjusted to current dollar values, truckers are being driven out of the California market by the costs of local regulation. This, of course, magnifies the disproportionate impact of the regulations because so many in-state truckers are exempted from compliance.

EPA alleges that there is no disparate impact on out-of-state truckers because "any tractor or trailer that travels less than 50,000 miles – whether it comes from Los Angeles or Las Vegas could qualify for the short haul exemption," and thus everyone is playing on a "level playing field." *See* EPA Brief at 41, 42. This is not a valid illustration, however, because the majority of the long haul trucks impacted by the regulation are not from a neighboring city like Las Vegas. For example, a Dallas, Texas owner-operator with a regular weekly route to San Diego, California would travel 1188 miles to reach the California border, before the remaining 173 miles are completed in California, for a round trip total of 2,716 miles. [13] On an annual basis (48 weeks), that interstate owner-operator would accumulate 130,368 miles, of which 16,608 miles would be driven on California roads. Thus, that owner-operator *does not qualify* for the short haul exemption.

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[12] *OOIDA v. Arctic Express, Inc.,* 2001 WL 34366624 (Sept. 4, 2001 S.D. Ohio).
[13] *Available at:* https://goo.gl/maps / GjQFB

In contrast, a California intrastate owner-operator making a weekly roundtrip between San Diego and Sacramento would accumulate 1004 miles per round trip, which multiplied by 48 weeks, amounts to 48,192 miles annually.[14] Thus, that owner-operator *does qualify* for the exemption, and he/she drives over 30,000 more miles on California roads than the Texas based owner-operator. The discriminatory impact of the local haul exemption is therefore irrefutable. So too is the diminished perceived benefit. Moreover, owner-operators domiciled on the east coast have an even greater disadvantage considering the distance they must drive just to get to the California border.

Finally, EPA's attempts to justify these disparities are unavailing. For example, EPA argues that *Bibb v. Navajo Freight Lines, Inc*. 359 U.S. 520 (1959) is inapposite because that case involved "a particular type of mudguard that was legal in at least 45 states, [but] illegal in Illinois." EPA Brief at 49. But that is precisely the same situation presented here. No other state in the country imposes the burdens mandated by California, and it is just as illegal for owner-operators domiciled in other states to enter California without meeting its emissions standards as it was in *Bibb* to enter Illinois without meeting its mud flap standards. *See* 17 CCR §95310 ("Penalties"). Moreover, in contrast to the $30 mud-flap cost in *Bibb*, here, the cost of California's mandates run to the thousands of dollars for

[14] *Available at:* https://goo.gl/maps/ qr5Qq

each interstate owner-operator, and billions in the aggregate. *See* OOIDA Opening Brief at 12-13. While Respondents baldly assert that OOIDA has not met its burden, they fail to contest these pivotal facts.

The Court should also reject EPA's assertion that any Commerce Clause problem is resolved in this case because "other states are free under CAA Section 7507, 42 U.S.C. § 7507, to adopt the Board's Regulation." *See* EPA Brief at 49. But this only serves to magnify the scope of the problem. By requiring truckers throughout the nation to meet its regulatory mandate, CARB is robbing other states of their sovereign freedom to opt in to – or opt out of - a similar regime. CARB has effectively made that decision for them by requiring owner-operators domiciled in all states to comply with its regime, whenever they seek to truck a shipment into or out of California.[15]

[15] Contrary to CARB's contentions, *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) is very much on point here in holding that "the critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundary of the state," as well as "how the challenged state may interact with the legitimate regulatory regimes of other States …." CARB Brief at 35.

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 4, 911 words excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: May 27, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of May, 2015 an electronic copy of *Petitioners' Reply Brief*, was served via CM/ECF system to all parties of record in compliance with Circuit Rule 25(c).

Dated: May 27, 2015

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