

ORAL ARGUMENT NOT YET SCHEDULED

Case No. 22-1081 (and consolidated cases)

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

STATE OF OHIO, et al.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

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

**BRIEF OF OWNER-OPERATOR INDEPENDENT DRIVERS
ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF
PETITIONERS**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), amicus curiae Owner-Operator Independent Drivers Association certifies as follows:

A. Parties and *amici*

Owner-Operator Independent Drivers Association is participating as an *amicus curiae* before this Court. All other parties appearing to date in this court are referenced in the briefs of the State 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 Preemption; Notice of Decision*, 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 Ass'n v. EPA*, No. 22-1083; *Am. Fuel &*

Petrochemical Mfrs. v. EPA, No 22-1084; and *Clean Fuels Dev. Coal. v. EPA*,

No. 22-1085.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and Circuit Rule 29(c), amicus curiae Owner-Operator Independent Drivers Association (“OOIDA”) discloses that it has no parent corporation, and no publicly held corporation owns 10% or greater ownership in OOIDA.

CIRCUIT RULE 29(d) CERTIFICATE

Undersigned counsel conferred with counsel for other expected *amici* in support of the Petitioner known by the close of business Friday, October 28, 2022, Western States Trucking Association, and with counsel for the collective *amici* Western States Petroleum Association, Texas Petroleum Association, and the National Tank Truck Carriers Association and determined that each counsel was preparing different legal and factual arguments that represented the unique interests and perspectives of their clients, making it necessary to file separate briefs.

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GLOSSARY

NPRM	Notice of Proposed Rulemaking
OOIDA	<i>Amicus</i> Owner-Operator Independent Drivers Association, Inc.
ZEV	Zero-Emission Vehicle

STATUTES AND REGULATIONS

All applicable statutes and regulations are set forth in the Initial Brief for Petitioners.

STATEMENT OF AMICUS CURIAE¹

The Owner-Operator Independent Drivers Association, Inc., (“OOIDA”) is a not-for-profit trade association made up of more than 150,000 owner-operators, small-business motor carriers, and professional truck drivers from across the North America. Incorporated in 1973, OOIDA represents small business truckers on all issues affecting their operations, including government environmental mandates that affect the vehicles and equipment that are the tools of their trade. OOIDA’s interest in this proceeding stems not from a direct interest in California’s Advanced Clean Car Program, Advanced Clean Cars Summary, California Air Resources Board, https://ww2.arb.ca.gov/sites/default/files/2019-12/acc%20summary-final_ac.pdf (which would likely have a tangential impact on OOIDA members), but from the impact that a decision on the legal issues presented

¹ No party’s counsel authored this brief in whole or in part. Moreover, no party or party’s counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus curiae*, its members, or its counsel made such a monetary contribution. All parties have consented to the filing of this *amicus* brief.

here would have on future EPA decisions to permit or deny waiver requests from California for initiatives that would directly impact OOIDA members, including California's Advanced Clean Fleets Regulation (*see* <https://ww2.arb.ca.gov/our-work/programs/advanced-clean-fleets>).

SUMMARY OF THE ARGUMENT

The Private Petitioners raise the major questions doctrine to argue that “this Court should demand clarity from Congress before endorsing EPA’s expansive interpretation of Section 209(b).” Private Petitioners’ Brief at 40. Both the State Petitioners and the Private Petitioners describe the extraordinary scope of California’s ambitious rules governing automobile emissions. *See* Private Petitioners’ Brief at 19 -20; *see also*, State Petitioners’ Brief at 42-44. OOIDA presents to this Court its analysis of an analogous pending California rule regarding commercial motor vehicle emissions that is similarly overbroad in its scope, which OOIDA expects to be the subject of a future Section 209 waiver request. California’s pending Advanced Clean Fleets Regulations would, in effect, impose a new national heavy-duty truck emissions policy that would not only affect manufacturers, but

also fundamentally affect heavy truck purchasers and users across the country, the industries that fuel and repair those vehicles, and the interstate commerce those users serve. This Court's decision upon the scope of Section 209(b) of the Clean Air Act in this appeal will have a significant impact on the EPA's handling of California waiver petitions beyond the Advanced Clean Car Program at issue in this appeal.

ARGUMENT

I. The major-question doctrine calls into question the scope of California's vehicle emissions proposals.

The Supreme Court has recognized the major questions doctrine to address "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). Section 209 of the Clean Air Act first denies states the authority to regulate vehicle emissions standards. 42 U.S.C. § 7543(a). As an exception to this prohibition, California was granted the opportunity to impose stricter "State standards" for emissions "to meet compelling and extraordinary conditions." *Id.* at § 7543(b).

California's present Advanced Clean Car Program and its proposed Advanced Clean Fleets Regulation for heavy duty trucks (affecting OOIDA members), however, are intended to address problems beyond compelling and extraordinary conditions specific to California.

But even if the Court were to find that the environmental conditions in California were compelling and extraordinary, Congress could not have contemplated authorizing California to issue regulations that are so broad that they effectively regulate, and place extraordinary burdens upon, a national industry and the infrastructure needs of other states. California's pending heavy-duty truck emissions rules seek to regulate the owners and operators of heavy-duty trucks from across the country if those owners and operators wish to operate in California for any amount of time. The burdens of achieving compliance with such rules will dramatically impact the businesses in interstate commerce that those vehicle operators serve and the businesses who serve and support those vehicle owners and operators. And finally, other states will be required to make major

investments in new infrastructure to accommodate the safe and efficient use of electric vehicles. It is unreasonable for California and the EPA to assert that Congress authorized California to impose regulations with such a broad extraterritorial impact.

II. The Court's decision will impact the scope of the Section 209 waiver for future California rules.

A. California's regulatory ambitions extend beyond the Advanced Clear Car Program to heavy duty trucks.

OOIDA's interest in this litigation looks to the future for how EPA might review a Section 209(b) waiver request from California for its pending electric vehicle mandate on heavy-duty trucks. OOIDA believes the broad scope and impact of the proposed heavy duty electric truck mandate goes far beyond the regulatory power authorized by Congress in Section 209(b). The impact of this rule can first be described by the size of California's economy and the scope of its reliance on interstate trucking.

California is unique among states in that it is a major agriculture producer, a major manufacturer, and a major gateway for United States

imports and exports.² It is also a major consumer of the nation's agricultural production and manufacturing.³ California's economic significance is predicated on the ability to efficiently move goods to, through and from the state. When it comes to the transportation of most of this freight, there is no substitute for trucking.

California's gross domestic product represents approximately 15% of the United States economy.⁴ California accounts for 23% of the United States' agriculture production and 15% of its manufacturing.⁵ California is

² See California Department of Transportation, California Freight Mobility Plan 2020 at 147, 151-57, 179-82, *available at* <https://dot.ca.gov/-/media/dot-media/programs/transportation-planning/documents/freight-planning/cfmp-2020-final/final-cfmp-2020-chapters-1-to-6-remediated-a11y.pdf>.

³ *Id.* at 155, 157, 168-70.

⁴ Regional Data: GDP and Personal Income, SAGDP1 State annual gross domestic product (GDP) summary, Bureau of Economic Analysis, *available at* <https://apps.bea.gov/itable/itable.cfm?ReqID=70> (access state GDP data via "Annual Gross Domestic Product (GDP) by State" menu and select "United States" and "California" to display in table).

⁵ *Id.*; see also Declaration of John E. Husing, Ph.D., in Support of Plaintiffs' Motion for Preliminary Injunction at Exhibit B p. 2-3, ECF. 54-5, *Cal. Trucking Ass'n v. Becerra*, No. 3:18-CV-02458-BEN-BLM (S.D. Cal. Dec. 2, 2019) ("Husing Dec."). John E. Husing, Ph.D. is a research economist specializing in Southern California's economy. His declaration and corresponding expert report were submitted in the challenge to California's AB 5 worker classification rule to demonstrate the impact of the new law on carrier prices, routes, and services. *Id.* ¶¶ 1-3.

also home to 12 deep water port complexes whose share of U.S. import container trade has ranged from 40%-50% from 2000 through 2017, rivaling the Atlantic, Gulf, and Pacific-Northwest ports combined.⁶ The neighboring ports of Los Angeles and Long Beach are the busiest ports not only in the United States, but also in all of North America with a combined market share (by volume) of 29%.⁷ California's highways serve as vital corridors for reaching markets throughout western United States and beyond. In short, California is at the center of the region's and nation's economy. Indeed, Forbes reports that "[i]f it were a country, California's

⁶ See California Freight Mobility Plan 2020, *supra* note 2, at 34.

⁷ Federal Maritime Commission Bureau of Trade Analysis, *U.S. Container Port Congestion & Related International Supply Chain Issues: Causes, Consequences & Challenges* at 1 (July 2015), available at https://www.fmc.gov/wp-content/uploads/2019/04/PortForumReport_FINALwebAll.pdf; Hugh R. Morley, *North American port rankings: Mexican ports grow fastest*, JOC.com (May 6, 2019), https://www.joc.com/port-news/north-america-port-rankings-mexican-ports-grow-fastest_20190506.html; see also Husing Dec., *supra* n.5, at 3-4 (explaining that the ports of Los Angeles and Long Beach handled 35.9% of all U.S. imported containerized cargo in 2017).

\$3.1 trillion economy would be the fifth biggest in the world, ranked between Germany and the United Kingdom.”⁸

It is no surprise then that California is both a major destination for and exporter of goods. In 2015, California imported \$382 billion worth of goods (178 million tons) from other states and exported \$506 billion (90 million tons).⁹ Arizona, Nevada, and Oregon are major exporters to and importers of freight from California, but significant exports and imports can also be attributed to Washington, Texas, Nebraska, Illinois, and even Florida.¹⁰ This interstate trade occurs alongside international imports passing through California on their way to other states. In 2015, 37 million tons of goods valued at \$179 billion made the journey from international markets, through California, to the other 49 states.¹¹

⁸ See Forbes, *Best States for Business 2019: California*, <https://www.forbes.com/places/ca/?sh=6cd7d23e3fef>.

⁹ California Freight Mobility Plan 2020, *supra* note 2, at 165-70.

¹⁰ *Id.*

¹¹ *Id.* at 179-81.

Much of this freight traveling to, though, and from California moves by truck.¹² In 2018, 49% of all California-produced goods destined for other states, representing 67 million tons, made the journey exclusively by truck while 27% of inbound goods, representing 61 million tons, did the same.¹³ In 2015, 12 million tons of goods passed through California on trucks headed for the international market. Meanwhile, despite being home to the busiest ports in North America,¹⁴ California moved 8 million tons of goods via truck destined for international markets through other states.¹⁵

¹² *Id.* at 180; *see also* Husing Dec., *supra* n.5, at 2-4 (explaining the significance of trucking to the California economy).

¹³ Center for Transportation Analysis, *2018 Weight/Value for shipments within, from, and to state by mode, Freight Analysis Framework Version 4*, available at <https://faf.ornl.gov/fafweb/FUT.aspx>; Bureau of Transportation Statistics, *California*, available at https://www.bts.gov/archive/publications/commodity_flow_survey/2012/state_summaries/state_tables/ca (last visit on October 31, 2022); *see also* Husing Dec., *supra* n.5, at 2 (explaining that California leads the nation in total value of all commodities exported by truck).

¹⁴ The ports of Los Angeles and Long Beach are the point of entry for 40 percent of containers to the U.S. *See* The White House, *FACT SHEET: Biden Administration Efforts to Address Bottlenecks at Ports of Los Angeles and Long Beach, Moving Goods from Ship to Shelf* (October 13, 2021) available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/13/fact-sheet-biden-administration-efforts-to-address-bottlenecks-at-ports-of-los-angeles-and-long-beach-moving-goods-from-ship-to-shelf>.

¹⁵ California Freight Mobility Plan 2020, *supra* note 2, at 162.

There is little doubt that when California establishes a vehicle standard for all trucks operating on its highways, it imposes burdens and costs extraterritorially upon a significant number of out-of-state truck owners who regularly or occasionally haul freight to and from California and, by implication, affects the businesses and infrastructure across the country that support such vehicles and their operators.

The size and influence of California's economy and its reliance on trucking does not give it carte blanche to ignore the scope of the rules authorized under Section 209(b), and yet the cost and impact of the proposed heavy-duty truck rules would far exceed the scope of regulations so authorized by Congress.

B. California's broad ambitions to mandate electric heavy-duty trucks will impose significant extraterritorial burdens upon interstate commerce and other states.

The requirement that every trucker in the country who wants to haul freight to, within, or from California must acquire a zero-emission vehicle "ZEV" is economically and logistically infeasible under California's timeline and without a nationwide plan to support such a

sea-change in our transportation system. California's own Deployment Plan for the National Electric Vehicle Infrastructure Program (August 2022) acknowledges the infrastructure burdens that will accompany its ZEV mandate:

Readily available EV charging infrastructure is a key component to the adoption of EVs. EV drivers, especially those with access to only one vehicle, need to be able to drive to the same places they drove to in gasoline or diesel-powered vehicles. Access to EV chargers needs to be available to all drivers, including those in disadvantaged, low-income, Tribal, and rural communities.

California's Deployment Plan for the National Electric Vehicle Infrastructure Program (August 2022) at 5. At present, there is grossly insufficient interstate infrastructure available to recharge heavy-duty ZEV trucks as they traverse the country to carry cargo into or out of California. This will inevitably lead to a devastating supply chain crisis.¹⁶

¹⁶ See, e.g., Bengt Halvorson, *Electric Island: First US charging station for electric semis is ready for megawatt fast-charging*, Green Car Reports, https://www.greencarreports.com/news/1132019_first-charging-station-electric-semis-megawatt-fast-charging/.

In addition, the OOIDA Foundation, a not-for-profit research organization,¹⁷ has gathered the following data demonstrating that it is neither logistically nor economically feasible to impose a zero-emission requirement for every interstate truck in the country so as to bring them into compliance with California's proposed rule:

- The zero-emission mandate would (1) force small-business interstate owner- operators to purchase entirely new ZEV vehicles, adding over \$100,000 per truck; (2) significantly lower the value of their non-ZEV vehicles; and (3) increase interstate trucking costs by billions of dollars.
- For example, a typical 2021 Class 8 diesel truck with sleeper averages approximately \$135,000-155,000. *See* Ben Sharpe & Hussein Basma, *A Meta-Study of Purchase Costs for Zero-Emission Trucks*, The International Council on Clean Transportation, at 10 (February 2022), *available at* <https://theicct.org/wp-content/uploads/2022/02/purchase-cost-ze-trucks-feb22-1.pdf>). In contrast, early estimates for the additional costs of the battery pack to a heavy-duty truck would be between \$115,000-210,000, nearly *doubling* the cost of a non-ZEV truck. *Id.* at 31.

¹⁷ The OOIDA Foundation, Inc. is a 501(c)(3) Non-Profit Corporation, incorporated on March 28, 1991. The purposes for which the Corporation is organized are to fund and sponsor research concerning economic and safety issues affecting the motor carrier industry. *See* <https://www.oida.com/foundation/>.

- At present, there are no actual costs known for class 8 ZEV trucks comparable to those that OOIDA's members typically use and own,¹⁸ because they are not yet being manufactured to any significant degree. Accordingly, imposing such a requirement on interstate owner-operators should not even be considered until their actual market costs are established.
- OOIDA's members collectively own and operate more than 240,000 individual heavy-duty trucks. Accordingly, the estimated aggregate cost to replace those trucks with ZEV trucks (at \$250,000-300,000 per vehicle), could approach \$72 billion.¹⁹

Requiring interstate truckers to purchase a ZEV truck would also require them to sell their non-ZEV trucks because they would be unable to purchase or finance multiple trucks. This may also cause an interference with financing contracts for diesel trucks where the owner needs to enter into a new contract to buy a ZEV.

¹⁸ 88% of OOIDA owner-operators drive class 8 trucks. *See* 2022 Owner-Operator Member Profile Survey at 47, OOIDA Foundation, *available at* <https://www.ooida.com/wp-content/uploads/2022/05/2022-Owner-Operator-Survey.pdf>.

¹⁹ The State of California could, of course, ameliorate this impact by subsidizing these costs.

Mandating the replacement of non-ZEV trucks will lead to a drastic loss in resale value of diesel trucks. For example, while the value of a traditional diesel truck normally remains high due to its long engine life, the resale value of such trucks, particularly in states like Arizona, Nevada, Utah, Colorado, Oregon, and Washington, that are in close proximity to California, will plummet because would-be purchasers also would not be permitted to operate the truck in California.

A truck owner relies heavily on the life expectancy of a diesel truck. For instance, Paccar, an engine manufacturer, estimates that 90 percent of its MX engines will reach one million miles without needing a major overhaul. See Paccar MX13 Spec Sheet, *available at* <https://www.kenworth.com/media/fasnrrmw/2018-mx13-spec-sheet-060118.pdf>. Detroit Diesel says its DD13's B50 rating is 1 million miles, meaning that 50% of the DD13 engines will reach the 1 million mark without rebuilding. See Detroit Diesel, Detroit DD13 Engine, <https://demanddetroit.com/engines/dd13/>. Thus, a requirement that truck

owners prematurely replace their non-ZEV trucks would undermine their investments, savings, business models, and contractual commitments.

In addition, charging an EV takes time—a typical electric car (60kWh battery) takes just under 8 hours to charge from empty-to-full with a 7kW charging point. Comparing this—let alone the time required to recharge substantially larger electric heavy trucks—to the time it takes to fill a tank with diesel, begins to describe another challenge presented by electric vehicles. Although CARB has evaluated the cost/benefit impact based on its own ZEV infrastructure, e.g., charging stations, CARB has not revealed any corresponding findings regarding the infrastructure available to interstate truckers in other states that a trucker must traverse in delivering cargo, or deadheading,²⁰ to and from California.

Data regarding the availability of recharging stations is demonstrably uneven. In 2020, one third of EV charging stations—22,620 stations—were located in California, according to a recent study by Pew Trust. Other states

²⁰ Truck deadheading is the practice of driving a semi-truck with an empty trailer.

had few. North Dakota had 36 public chargers, Alaska just 26.²¹ And OOIDA is not aware of any party addressing whether there is enough capacity in our current electric power grid to charge all the expected ZEVs, especially as they move across the country, to and from California.

Given the nationwide shortage of truck parking and the fact that recharging stations might be located primarily along the major interstates, suburban, rural, and arterial roads, truck routes will be affected as truckers will be forced to route themselves close to recharging stations, even if other routes would be shorter or otherwise more efficient. This will lead to added congestion and more difficulty finding parking along these corridors,

²¹ See Elaine S. Povich, *Got an Electric Car? Great! Where Do You Plug It In?*, Pew, <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/01/02/got-an-electric-car-great-where-do-you-plug-it-in>.

A recent study published in *Nature Energy* by a research team from the University of California at Davis found that about 1 in 5 EV owners—20 percent of plug-in hybrid vehicle owners and 18 percent of pure battery-electric vehicle owners—eventually switched back to gas-powered vehicles. The top reason cited was “dissatisfaction with the convenience of charging.” See National Center for Sustainable Transportation, *Discontinuance Among California’s Electric Vehicle Buyers: Why are Some Consumers Abandoning Electric Vehicles?*, <https://ncst.ucdavis.edu/research-product/discontinuance-among-californias-electric-vehicle-buyers-why-are-some-consumers/>.

especially in an industry whose working hours are strictly circumscribed by federal regulations. All these issues will introduce unpredictability to truckers' schedules, thereby negatively impacting supply chains.

Another complicating factor is the fact that charging stations are often dependent on the vehicle manufacturers' design. Tesla chargers work for Tesla but not for VWs or Chevrolets or Fords. CARB and EPA must also deal with manufacturers' intellectual property rights in this proprietary information to surmount these obstacles.

Furthermore, battery powered vehicles are heavier than diesel powered vehicles. The new Ford electric pickup truck weighs 150-200 lbs. more than the gas/diesel powered version. In a large truck that difference could be several hundred to thousands of pounds. Given federal and state weight limits on heavy-duty trucks, this factor will reduce the cargo carrying capacity of trucks by upwards of 9,000 pounds. *See, A Meta-Study of Purchase Costs for Zero-Emission Trucks*, The International Council on Clean Transportation, at 31 (February 2022), *available at*

<https://theicct.org/wp-content/uploads/2022/02/purchase-cost-ze-trucks-feb22-1.pdf>). This factor will reduce the trucker's revenue per load and require more trucks on the road to haul the same amount of freight.

The most significant maintenance cost in a ZEV truck is the replacement of the batteries which are presently predicted to last 5 years or less. Trucks based in states with extreme cold temperatures will likely require replacement batteries much sooner as cold temperatures adversely affect battery life. Finally, there is a dearth of safety data, including fire and operational hazards, related to the operation of heavy-duty ZEVs on long-haul trucking routes.

Thus, the burdens of California's rules would have the effect of regulating and changing the business structure of a large component of the trucking industry across the country, and create new demands for infrastructure, charging stations and support services that are beyond California's control or responsibility.

CONCLUSION

OOIDA understands that electric vehicles and other alternatives to petroleum-burning engines are the future for the trucking industry and the country. But California is overstepping its authority, both with respect to the automobile rule at issue here and its proposed heavy duty truck mandate. The federal government, not one state, is the appropriate authority to impose a mandate of such “vast economic and political significance.” Only Congress has the authority to pass the laws and appropriate the resources to support the nationwide infrastructure that will ensure the least burdensome and most efficient adoption of any electric vehicle mandate.

Finally, because California’s electric vehicle rules would have such a significant extraterritorial impact on persons and businesses that are not their constituents and to whom they are not politically accountable, Congress is in a better position, and has more responsibility through the legislative process, to anticipate and address the needs and challenges of all

parties that may be burdened by such a mandate. It would not be reasonable for the Court to find that Congress intended Section 209(b) to authorize California to adopt what would effectively be a national electrified vehicle mandate and a new national emissions mandate.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION**

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) and D.C. Cir. R. 32(e)(2)(B) in that the brief contains 3,390 words excluding those parts exempted by Fed. R. App. P. 32(f).

Dated: October 31, 2022

/s/ Paul D. Cullen, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2022, an electronic copy of the foregoing brief was electronically filed and served on all parties of record via the Court's CM/ECF system.

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