

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 9, 2009

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN ROAD AND)
TRANSPORTATION BUILDERS)
ASSOCIATION,)

Petitioner,)

v.)

No. 08-1381

U.S. ENVIRONMENTAL)
PROTECTION AGENCY, *et al.*,)

Respondents.)

**BRIEF OF AMICI CURIAE AMERICAN LUNG ASSOCIATION,
NATIONAL ASSOCIATION OF CLEAN AIR AGENCIES,
NORTHEAST STATES FOR COORDINATED AIR USE
MANAGEMENT, AND THE ENVIRONMENTAL DEFENSE FUND
IN SUPPORT OF RESPONDENTS**

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RULE 26.1 STATEMENT

Amici curiae the American Lung Association, the National Association of Clean Air Agencies, Northeast States for Coordinated Air Use Management, and the Environmental Defense Fund state that none of them has a parent corporation and that no publicly-held company owns an interest of 10 percent or more in any of them.

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Amici Curiae submit this certificate as to parties, rulings, and related cases.

A. Parties, Intervenors, and *Amici* before the District Court

This is a petition for review of agency action. There were no proceedings before the district court.

B. Parties, Intervenors, and *Amici* in this Court

All parties, intervenors, and *amici curiae* are listed in the Brief for Petitioner American Road and Transportation Builders Association.

C. Agency Action under review

Petitioners seek review of EPA's final action denying their petition to amend or repeal certain EPA regulations. EPA published notice of that final action at "Control of Emissions from Nonroad Spark-Ignition Engines and Equipment; Final Rule," 73 Fed. Reg. 59,034, 59,130 (Oct. 8, 2008).

D. Related cases

This case has not previously been before this Court or any other Court, and counsel are unaware of any related case involving the same or similar issues.

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TABLE OF CONTENTS

RULE 26.1 STATEMENT.....	i
STATEMENT AS TO PARTIES, RULINGS, AND RELATED CASES	ii
TABLE OF AUTHORITIES	vi
GLOSSARY	xi
INTEREST OF AMICI	1
BACKGROUND.....	2
A. CAA Regulation and Preemption of Emissions Standards	2
B. The 1994 Rulemaking	4
C. ARTBA’s Petition	6
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. ARTBA MAY NOT CHALLENGE AGENCY ACTIONS TAKEN IN 1994 AND UPHeld BY THIS COURT IN <i>EMA</i>	10
II. THE STATE PROGRAMS THAT ARTBA ASKS EPA TO PREEMPT ARE VITALLY IMPORANT TO STATES’ ABILITY TO PROTECT PUBLIC HEALTH AND SATISFY THEIR OBLIGATIONS UNDER THE ACT	13
III. THE PRESUMPTION AGAINST PREEMPTION APPLIES IN FORCE TO STATE LAWS REGULATING THE USE AND OPERATION OF NONROAD ENGINES	22
IV. EPA PROPERLY DENIED ARTBA’S REQUESTS TO ADOPT NEW REGULATIONS PREEMPTING NONROAD FLEET RULES....	28

CONCLUSION 32

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases:

<i>A.L.A. Schechter Poultry Corp. v. United States</i> , 295 U.S. 495 (1935).....	24
<i>Alabama Power v. EPA</i> , 606 F.2d 1068 (D.C. Cir. 1979)	11
<i>Allway Taxi Inc. v. City of New York</i> , 340 F. Supp. 1120, 1124 (S.D.N.Y) <i>aff'd</i> 468 F.2d 624 (2d Cir. 1972)	21
<i>AT & T Corp. v. Iowa Utilities Bd.</i> , 525 U.S. 366 (1999).....	29
<i>Bates v. Dow Agrosiences LLC</i> , 544 U.S. 431 (2005)	23,28
<i>BCCA Appeal Group v. EPA</i> , 355 F.3d 817 (5 th Cir. 2003)	12
<i>Bldg. & Constr. Trades Council v. Associated Builders and Contrs.</i> , 507 U.S. 218 (1993)	32
* <i>Engine Mfrs. Ass’n v. South Coast Air Qual. Mgt. Dist.</i> , 498 F.3d 1031 (9 th Cir. 2007)	7,31
* <i>Engine Mfrs. Ass’n v. EPA</i> , 88 F.3d 1075 (D.C. Cir. 1996).....	5,6,7,8,10,11,12,13,22,27
<i>Exxon Mobil Corp. v. EPA</i> , 217 F.3d 1246 (9th Cir. 2000)	24
<i>Hammer v. Dagenhart</i> , 247 U.S. 251 (1918)	24
<i>Hawaiian Airlines, Inc. v. Norris</i> , 512 U.S. 246 (1994)	30
* <i>Huron Portland Cement Co. v. City of Detroit</i> , 362 U.S. 440 (1960)	24,25,26
<i>John R. Sand & Gravel Co. v. United States</i> , 128 S. Ct. 750 (2008)	12
<i>Kimball v. Thompson</i> , 165 F.2d 677 (8th Cir. 1948)	24
<i>LaShawn A. v. Barry</i> , 87 F.3d 1389 (D.C. Cir. 1996)	12
<i>Massachusetts v. U.S. Dep’t of Transportation</i> , 93 F.3d 890 (D.C. Cir. 1996) ...	24

<i>Motor & Equipment Mfrs Ass’n, Inc. v. EPA</i> , 627 F.2d 1095 (D.C. Cir. 1979) <i>cert denied</i> , 446 U.S. 952 (1980)	22
<i>Reeves, Inc. v. Stake</i> , 447 U.S. 429 (1980)	31
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947)	23
<i>Train v. Natural Resources Def. Council</i> , 421 U.S. 60 (1975).....	11,24
<i>Union Elec. Co. v. EPA</i> , 427 U.S. 246, 265-66 (1976)	13
* <i>Wyeth v. Levine</i> , 129 S. Ct. 1187 (2009)	23
<u>Statutory Provisions:</u>	
15 U.S.C. § 1203(c)(1)	31
15 U.S.C. § 2075(c)	31
42 U.S.C. § 7401(a)(3)	3
42 U.S.C. § 7410	12
42 U.S.C. § 7410(a)(2)(E)(ii).....	30
42 U.S.C. § 7416	3
42 U.S.C. § 7420.....	14
42 U.S.C. § 7503	15
42 U.S.C. § 7511a	15
42 U.S.C. § 7513a	15
42 U.S.C. § 7521	2
42 U.S.C. § 7541(a)(2)	23

42 U.S.C. § 7543(b)	2
42 U.S.C. § 7543(c)	23
*42 U.S.C. § 7543(d)	3,23,28
*42 U.S.C. § 7543(e)	4,5,29
42 U.S.C. § 7547(a)	4
42 U.S.C. § 7550(2)	3
42 U.S.C. § 7550(10)	4
42 U.S.C. § 7550(11)	4
*42 U.S.C. § 7607(b)(1)	8,9,11,12
47 U.S.C. § 243(d)	32
Pub. L. No. 90-148 (1967)	2
Pub. L. No. 84-145 (1955).....	27
New York City, Local Law 77 (approved December 20, 2003)	20
<u>Administrative Materials:</u>	
Executive Order No. 13,132 (Federalism), 64 Fed. Reg. 43,255 (Aug. 4, 1999)	31
*59 Fed. Reg. 31,305 (June, 17, 1994)	5
*59 Fed. Reg. 36,969 (July 20, 1994)	5
66 Fed. Reg. 57,196 (Nov. 14, 2001)	12,19
66 Fed. Reg. 57,160 (Nov. 14, 2001)	12
69 Fed. Reg. 38,958 (June 29, 2004)	15

71 Fed. Reg. 61,144 (Oct. 17, 2006) 13

73 Fed. Reg. 16,436 (March 27, 2008) 13

Legislative History:

H.R. Rep. No. 90-728 (1967)23

H.R. Rep. No. 95-294 (1977)12

Sen. Rep. No. 91-1196 (1990)12

Sen. Rep. No. 90-403 (1967)23

136 Cong. Rec. S17,237 (Oct. 26, 1990)27

136 Cong. Rec. S16,976 (Oct. 27, 1990)28

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90 IOWA L. REV. 377 (2005)26

American Lung Association.
Facts about Particle Air Pollution (April 2009).....16

Michelle L. Bell, *et al.*, *The Exposure-Response Curve for Ozone and Risk of Mortality and the Adequacy of Current Ozone Regulations*,
114 ENV. HEALTH PERSPECT. 532 (2006)16

California Air Resources Board, *Overview of the Regulation to Reduce Emissions from In-Use Off-Road Diesel Vehicles* (2008) 20

Lincoln L. Davies, *Lessons for an Endangered Movement*,
31 ENVTL. L. 229 (2001) 26

John P. Dwyer, *The Practice of Federalism under the Clean Air Act*,
54 MD. L REV. 1183 (1995) 15

Irina N. Krivoshto, <i>et al.</i> , The Toxicity of Diesel Exhaust: Implications for Primary Care, 21 J. AM. BOARD FAM. MED. 55 (2008)	17
Richard J. Lazarus, THE MAKING OF ENVIRONMENTAL LAW (2004)	26
Nina A Mendelson, <i>Chevron</i> and Preemption, 102 MICH. L. REV. 737 (2004) ...	31
National Research Council, Estimating Mortality Risk Reduction and Economic Benefits from Controlling Ozone Air Pollution (2008)	15
Puget Sound Clean Air Agency, Final Report: Puget Sound Air Toxics Evaluation (Oct. 2003)	17
William H. Rodgers, ENVIRONMENTAL LAW (2d Ed. 1994)	26
South Coast Air Quality Management District, Final Report: MATES III (September 2008)	17
Arthur C. Stern, History of Air Pollution Legislation in the United States, 32 J. AIR POLLUTION CONTROL ASS'N 44 (1982)	26
Dorceta E. Taylor, The Urban Environment: The Intersection of White Middle-Class and White Working-Class Environmentalism (1820-1950s), 7 HUMAN ECOLOGY 207 (1998)	26
U.S. EPA, National-Scale Air Toxics Assessment for 2002-Fact Sheet (June 24, 2009)	17

*Authorities chiefly relied upon are marked with an asterisk.

GLOSSARY

ALA	American Lung Association
APA	Administrative Procedure Act
ARTBA	American Road & Transportation Builders Association
CAA (or the Act)	Clean Air Act
CARB	California Air Resources Board
EDF	Environmental Defense Fund
EPA	Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards
NACAA	National Association of Clean Air Agencies
NESCAUM	Northeast States for Coordinated Air Use Management
NO _x	Nitrogen Oxide
PM	Particulate Matter
SCAQMD	South Coast Air Quality Management District
SIP	State Implementation Plan
SO ₂	Sulfur Dioxide

Amici the American Lung Association (ALA), the National Association of Clean Air Agencies (NACAA), Northeast States for Coordinated Air Use Management (NESCAUM), and the Environmental Defense Fund (EDF) respectfully submit this brief in support of respondent Environmental Protection Agency's (EPA's) denial of a petition for rulemaking by petitioner American Road & Transportation Builders Association (ARTBA) requesting that the agency amend its rules concerning preemption of State and local regulations relating to nonroad engines.

INTEREST OF AMICI

Amici include private organizations dedicated to protection of public health and the environment. ALA is a national nonprofit organization dedicated to saving lives through the improvement of lung health and the prevention of lung disease. EDF is a national nonprofit environmental organization representing more than 500,000 members who care deeply about public health and clean air.

Amici also include organizations representing many of the state and local agencies and officials responsible for formulating and implementing air pollution programs to protect public health and the environment in their jurisdictions including, under the cooperative federalism scheme of the Clean Air Act (CAA or Act), State Implementation Plans (SIPs) to attain

National Ambient Air Quality Standards (NAAQS). NACAA represents air pollution control agencies in 53 states and territories and more than 165 major metropolitan areas across the United States. NESCAUM is an association of the air quality agencies of Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont.

ARTBA's request that EPA declare broad categories of state and local regulations preempted would deprive states of regulatory tools that are vital to protecting public health and are necessary for some jurisdictions with the most urgent air pollution problems to achieve compliance with health-based federal air quality standards. ARTBA and its amici disregard principles of federalism that protect traditional state and local police powers – powers that the Congresses that enacted and amended the CAA intended to preserve.

BACKGROUND

A. CAA Regulation and Preemption of Emissions Standards.

Since 1967, the CAA has authorized EPA to establish emissions standards for new motor vehicles and has preempted state emission standards for such vehicles – while also preserving California's authority to adopt its own standards as approved by EPA. See Pub. L. 90-148 § 1, 2 (1967), as amended, CAA Sections 202, 209(b), 42 U.S.C. §§ 7521, 7543(b). The preemption provisions represent a limited exception to the general approach

of the CAA, in which Congress declared that “air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments,” 42 U.S.C. § 7401(a)(3), and expressly preserved “the right of any State or political subdivision thereof” to adopt controls more stringent than those prescribed in the Act, *id.* § 7416. Congress limited the scope of preemption by restricting it to regulations affecting “new” motor vehicles, by authorizing California to adopt its own emissions standards with EPA’s approval, and by providing in Section 209(d) that “[n]othing in this Part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation or movement of registered or licensed motor vehicles.” *Id.* § 7543(d).

Until 1990, EPA’s authority to promulgate emissions standards, and any preemption of state standards, was limited to “motor vehicles,” defined as “self-propelled vehicle[s] for transporting property on a street or highway.” 42 U.S.C. § 7550(2). In 1990, Congress authorized EPA to regulate “nonroad” engines – internal combustion engines not used in motor

vehicles, see *id.*, § 7550(10)¹ – and provided for preemption of certain state regulation in terms similar to the preexisting regime for motor vehicles.

Section 213 directs EPA to determine whether emissions from nonroad engines cause or contribute to air pollution that may reasonably be anticipated to endanger public health and welfare and, if the Administrator so finds, to promulgate standards to control those emissions. 42 U.S.C. § 7547(a). Section 213(d) provides that the standards established in Section 213 would be “subject to” specified sections of the Act, including Section 209. *Id.* § 7547(d).

Section 209(e)(1), also added by the 1990 Amendments, prohibits States and their subdivisions from adopting or enforcing any “standard or other requirement” relating to the control of emissions from certain new nonroad engines, namely, new engines of smaller than 175 horsepower used in construction or farm equipment, and new locomotives and locomotive engines. 42 U.S.C. § 7543(e)(1). With respect to all other nonroad engines, Section 209(e)(2) provides a mechanism, similar to that set forth in Section 209(b) for motor vehicles, by which California may obtain a waiver from

¹ A “nonroad vehicle” is defined as a “vehicle that is powered by a nonroad engine and that is not a motor vehicle or a vehicle used solely for competition.” 42 U.S.C. § 7550(11). We refer to nonroad engines and nonroad vehicles collectively as “nonroad engines.”

EPA authorizing it to enact and enforce “standards and other requirements relating to the control of emissions” from nonroad engines. *Id.* § 7543(e)(2).

B. The 1994 Rulemaking. In 1994, EPA found under Section 213(a) that all nonroad engines were “significant contributors” to pollution expected to harm public health and welfare, provided a definition of “new nonroad engine” similar to the existing regulatory definition for new motor vehicles, promulgated standards for large, land-based nonroad diesel engines, and promulgated regulations and an interpretive rule addressing the scope of preemption of state and local regulation. 59 Fed. Reg. 31,305 (June, 17, 1994); 59 Fed. Reg. 36,969 (July 20, 1994). EPA concluded that “states are not precluded under section 209 from regulating the use and operation of nonroad engines, such as regulations on hours of usage, daily mass emission limits, or sulfur limits on fuel; nor are permits regulating such operations precluded once the engine is placed into service or once the equitable or legal title to the engine or vehicle is transferred to an ultimate purchaser . . .” 59 Fed. Reg. at 31,339 (Appendix A).

In *Engine Manufacturers Ass’n v. EPA*, 88 F.3d 1075 (1996) (*EMA*), this Court addressed industry challenges to EPA’s 1994 nonroad engines rulemaking. This Court upheld EPA’s definition of “new” nonroad engines, 88 F.3d at 1087, but held that the text of Section 209(e)(2) rendered

unlawful EPA's interpretation of the Section 209(e)(2) preemptive scope as limited to standards for "new" engines. *Id.* at 1092-93.

The *EMA* Court unanimously upheld EPA's conclusion that Section 209(e) does not preempt use and operational controls imposed by state and local governments to limit air pollution from nonroad engines, agreeing that EPA had reasonably concluded that such controls are not "standards or other requirements" within the meaning of Section 209(e)(2). This Court rejected industry's contention that regulations of use and operation of nonroad vehicles are prohibited "requirements," concluding that EPA had reasonably construed that term to refer to "ancillary enforcement mechanisms such as certificates and inspections," and upheld the agency's conclusion that Section 213(d), which provides that EPA's standards for nonroad vehicles are "subject to" Section 209 of the Act, incorporates Section 209(c)'s preservation of state authority to regulate "use, operation, or movement." See 88 F.3d at 1093-94.

C. ARTBA's Petition. On July 12, 2002, ARTBA filed a petition asking EPA to commence a new rulemaking to amend regulations and statutory interpretations concerning the preemption of state and local laws relating to nonroad engines and vehicles. ARTBA asked that EPA amend its regulations to provide that two kinds of state regulations of nonroad engines

are preempted: (1) “in-use and operational controls,” and (2) “fleetwide purchase, sale or use standards.” Petition at 1 (JA 82).

After taking public comment, EPA denied ARTBA’s petition in whole. With respect to fleet rules, EPA decided that its regulations “as written are sufficient and need not be revised.” *Response to the Petition of American Road and Transportation Builders Association to Amend Regulations Regarding the Preemption of State Standards Regulating Emissions from Nonroad Engines* at 1 (JA 230) (*Response*). EPA noted that the regulations “basically mirror[] the language in the statute,” and that, depending on the circumstances, some fleet rules would be preempted while others would not. *Id.* at 15 (JA 244). Thus, EPA “believe[d] it is not appropriate to revise the regulations to identify every type of state or local standard or other requirement that is preempted under section 209(e).” *Id.* EPA rejected ARTBA’s argument that fleet rules adopted by states for their own fleets are preempted, observing that, on remand from a Supreme Court decision that had expressly reserved the question, the Ninth Circuit had upheld such rules. See *Response* 17-18 (discussing *Engine Manufacturers Association v. South Coast Air Quality Management District*, 498 F.3d 1031 (9th Cir. 2007) (*South Coast*) (JA 246-47).

EPA also rejected ARTBA’s request for federal regulations preempting states from imposing in-use and operational controls. EPA explained that it “continues to believe that Congress did not intend to preempt state and local regulation of use and operation of nonroad engines under section 209(e) of the CAA, and that ARTBA had “point[ed] to no language in the statute or in the legislative history showing any specific intent to preempt state and local regulation of use and operation of nonroad engines.” *Response* at 27 (JA 256). EPA also rejected ARTBA’s argument that a rule EPA promulgated in 1998 for locomotives required that EPA modify its rules for other nonroad engines. *Id.* at 38-40 (JA 267-69).

SUMMARY OF ARGUMENT

EPA properly rejected ARTBA’s effort to convert Section 209(e)’s preemption of state emissions standards for nonroad engines – which EPA has consistently interpreted in light of the statutory purpose to protect manufacturers from having to design and certify multiple different engines – into a sweeping prohibition of state and local regulation of the use and operation of such engines.

Section 307(b) of the CAA stands as a jurisdictional bar to ARTBA’s effort to relitigate statutory interpretations announced in EPA’s 1994 rulemaking. Section 307(b) promotes stability in CAA administration, and

protects the interests of state and local governments that administer the Act in light of EPA's regulations. In addition, the *EMA* decision, which upheld EPA's reading of the CAA in relevant respects, is binding here, and its *stare decisis* effect is particularly weighty in light of the strong reliance interests of state and local governments charged with implementing the Act.

The laws ARTBA asked EPA to preempt are important to states' ability to protect the health of their citizens, and for localities to achieve reductions necessary to comply with the NAAQS. In-use and operational controls are particularly important because they can be tailored to fit local pollution problems and local economies.

Contrary to ARTBA's argument, the presumption against preemption applies to the statutory questions here. Protection of public health and welfare against the harms from local activities is a classic exercise of states' police powers. Concern for the traditional role of states in our federal system would require clear evidence of congressional intent to support a conclusion that Congress precluded states from regulating, for example, the use and operation of construction equipment.

Finally, ARTBA offers no reason why EPA's existing rules concerning preemption of state laws governing nonroad fleets are in any way inconsistent with the statute; nor is there merit to its arguments that EPA

should have disregarded a Ninth Circuit holding that rules for states' own fleets are not preempted.

ARGUMENT

I. ARTBA MAY NOT CHALLENGE AGENCY ACTIONS TAKEN IN 1994 AND UPHELD BY THIS COURT IN *EMA*

This petition is an effort to relitigate issues of statutory construction that were settled in the EPA's 1994 rulemaking. However, Section 307(b)(1) of the CAA requires that suits for judicial review of final actions of the Administrator be filed within 60 days of their publication, or within 60 days of the time new grounds for challenge arise. 42 U.S.C. § 7607(b)(1). ARTBA's effort to revisit EPA's regulatory definition of "new" nonroad engines and the agency's conclusion that in-use and operational controls are not preempted, is jurisdictionally barred under Section 307(b) because the relevant actions were taken by EPA in 1994. As EPA demonstrates, Br. 16, 19-21, ARTBA cannot avail itself of the statute's "new grounds" exception, nor can it use EPA's denial of a rulemaking petition raising statutory arguments that were available in the earlier challenge as a means of evading the jurisdictional bar.²

Section 307(b) protects reliance interests of the many parties – notably including state and local officials responsible for developing and enforcing

² EPA properly rejected ARTBA's arguments that EPA's adoption of its Locomotive Rule in 1998 required the agency to modify its preemption rules and interpretation for other nonroad vehicles. See Brief for Respondent at 41-51; Brief of Respondents-Intervenors CARB *et al.* at 17-20.

SIPs pursuant to CAA Section 110, 42 U.S.C. 7410. See *Train v. Natural Resources Def. Council*, 421 U.S. 60, 87 (1975) (noting states’ “reliance” on EPA’s regulations under the CAA). The timely challenge requirement in Section 307(b) safeguards “the integrity of the time sequences provided throughout the Act,” Sen. Rep. 91-1196 at 41 (1970), and “set[s] a tone for expedition of the administrative process that effectuates the congressional purpose to protect and enhance our invaluable natural resource, our clean air.” *Alabama Power v. EPA*, 606 F.2d 1068, 1075 (D.C. Cir. 1979). See also H.R. Rep. 95-294 at 322 (1977).

The development of SIPs is elaborate and time-consuming, and a rule that allowed belated challenges to EPA actions that had been in place for years would gravely compromise states’ efforts to complete their SIPs and achieve the public health and environmental goals the SIPs are intended to secure. The disruptive effect of ARTBA’s effort to relitigate actions taken years ago is illustrated by its extraordinary request (Br. 26) that this Court declare unlawful the Texas Low-Emission Diesel Rule, which was incorporated into a SIP in 2001, 66 Fed. Reg. 57,196 (Nov. 14, 2001); 66 Fed. Reg. 57,160 (Nov. 14, 2001). Under Section 307(b), any challenge to EPA’s 1994 actions defining “new” nonroad engines and deciding that in-use and operation restrictions were not preempted had to be filed within 60

days; such a challenge was rejected in *EMA*. And any challenge to EPA's application of its regulations in approving the Texas Diesel Rule had to be filed in the Fifth Circuit within 60 days of that 2001 action. 42 U.S.C. § 7607(b)(1); see *BCCA Appeal Group v. EPA*, 355 F.3d 817 (5th Cir. 2003) (upholding EPA's SIP approval). ARTBA's effort to reopen these matters now would, in addition to flouting explicit jurisdictional limitations in the CAA, severely disrupt states' efforts to attain compliance with the NAAQS in some of the most polluted regions of the nation.³

In addition to the Section 307(b) jurisdictional bar, the *EMA* Court's approval of both EPA's definition of the term "new" and EPA's conclusion that Section 207(e) does not preempt in-use and operational controls for nonroad engines is binding as a matter of *stare decisis*, and under this Court's rule that a panel cannot overrule a prior panel, *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C.Cir.1996) (en banc).

Stare decisis applies with "special force" in statutory construction cases, "for Congress remains free to alter" the statute as interpreted by the court. *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750,

³ As Intervenors CARB, *et al.*, point out, ARTBA also disregards the CAA's judicial review scheme and basic principles of justiciability by asking this Court to declare preempted California statewide and regional regulations for which the State has requested a waiver from EPA under Section 209(e)(2), but on which EPA has not acted. See Brief of Respondents-Intervenors at 9-11.

757 (2008) (citation and internal quotation marks omitted). In the many years since *EMA* was decided, states have crafted air pollution programs based upon the reading of the statute approved by this Court. The reliance interests that normally support adhering to precedent are especially strong here.

II. THE STATE PROGRAMS THAT ARTBA ASKS EPA TO PREEMPT ARE VITALLY IMPORANT TO STATES' ABILITY TO PROTECT PUBLIC HEALTH AND SATISFY THEIR OBLIGATIONS UNDER THE ACT

ARTBA and its Amici seek to convert Congress's preemption of state emissions standards that Congress feared would force manufacturers to design products for myriad jurisdictions into a sweeping immunity for the owners and lessees of nonroad engines from state and local regulation of the use and operation of these products. As EPA and Intervenors CARB, *et al.*, demonstrate, this bold effort is inconsistent with Congress's intent in enacting Section 209(e). Furthermore, ARTBA's request would, if accepted, have significant adverse effects on public health and would limit states' ability to balance air pollution control with local economic development.

The CAA makes states responsible for attaining uniform national health-based air quality standards, but leaves them broad discretion as to how to achieve any reductions. See 42 U.S.C. § 7420. See also *Union Elec.*

Co. v. EPA, 427 U.S. 246, 265-66 (1976) (“[s]o long as the national standards are met, the State may select whatever mix of control devices it desires”); *Train*, 421 U.S. at 79 (EPA lacks discretion to reject a SIP based upon its view of “the wisdom of a State’s choices of emission limitations”). States’ freedom to choose how to achieve pollution reductions is an important component of the Act’s cooperative federalism scheme because the nature of localities’ air pollution problems, their mix of sources, and the economic and social impacts of alternative control measures all vary widely. See, *e.g.*, John P. Dwyer, *The Practice of Federalism under the Clean Air Act*, 54 MD. L REV. 1183, 1198 (1995). The Act also exerts significant pressure on states that are in nonattainment status, including sanctions such as limitations on state permitting of new sources and requiring reductions from existing sources. See, *e.g.*, 42 U.S.C. §§ 7503, 7511a, 7513a.

Nonroad engines, such as those used in heavy construction and industrial equipment, ships and locomotives, contribute to unhealthful air quality across the nation.⁴ The majority of these larger nonroad engines run on diesel fuel. Diesel exhaust is among the most dangerous and pervasive sources of air pollution. Its components include particulate matter (PM), implicated in a host of respiratory problems and thousands of premature

⁴ See 69 Fed Reg. 38,958, 38,960-68 (June 29, 2004).

deaths every year; smog-forming oxides of nitrogen (NO_x); sulfur dioxide (SO₂), which forms harmful fine particles and falls back to earth as acid rain; and a noxious brew of toxic chemicals that together pose a cancer risk greater than that of any other air pollutant.

Particulate matter can aggravate lung diseases such as asthma and chronic bronchitis and increase the risk of heart attacks and premature death. People with heart, lung disease or diabetes, the elderly and children are at highest risk from exposure to particulate pollution.⁵

High ozone levels aggravate asthma, decrease lung function, inflame lung tissue, and increase hospital admissions and emergency room visits, and damage crops. People with asthma and other lung diseases, children and older adults are most at risk. Ozone also increases the risk of premature death.⁶

Diesel air pollution adds to cancer risk all around the country. EPA recently estimated that, diesel emissions make the highest contribution to

⁵ American Lung Association, *Facts about Particle Air Pollution, April 2009* (available at http://www.lungusa.org/site/c.dvLUK9O0E/b.5116683/k.43EF/State_of_the_Air_2009_Media_Materials.htm).

⁶ National Research Council, *Estimating Mortality Risk Reduction and Economic Benefits from Controlling Ozone Air Pollution* (2008); Michelle L. Bell, *et al.*, The Exposure-Response Curve for Ozone and Risk of Mortality and the Adequacy of Current Ozone Regulations, 114 ENV. HEALTH PERSPECT. 532 (2006).

cancer risk of all hazardous air pollutants.⁷ For example, in the Seattle area, diesel soot accounts for somewhere between 70-85% of the total cancer risk from all air toxics.⁸ And in the South Coast Air Basin, which included Los Angeles, diesel exhaust contributes about 84% of the cancer risk from air toxics.⁹ Because diesel air pollution is a complex mixture of chemicals, exposure to diesel air pollution contributes to a wide range of non-cancer health effects, including worsened lung disease, cardiovascular effects, neurotoxicity, low birth weight in infants, premature births, congenital abnormalities, and elevated infant mortality rates.¹⁰

Federal clean air programs often do not go far enough in preventing these harmful health impacts in all parts of the country. Limiting states' ability to control pollution from nonroad engines severely constrains their ability to protect public health.

⁷ U.S. EPA, National-Scale Air Toxics Assessment for 2002-Fact Sheet (June 24, 2009) 2009 (available at <http://www.epa.gov/nata2002/factsheet.html>).

⁸ Puget Sound Clean Air Agency, Final Report: Puget Sound Air Toxics Evaluation, October 2003 (available at http://www.pscleanair.org/airq/basics/psate_final.pdf).

⁹ South Coast Air Quality Management District, Final Report: MATES III (September 2008) (available at <http://www.aqmd.gov/prdas/matesIII/MATESIIIFinalReportSept2008.html>).

¹⁰ Irina N. Krivoshto, *et al.*, The Toxicity of Diesel Exhaust: Implications for Primary Care, 21 J. AM. BOARD FAM. MED. 55 (2008).

Despite the implementation of federal emissions standards for both on-road and nonroad vehicles and engines, large areas of the country remain in nonattainment of NAAQS. Approximately 88 million people nationwide either live in counties that do not meet current federal air quality standards for fine particles that contribute to violations elsewhere. About 132 million people live in counties that violate the eight-hour federal air quality standard for ozone. These standards have recently been updated to be more protective in light of scientific studies documenting adverse health effects at lower pollution concentrations, so the number of people living in communities that violate federal air quality standards will increase.¹¹

The kinds of operational and in-use controls that ARTBA seeks to preempt represent valuable means of addressing public health and nonattainment problems. Indeed, many areas with the most severe nonattainment problems could achieve necessary reductions in air pollution most efficiently and cost-effectively by addressing nonroad emissions. For example, in approving the SIP revisions including the Texas Low Emission Diesel Fuel – a state rule ARTBA seeks to invalidate in this proceeding, see Br. 26 – EPA explained:

¹¹ See National Ambient Air Quality Standards for Ozone; Final Rule, 73 Fed. Reg. 16,436 (March 27, 2008); National Ambient Air Quality Standards for Particulate Matter; Final Rule, 71 Fed. Reg. 61,144 (Oct. 17, 2006).

First we quantified the emissions reductions needed to achieve the NAAQS and showed that even with implementation of the extraordinary controls being adopted by the State, additional reductions are needed. In order to address the difficult nonattainment problem in the Houston area, the State has adopted a long list of control measures, many of which have never been implemented by other states. Notwithstanding these aggressive controls, the State has identified a shortfall in the required emission reductions and has committed to pursue other necessary controls.

After demonstrating the air quality need, we showed that, at this time, there are no reasonable and practicable alternatives sufficient to achieve the NAAQS. In coming to adopt the LED [low-emission diesel] control, the State reviewed an unprecedented list of alternatives, reviewing the costs, benefits, implementation time, public acceptance and other factors for evaluating reasonableness and practicability.

66 Fed. Reg. at 57,217. In some areas with longstanding nonattainment problems, the need for operational and in-use controls is particularly strong because the number of stationary sources from which additional emissions reductions can be obtained is limited.

California, home to some of the nation's dirtiest air, has also implemented successful programs to reduce emissions from in-use nonroad engines. On July 26, 2007, the California Air Resources Board approved a regulation to reduce emissions from existing off-road diesel vehicles used in California in construction, mining, and other industries. CARB explained that most existing off-road vehicles have no emission controls and can last 30 years or longer. As a result, the vehicles covered by the CARB regulation

account for nearly a quarter of statewide diesel mobile-source PM and NO_x. These emissions are responsible for about 1,100 premature deaths per year, and are not addressed by federal standards. In total, the state regulation is expected to reduce 187,000 tons of NO_x emissions and 33,000 tons of PM emissions between 2009 and 2030. The regulation is also expected to prevent about 4,000 premature deaths over its course. The associated health benefits are expected to save the state \$18 billion to \$26 billion in total. CARB also noted the importance of the program in meeting NAAQS.¹² Many other states that also struggle with harmful air quality and nonattainment areas, including New York, New Jersey and Texas, rely on significant PM and ozone reductions from in-use nonroad diesel engine emissions reductions programs to protect public health and work toward attainment status.¹³

Operational and in-use controls on nonroad engines are a valuable part of states' air pollution abatement arsenal because they can be tailored to

¹² California Air Resources Board, Overview of the Regulation to Reduce Emissions from In-Use Off-Road Diesel Vehicles (2008) (available at <http://www.arb.ca.gov/msprog/ordiesel/documents/OfRdDieselOverviewFS.pdf>).

¹³ See New York City, Local Law 77 (approved December 20, 2003); New Jersey Department of Environmental Protection, Diesel Risk Reduction Program (see www.stopthesoot.org); Texas Commission on Environmental Quality, Texas Emissions Reduction Plan (see <http://www.tceq.state.tx.us/implementation/air/terp/>).

achieve emissions reductions where and when they are most needed, and to fit with local economy and geography. Indeed, the *EMA* Court cited this very factor as supporting the “reasonableness” of EPA’s view that operational and in-use measures are not “standards or other requirements” for purposes of Section 209(e)(2). See 88 F.3d at 1094 n.58 (approvingly citing EPA’s observation that because “in-use restrictions are inherently local in character, in that their appropriateness depends on local conditions, it would not make sense for Congress to require all states to follow California’s lead on this issue”).

States need the flexibility to implement local and regional programs where federal emissions standards may be inadequate to prevent temporal spikes in pollution concentrations or geographic “hotspots.” Many states and localities with significant nonattainment problems have found that limitations on the use and operation of nonroad equipment – as by limiting the time at which equipment may be used, or imposing clean fuel requirements – are valuable means of obtaining potentially life-saving reductions in air pollution. For example, Boston’s “Big Dig” project, which began in 1991 and lasted over a decade, and involved hundreds of pieces of heavy construction equipment being used 24 hours per day. The project was located in a nonattainment area for ozone. Due to the close proximity to

residential neighborhoods, hospitals, schools, and other sensitive communities, the state put in place a program to restrict diesel emissions from engines on the project site. In addition, New York established contract specifications requiring best available retrofit technology for equipment used in the reconstruction of lower Manhattan after the attacks of September 11th. Both of these programs were so successful that several public agencies, including the Connecticut Department of Transportation, Massachusetts Highway Department, New York Transit Authority, and Massachusetts Bay Transportation Authority, now require retrofits on local construction projects.¹⁴

Moreover, operational and in-use controls do not implicate the primary concern that prompted Congress to preempt states from adopting their own emissions standards – the burdens that disparate design or certification standards would impose on manufacturers. See *Allway Taxi, Inc. v. City of New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y) (“[B]oth the history and text of the Act show that [the predecessor of § 209(b)] was made not to hamstring localities in their fight against air pollution but to prevent the burden on interstate commerce which would result if, instead of uniform standards, every state and locality were left free to impose different

¹⁴ See Northeast Diesel Collaborative (information available at <http://www.northeastdiesel.org/construction.htm>).

standards for exhaust emission control devices for the manufacture and sale of new cars.”), *aff’d* 468 F.2d 624 (2d Cir. 1972); S. Rep. No. 90-403 at 33 (1967); H.R. Rep. 90-728 at 21 (1967). See also *Motor & Equipment Mfrs Ass’n, Inc. v. EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979), *cert denied*, 446 U.S. 952 (1980).¹⁵ As the express reservation of authority in Section 209(d) illustrates, that rationale does not apply to operational and in-use controls, which do not impose design or certification requirements that would burden manufacturers, but instead address how and when engines may be used.

III. THE PRESUMPTION AGAINST PREEMPTION APPLIES IN FORCE TO STATE LAWS REGULATING THE USE AND OPERATION OF NONROAD ENGINES

ARTBA argues that the presumption against preemption should not apply because this case involves an “area with no history of state exercise of

¹⁵ ARTBA asserts in passing that Section 209(c), 42 U.S.C. § 7543(c), added in 1977 to prevent states from requiring approval of vehicle parts subject to the voluntary certification provisions in Section 207(a)(2), 42 U.S.C. § 7541(a)(2), “abrogate[ed]” *Allway Taxi*’s holding that states and local governments may regulate vehicle emissions when the burden of compliance does not fall on manufacturers. ARTBA Br. 12. EPA addressed this “curious” argument, explaining that the “little-used” provision concerning the effect of voluntary certification of parts has never, “in any legislative history or any subsequent case or EPA determination” been understood to have any affect on *Allway Taxi*, and noting that this Court cited *Allway Taxi* favorably in *EMA*. See *Response* 31-32 n.25 (JA 260-61). See also *EMA*, 88 F.3d at 1086 n.39 (rejecting petitioners’ argument that EPA’s interpretation is impermissible because *Allway Taxi* was “wrongly decided”).

police power (nonroad vehicle-emission standards), in pari material with an area in which such state police power has been displaced for almost a century (locomotive emission standards).” Br. 26. The argument is incorrect.

First, ARTBA misstates the scope of the presumption. As the Supreme Court recently reaffirmed, as one of the “cornerstones of our pre-emption jurisprudence,” that “[i]n *all* pre-emption cases, and *particularly* in those in which Congress has legislated ... in a field which the States have traditionally occupied, ... we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009) (citations and internal quotation marks omitted; emphasis added). *See also Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (“[W]e assume that a federal statute has not supplanted state law unless Congress has made such an intention ‘clear and manifest.’”) (citations omitted); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Equally unavailing is ARTBA’s contention that states’ historic police powers are not at stake here. “Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police

power.” *Huron Portland Cement Co. v. City of Detroit, Mich.*, 362 U.S. 440, 442 (1960). See also *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000) (“Air pollution prevention falls under the broad police powers of the states, which include the power to protect the health of citizens in the state. Environmental regulation traditionally has been a matter of state authority.”) (citing *Massachusetts v. United States Department of Transportation*, 93 F.3d 890, 894 (D.C. Cir. 1996)); *Allway Taxi*, 340 F. Supp. at 1124. Accordingly, in the realm of air pollution, “the authority of the states is assumed not to have been preempted unless it was the clear and manifest purpose of Congress to do so.” *Exxon Mobil*, 217 F.3d at 1256.¹⁶

As *Huron Portland Cement* emphasizes, states’ authority to protect the health and welfare of their citizens against harms from local sources of air pollution lies at the core of their police powers.¹⁷ States were active in

¹⁶ ARTBA’s contention that governmental authority over locomotive emissions has been exclusively federal hardly advances its cause in this case, which does not involve locomotives or other inherently interstate sources – yet even there ARTBA understates states’ historic authority. See, e.g., *Kimball v. Thompson*, 165 F.2d 677, 681-82 (8th Cir. 1948) (recognizing that locomotive smoke could be a nuisance under Nebraska law).

¹⁷ Throughout much of our history, regulation of the use and operation of construction equipment would have been classified as *exclusively* “local” as a matter of constitutional law. E.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 548-59 (1935); *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918).

addressing local air pollution long before the federal government became active. States regulated local hazards to public health and welfare through the common law of nuisance, *see* William H. Rodgers, ENVIRONMENTAL LAW, § 2.1 at 113-114 (2d Ed. 1994) (noting “scope and reach of this all-purpose doctrine”), and municipalities began adopting “smoke ordinances” regulating local air pollution more than a century ago. *See, e.g.*, Jonathan H. Adler, Judicial Federalism and the Future of Environmental Regulation, 90 IOWA L. REV. 377, 474 (2005) (citing, *inter alia*, Arthur C. Stern, History of Air Pollution Legislation in the United States, 32 J. AIR POLLUTION CONTROL ASS'N 44, 44 (1982); Richard J. Lazarus, THE MAKING OF ENVIRONMENTAL LAW 51 (2004) (“by 1912, twenty-three of the twenty-eight largest cities of the United States had smoke abatement laws”).

It is not true, as ARTBA suggests, that “nonroad engines” (a special category created by the CAA) were exempt from state and local regulation: “In 1881, Chicago enacted an ordinance making ‘emission of dark smoke from the smokestack of any boat or locomotive or from any chimney within the city’ a nuisance, thus becoming the first city in the United States to address air pollution.”¹⁸ Indeed, in *Huron Portland Cement Co.*, the

¹⁸ Lincoln L. Davies, Lessons for an Endangered Movement, 31 ENVTL. L. 229, 273 (2001) (citing Dorceta E. Taylor, *The Urban Environment: The*

Supreme Court upheld the application of Detroit’s smoke ordinance to a federally licensed and inspected vessel that carried interstate traffic on the Great Lakes. 362 U.S. at 445-46. In upholding the Detroit regulation, the Court emphasized the extent to which Congress itself, in enacting the Air Pollution Control Act in 1955, Pub. L. No. 84-145, had recognized “that the problem of air pollution is peculiarly a matter of state and local concern.]” 362 U.S. at 446. *See id.* at 445 (quoting congressional findings that “in recognition of the dangers to the public health and welfare, injury to agricultural crops and livestock, damage to and deterioration of property, and hazards to air and ground transportation, from air pollution, it is hereby declared to be the policy of Congress to preserve and protect the primary responsibilities and rights of the States and local governments in controlling air pollution”) (quoting 69 Stat. 322).

The legislative history of Section 209(e) makes clear that Congress understood that states’ police powers allowed them to regulate emissions from nonroad engines. Lead sponsors of the 1990 CAA Amendments underscored that states may “continue to require existing and in-use nonroad engines to reduce emissions by setting fuel requirements, operational conditions or limits on the use of such equipment.” 136 Cong. Rec. S17,237

Intersection of White Middle-Class and White Working-Class
Environmentalism (1820-1950s), 7 HUMAN ECOLOGY 207, 265 (1998).

(Oct. 26, 1990) (Sen. Chafee), and that states “fully retain existing authority to regulate emissions from all types of existing or in-use nonroad engines or vehicles by specifying fuel quality specifications, operational modes or characteristics or measures that limit the use of nonroad engines or equipment.” 136 Cong. Rec. S16,976 (Oct. 27, 1990) (Sen. Baucus).

And as both EPA and this Court in *EMA* noted, the distinctly “local” character of in-use and operational controls makes it a logical matter for state regulation. *EMA*, 88 F.3d at 1094 n. 58 (noting with approval EPA’s argument that “because in-use restrictions are inherently local in character, in that their appropriateness depends on local conditions, it would not make sense to require all states to follow California’s lead on this issue”). The CAA’s express savings clause confirming state authority over “use” and “operation” demonstrates that Congress recognized and intended to preserve states’ authority in this field.¹⁹

¹⁹ Section 209(d) is not only a description of kinds of state laws that are not preempted; it is also a limitation on EPA’s rulemaking power; it precludes EPA from promulgate emissions standards that purport to preempt states’ authority to regulate use or operation. Thus, it makes sense to refer EPA’s Section 213 rulemaking authority as being “subject to” the Section 209(b) limitation. Cf. *EMA*, 88 F.3d at 1094 (finding it curious that that “EPA’s standards can be ‘subject to’ § 209, which deals only with the preemption and permissibility of *state* standards and other requirements.” 88 F.3d at 1094 (emphases in original).

Regulations on the use and operation of machinery to protect public health from harms caused by local activities represent a classic form of police power, and the presumption against preemption applies in its full strength. Thus, even if the wisdom of EPA’s longstanding interpretation that Section 209(e) does not preempt in-use and operational controls were up for reexamination in this case, the presumption would provide an additional and powerful reason to sustain EPA’s interpretation. Even if ARTBA had conjured up a construction plausibly supporting preemption, a court (and an agency) “would nevertheless have a duty to accept the reading disfavoring preemption.” *Bates*, 544 U.S. at 449.

IV. EPA PROPERLY DENIED ARTBA’S REQUESTS TO ADOPT NEW REGULATIONS PREEMPTING NONROAD FLEET RULES.

As EPA demonstrates, Br. 33-52, the agency also correctly declined ARTBA’s invitation to amend its regulations categorically to preempt state fleet rules. EPA explained that the language of its existing regulations “basically mirrors the language” of Section 209(e), and that under that language, some fleet rules – such as fleet average requirements – are preempted. *Response* at 15 (JA 244). But it also noted that some fleet rules are clearly not preempted, including those that impose operational and use

requirements, and that the status of other kinds of fleet rules would depend on particular circumstances. *Id.*

This approach was surely reasonable. The Act does not require EPA to provide an administrative gloss to Section 209(e)'s preemption regulations at all – and still less does it require adoption of regulations of any particular level of detail. Cf. Br. of Amici Curiae in Support of Petitioner at 6 (asserting without citation that EPA is obligated to promulgate “comprehensive” preemption regulations).²⁰ It cannot violate the CAA for EPA to adopt preemption regulations that track the preemption provisions of the statute. See *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 396 (1999) (“[I]t is hard to declare the FCC’s rule unlawful when it tracks the pertinent statutory language almost exactly.”).

Nor did EPA act unreasonably in concluding that “the determination of whether a regulation is preempted may need to be reviewed on a case-by-case basis, in which a list of categories of standards that are either preempted

²⁰ Both ARTBA (Br. 8) and its Amici (Br. 6) reference the CAA’s requirement that state implementation plans contain necessary assurances that the state has “adequate authority under State (and, as appropriate, local) law to carry out such plans (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof)[.]” 42 U.S.C. § 7410(a)(2)(E)(ii). But nothing in that provision requires EPA to add a regulatory gloss to the statutory preemption provisions, still less to adopt broad regulations likely to sweep in state laws that, upon careful case-by-case review, would be found non-preempted.

or not preempted may be overinclusive or underinclusive.” *Response* at 15 (JA 244). Not only are courts institutionally well suited to construe federal statutes, but – unlike federal agencies – they have both the expertise and the constitutional mandate to ensure that resolution of preemption controversies gives due effect to considerations of state sovereignty. See Nina A. Mendelson, *Chevron* and Preemption, 102 MICH. L. REV. 737, 779 (2004) (noting the “relative institutional competence” of courts over agencies in considering “federalism values” implicated by preemption disputes).

ARTBA asks this Court to compel EPA to do what would be anathema for any court: to sweep away yet-to-be-enacted state laws, and to resolve preemption questions *en gros* without regard to particular facts or the impact on state sovereignty. See *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 259 n.6 (1994) (“Principles of federalism demand * * * caution in finding that a federal statute pre-empts state law.”). Indeed, federal agencies have been directed not to treat state authority in cavalier fashion. See Executive Order No. 13,132 (Federalism), §§ 2(1), 4(c), 64 Fed. Reg. 43255, 43256-57 (Aug. 4, 1999) (establishing as Executive Branch policy that “[t]he national government should be deferential to the States when taking action that affects the policymaking discretion of the States” and that “[a]ny regulatory preemption of State law shall be restricted to the minimum level

necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated”).²¹

EPA also properly took into account the Ninth Circuit’s holding that that “the Clean Air Act does not preempt the Fleet Rules as they direct the procurement behavior of state and local government entities.” *South Coast*, 498 F.3d at 1039. ARTBA cannot demonstrate that EPA acted unlawfully by refusing to adopt an interpretation contradicting the Ninth Circuit’s holding. As explained by Intervenors, ARTBA’s contention that *South Coast* “is no longer good law” is meritless. Brief of Respondents-Intervenors CARB, *et al.*, at 16.

The Ninth Circuit’s application of the market participant doctrine to SCAQMD’s fleet procurement rules in *South Coast* is consistent with settled principles concerning states’ procurement and property management activities. See *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980) (noting that there “is no indication of a constitutional plan to limit the ability of the states themselves to operate freely in the free market.”). See also *Bldg. & Constr.*

²¹ When Congress expressly calls upon agencies to decide preemption questions, it typically instructs the agency to decide that question in the context of specific state laws and factual circumstances. See 47 U.S.C. § 243(d) (Telecommunications Act authorizing FCC, after a hearing, to preempt specific state or local laws); see also 15 U.S.C. §§ 1203(c)(1), 2075(c).

Trades Council v. Associated Builders and Contrs., 507 U.S. 218, 231
(1993).

CONCLUSION

ARTBA's petition for review should be dismissed.

Respectfully submitted,

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July 30, 2009