No. _____

In The
Supreme Court of the United States

JACK CODY,

Petitioner,

v.

STATE AIR RESOURCES BOARD *et al*.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, Third Appellate District

PETITION FOR A WRIT OF CERTIORARI

PAUL D. CULLEN, SR.
DANIEL E. COHEN
Counsel of Record
PAUL D. CULLEN, JR.
CHARLES R. STINSON
THE CULLEN LAW FIRM, PLLC
1101 30th Street NW, Suite 300
Washington, DC 20007
202-944-8600
dec@cullenlaw.com

Counsel for Petitioner Jack Cody

BRIAN LEIGHTON
BRIAN LEIGHTON LAW OFFICES
755 N. Peach Avenue, Suite G-10
Clovis, CA 93611
559-297-6190

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

"[T]he State courts . . . have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited." *Tafflin v. Levitt*, 493 U.S. 455, 470 (1990) (Scalia, J., concurring) (quoting The Federalist No. 82 (Alexander Hamilton)). In this case, the California courts refused to permit Petitioner to raise a federal constitutional defense in a California State enforcement proceeding under a California State environmental regulation, concluding that the jurisdictional provisions of the Clean Air Act ("CAA"), 42 U.S.C. § 7607(b)(1), rebutted the presumption of concurrent state court jurisdiction. The Court acknowledged that the CAA was silent on this novel question.

The question presented is:

In this case of first impression before this Court, does the CAA withdraw concurrent state court jurisdiction to adjudicate the constitutionality of state regulations, where 42 U.S.C. § 7607(b)(1) is altogether silent on the subject of state court jurisdiction?

PARTIES TO THE PROCEEDING BELOW

The Court of Appeal of the State of California, Third District (California Court of Appeal) consolidated two separate appeals in this matter, involving different plaintiffs/appellants. The parties in those respective appeals were as follows:

Appeal No. C083083

Petitioner:
Jack Cody

Respondents:
State Air Resources Board

Richard W. Corey

Mary D. Nichols

Matt Rodriguez

Appeal No. C082828

Petitioner:
Alliance for California Business

Respondent:
State Air Resources Board

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner is Jack Cody d/b/a Cody Transportation Ltd., which is a Subchapter S Corporation having no parent corporations, subsidiaries (including wholly-owned subsidiaries), or affiliates that have issued shares to the public.

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PETITION FOR A WRIT OF CERTIORARI

This case presents a landmark question of first impression concerning whether the state courts of California, and the courts of all other states in the country, have been deprived of their sovereign jurisdiction to provide redress for constitutional violations by state officials under state environmental regulations, merely because such regulations have been approved by a federal regulatory agency as being consistent with federal regulatory standards under the CAA. The California Court of Appeal acknowledged that this case presents "a novel question regarding jurisdiction under the unique and complex cooperative federalism scheme of the federal Clean Air Act (42 U.S.C. § 7401 et seq.)." *Alliance for California Business v. State Air Resources Bd.*, 23 Cal. App. 5th 1050, 1053, 234 Cal. Rptr. 3d 22, 24 (2018), App. 1-29 ("*Alliance*"). But in reaching the unprecedented conclusion that the courts of California have been deprived of their inherent jurisdictional power to redress constitutional violations, the California Court of Appeal demonstrably misconstrued the meaning of the CAA, ignored controlling United States Supreme Court precedent, and split with the Seventh Circuit Court of Appeals, the only other appellate authority to consider the question at hand. This Court should resolve this important question of federalism and sovereign state jurisdiction.

This case implicates a core concept in American jurisprudence: the state courts' concurrent jurisdiction to decide matters of federal constitutional law. So central is this concept to our system of justice that in 1788,

Alexander Hamilton singled it out for attention during the debate regarding the ratification of the Constitution:

> When . . . we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of one whole, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.

The Federalist No. 82 (Alexander Hamilton). Two hundred years later, Justice Scalia elaborated upon the enduring sanctity of this organic principle of federalism:

> State courts have jurisdiction over federal causes of action not because it is "conferred" upon them by the Congress; nor even because their inherent powers permit them to entertain transitory causes of action arising under the laws of foreign sovereigns, but because "[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other. . . ."
>
> It therefore takes an affirmative act of power under the Supremacy Clause to oust the States of jurisdiction—an exercise of what one of our earliest cases referred to as "the power

> of congress to *withdraw*" federal claims from state-court jurisdiction.

Tafflin, 493 U.S. at 469-70 (Scalia, J., concurring) (quoting *Claflin v. Houseman*, 93 U.S. 130, 137 (1876) and *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 26 (1820)). Contrary to these fundamental precepts, the California Court of Appeal found that the CAA divested the California state courts of jurisdiction to hear Petitioner's constitutional defenses, even though the court conceded that the statute at issue "is silent regarding the jurisdiction of state courts." *Alliance*, 23 Cal. App. 5th at 1061, 234 Cal. Rptr. 3d at 30.

The California Court of Appeal specifically seized on language in 42 U.S.C. § 7607(b)(1) providing that review of administrative action "may be filed only in the United States Court of Appeals for the appropriate circuit." However, the case upon which the court placed chief reliance, *National Association of Manufacturers v. Department of Defense*, ___ U.S. ___, 138 S. Ct. 617, 626 (2018), demonstrates that the quoted language governs whether review can be sought in a *federal* district court or a *federal* court of appeals. The case did not address the subject of concurrent *state* court jurisdiction. By concluding that this language withdraws state court jurisdiction, the California Court of Appeal effectively re-wrote the statute. However, it is the province of Congress, not the courts, to write statutes. As Justice Sotomayor wrote in *National Association of Manufacturers*: "The Court declines the government's invitation to override Congress' considered choice by rewriting the words of the statute." *Id*., 138 S. Ct. at 632.

Additionally, this case involves a question of the constitutionality of an extraordinarily burdensome, expensive, and discriminatory regulation—a regulation no other state in the country has promulgated—which brazenly violates the Commerce Clause. The court's conclusion, at odds not only with centuries of precedent, but with a core concept "intrinsic in our constitutional order," carries important implications for the limits of state court jurisdiction that go well beyond this case. *See* Josh Blackman, *State Judicial Sovereignty*, 2016 U. Ill. L. Rev. 2033, 2038 (2016). The detrimental precedent established by the California Court of Appeal will serve to erode state court jurisdiction in virtually every case in which a federal agency approves a state regulation in some manner.

The Court should grant certiorari. Neither this Court nor any state or other federal court has ever ruled that the courts of the various states are divested of jurisdiction to hear constitutional claims and defenses by virtue of the judicial review provisions of the Clean Air Act—until now. The only court to have directly addressed the question is the Seventh Circuit, which expressly acknowledged concurrent state court jurisdiction. Given this conflict, and the momentous principles of federalism at stake, this Court should provide guidance to the state courts on when, and under what circumstances, they are stripped of their sovereign jurisdiction under a statute that is "silent" on the subject.

OPINIONS BELOW

The Judgment of the Superior Court of the State of California, County of Sacramento, was entered on August 31, 2016. App. 30-41. The Opinion of the California Court of Appeal, Third District, is reported at 23 Cal. App. 5th 1050, 234 Cal. Rptr. 3d 22 (2018), App. 1-29.

JURISDICTION

The Order of the Supreme Court of California denying petitions for review was entered on August 15, 2018. App. at 43. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Commerce Clause of the U.S. Constitution provides: "The Congress shall have the Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

Cal. Gov. Code § 11350(a) provides: "Any interested person may obtain a judicial declaration as to the validity of any regulation or order of repeal by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure."

The Clean Air Act provides, in relevant part: "A petition for review of the Administrator's action in approving or promulgating any implementation plan . . . or any other final action of the Administrator under this Act . . . which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit." 42 U.S.C. § 7607(b)(1).

STATEMENT OF THE CASE

A. Factual and Procedural Background

California's Truck and Bus Regulation (codified at Cal. Code Regs., tit. 13, § 2025) (the "Regulation") imposes emissions requirements on all heavy duty vehicles operated in California. Petitioner Jack Cody, a commercial motor vehicle ("CMV") operator domiciled in South Dakota, as well as thousands of other small business owners, must retrofit their vehicles with extremely expensive engine particulate filters to meet these emissions standards.

These filters require an investment of at least $18,000 per vehicle. *See Cal. Dump Truck Owners Ass'n v. Nichols*, 924 F. Supp. 2d 1126, 1134 (E.D. Cal. 2012). It is estimated that the Regulation will cost $1.5 billion over the first five years of its implementation and $2.2 billion over the Regulation's life. *Id.* at 1133.

Interstate truckers make long-term investments in equipment (typically at least $150,000 per truck),

which meet applicable standards at the time of purchase, with the reasonable expectation they will be able to use those trucks for many years. *Owner-Operator Indep. Drivers Ass'n v. Corey*, No. 2:14-CV-00186-MCE-AC, 2014 WL 5486699, at *2 (E.D. Cal. Oct. 29, 2014). Because trucks are purchased with the intent that they be used for decades, many owner-operators have lengthy mortgages on their vehicles. *Id*. If interstate owner-operators do not comply with the retrofitting mandates, the resale value of their existing trucks will diminish. *Id.* On the other hand, the cost of compliance is so high that, for many, their only other alternative will be to discontinue conducting business in California. *Id*.

The Regulation—imposed solely by California just like the mudflaps imposed solely by Illinois in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959)—imposes an unconstitutional burden on interstate commerce. *See* 359 U.S. at 529-30 ("A State which insists on a design out of line with the requirements of almost all the other States may sometimes place a great burden of delay and inconvenience on those interstate motor carriers entering or crossing its territory."). California's requiring an exceedingly costly equipment add-on, out-of-line with all other states, violates the Commerce Clause by placing an undue burden on interstate operators because they drive comparatively fewer miles on California roads than California truckers. *See id.*; *see also Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1015 (9th Cir. 1994) ("[T]he purpose of the Commerce Clause is to protect the nation

against economic Balkanization. . . ."); *cf. Am. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 276 (1987) (state tax held unconstitutional where it imposed a "cost per mile . . . approximately five times as high for out-of-state vehicles as for local vehicles"). If California can impose such burdensome standards, "so can every other state, and there is no guarantee that the standards will be similar." *Union Pac. R.R. Co. v. Cal. Public Utilities Comm'n*, 346 F.3d 851, 871 (9th Cir. 2003). Furthermore, there is no evidence "indicating that Congress intended to permit the states, directly or by EPA authorization, to engage in actions otherwise violative of the Commerce Clause." *See Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 783 (4th Cir. 1996).

Cody "was issued a citation in October 2014 for operating a truck in California without a filter, in violation of the Regulation." *Alliance*, 23 Cal. App. 5th at 1058, 234 Cal. Rptr. 3d at 28. He appealed the citation to the California State Air Resources Board ("Board"), contending that the Regulation violated the Commerce Clause; however, the Board denied Cody's appeal. *Id*. at 1059-60, 234 Cal. Rptr. 3d at 29. Cody then filed a petition for writ of mandate and complaint for declaratory relief against the Board and certain of its members in Sacramento County Superior Court. *Id.* Cody challenged the constitutionality of the statute "on its face and/or as applied" to him. *Id.* The superior court granted a motion for judgment on the pleadings, ruling that the court lacked subject-matter jurisdiction over the case. *Id.* On appeal to the California Court of Appeal, the court consolidated Cody's appeal with an

appeal by the Alliance for California Business, which raised similar jurisdictional questions. *Id.* at 1053, 234 Cal. Rptr. 3d at 24. The Court of Appeal affirmed the trial court's ruling, and the Supreme Court of California denied petitions for review. App. 29, 42.

B. The Clean Air Act

The rulings of the superior court and the California Court of Appeal were based on Section 307(b) of the CAA (codified at 42 U.S.C. § 7410(b)). Under the CAA, each state is required to submit to the Environmental Protection Agency ("EPA") a State Implementation Plan ("SIP") detailing how the state intends to implement, maintain, and enforce national ambient air quality standards. 42 U.S.C. § 7410(a). The EPA is required to approve any SIP that meets certain minimum criteria. *Id.* § 7410 (k)(3); *see also* 40 C.F.R. Part 52. Pursuant to 42 U.S.C. § 7607(b)(1) (Section 307(b)(1) of the CAA), a "petition for review of action of the [EPA] Administrator [in approving a SIP] may be filed only in the United States Court of Appeals for the appropriate circuit . . . within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register." *Id.* According to the California Court of Appeal, "section 307(b)(1) vests exclusive and original jurisdiction over th[is] challenge[ ] to the Regulation . . . in the Ninth Circuit Court of Appeals." *Alliance*, 23 Cal. App. 5th at 1054, 234 Cal. Rptr. 3d at 25.

REASONS FOR GRANTING THE PETITION

I. The CAA Does Not Divest California Courts of Jurisdiction to Review Constitutional Violations.

A. It Is Presumed That State Courts Have Concurrent Jurisdiction to Enforce Rights Created Under Federal Law.

"The general principle of state court jurisdiction over cases arising under federal laws is straightforward: state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981) (citing *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962) and *Claflin v. Houseman*, 93 U.S. 130, 136 (1876)). "This rule is premised on the relation between the States and the National Government within our federal system." *Id.* (citing The Federalist No. 82 (Alexander Hamilton)). "The two exercise concurrent sovereignty. . . . Federal law confers rights binding on state courts, the subject-matter jurisdiction of which is governed in the first instance by state laws." *Id*.

"Nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule."

Charles Dowd Box Co., 368 U.S. at 507-08. "In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction." *Gulf Offshore Co.*, 453 U.S. at 478. The "presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Id*. Stated otherwise, "the presumption is that jurisdiction is concurrent, and some strong showing of need for exclusive jurisdiction is required to overcome that presumption." Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 Mich. L. Rev. 311, 325, n.63 (1976).

As Justice Scalia aptly stated: "It . . . takes an affirmative act of power under the Supremacy Clause to oust the States of jurisdiction—an exercise of what one of our earliest cases referred to as 'the power of congress to *withdraw*' federal claims from state-court jurisdiction." *Tafflin*, 493 U.S. at 469-70 (Scalia, J., concurring) (quoting *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 26 (1820)). Justice Scalia concluded:

> As an original proposition, it would be eminently arguable that depriving state courts of their sovereign authority to adjudicate the law of the land must be done, if not with the utmost clarity, . . . at least *expressly.*

Id. (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985) (state sovereign immunity can be eliminated only by "clear statement")).

> [T]o restrain a state proceeding that afforded an adequate vehicle for vindicating the federal plaintiff's constitutional rights "would entail an unseemly failure to give effect to the principle that state courts have the solemn responsibility equally with the federal courts" to safeguard constitutional rights and would "reflec(t) negatively upon the state court's ability" to do so.

Trainor v. Hernandez, 431 U.S. 434, 443 (1977) (quoting *Steffel v. Thompson*, 415 U.S. 452, 460-61, 462 (1974)). "The State would be prevented not only from 'effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies." *Id.* (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975)).

The California courts have also heretofore embraced these fundamental principles of federalism. *See, e.g.*, *Cianci v. Superior Court*, 40 Cal. 3d 903, 910, 221 Cal. Rptr. 575, 577 (1985) ("Our analysis of the question of jurisdiction proceeds from a well-defined doctrinal base fashioned by the United States Supreme Court in decisions stretching from the landmark case of *Claflin* . . . through *Charles Dowd Box Co.* . . . to *Gulf Offshore Co. v. Mobil Oil Corp*."); *see also Int'l Ass'n of Fire Fighters, Local 188, AFL-CIO v. Public Emp't Relations Bd.*, 51 Cal. 4th 259, 270, 120 Cal. Rptr. 3d 117, 123 (2011) ("[W]hen a federal administrative action is challenged on the ground that it violates a constitutional right, 'the availability of

judicial review is presumed,' and statutory provisions will not be construed as foreclosing such review 'unless Congress' intent to do so is manifested by "clear and convincing" evidence.'" (quoting *Califano v. Sanders*, 430 U.S. 99, 109 (1977))).

The Court of Appeal, however, inappropriately relaxed this demanding standard based on this Court's opinion in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). *See Alliance*, 23 Cal. App. 5th at 1062, 234 Cal. Rptr. 3d at 31. The court erroneously characterized *Thunder Basin* as standing for the proposition that the CAA's "comprehensive enforcement structure and unambiguous text, combined with Congress's clear concern with channeling and streamlining challenges to approved SIP submissions in one jurisdiction, establishes a 'fairly discernable' [*sic*] intent to preclude state court review." *Id.* (quoting *Thunder Basin*, 510 U.S. at 216). However, *Thunder Basin* did not even involve the question presented here regarding whether the CAA has ousted state courts of their inherent concurrent jurisdiction. *Thunder Basin* involved an entirely inapposite question of whether the Federal Mine Safety and Health Amendments Act, 30 U.S.C. §§ 801 *et seq*., allocated initial review of agency action to the agency itself, instead of the federal courts, where congressional intent was "fairly discernible in the statutory scheme." *See* 510 U.S. at 207 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984)). *Thunder Basin* did not address, nor alter, the far more exacting requirement that "depriving state courts of their sovereign authority to adjudicate the law of the land must be done, if

not with the utmost clarity, . . . at least *expressly.*" *Taffl in*, 493 U.S. at 469-70.

B. The CAA Does Not Divest the State Courts of Concurrent Jurisdiction.

The California Court of Appeal conceded that "section 307(b)(1) is silent regarding the jurisdiction of state courts." *Alliance*, 23 Cal. App. 5th at 1061, 234 Cal. Rptr. 3d at 30. Nevertheless, the court concluded that "the express language of the statute rebuts the presumption of concurrent jurisdiction." *Id*. In reaching this conclusion, the court noted that Section 7607 states that a petition for review may be brought "only" in the federal courts of appeals. *Id.* In support of its reasoning, the court cited *National Association of Manufacturers v. Department of Defense*, ___ U.S. ___, 138 S. Ct. 617, 626 (2018), involving what it referenced as an "analogous jurisdictional statute—section 509(b)(1) of the federal Clean Water Act." *Alliance*, 23 Cal. App. 5th at 1062, 234 Cal. Rptr. 3d at 31. In *Manufacturers*, this Court noted that the Clean Water Act "grants the federal courts of appeals original and 'exclusive' jurisdiction" over seven categories of EPA actions. 138 S. Ct. at 626. Because the EPA actions in that case did not fall within any of the seven categories, this Court concluded that any challenges "must be filed in federal district courts." *Id*. at 624. However, *Manufacturers* did not address, nor decide, any questions regarding whether the Clean Water Act divests state courts of concurrent jurisdiction. Rather, the case merely addressed whether judicial review—*in the federal courts*—was

channeled to either the district courts or the courts of appeals. In that regard, *Manufacturers* supports Cody's position here that the use of the word "only" in Section 7607 governs whether judicial review—*in the federal courts*—is channeled to the courts of appeals, or to the district courts. It does not expressly withdraw *state court* jurisdiction.

Cody's position in this regard is supported under other statutes as well. In *Tafflin*, the Court found that while RICO, 18 U.S.C. § 1964(c), granted federal jurisdiction "in any appropriate United States district court," the legislative history revealed "no evidence that Congress even considered the question of concurrent state court jurisdiction over RICO claims, much less any suggestion that Congress affirmatively intended to confer exclusive jurisdiction over such claims on the federal courts." *Tafflin*, 493 U.S. at 461.

In *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 824 (1990), this Court held that the enforcement provisions of Title VII authorizing jurisdiction in the United States district courts did not oust the state courts of their concurrent jurisdiction, rejecting the contention that the legislative history revealed Congress's intention that these claims be brought exclusively in the federal courts. Notably, just like the CAA here, *Yellow Freight* observed that Title VII "is completely silent on any role of the state courts over Title VII claims." *Id.* The Court concluded:

> In sum, without disagreeing with petitioner's persuasive showing that most legislators,

> judges, and administrators who have been involved in the enactment, amendment, enforcement, and interpretation of Title VII expected that such litigation would be processed exclusively in federal courts, we conclude that such anticipation does not overcome the presumption of concurrent jurisdiction that lies at the core of our federal system.

Id. at 826.

Other federal circuit cases further illustrate the flaws in the California Court of Appeal's reasoning. In *Holmes Financial Associates, Inc. v. Resolution Trust Corp.*, 33 F.3d 561, 566 (6th Cir. 1994), the Sixth Circuit was confronted with a statute providing that "no court shall have jurisdiction over" the suit at issue except for federal district courts. The Sixth Circuit read this provision narrowly, so as to preserve state court jurisdiction:

> Recent Supreme Court cases make clear that state courts have concurrent jurisdiction over cases arising under federal law unless Congress affirmatively divests them of that jurisdiction by express statutory language or by enacting a statutory scheme which only provides for federal fora and which would be plainly disrupted by the exercise of state court jurisdiction. In enacting [the statute at issue], Congress has done neither.

Id. at 569.

The Seventh Circuit has expressly held that Section 7607 does not channel review of state regulations

exclusively to the federal courts of appeals. In *Indiana & Michigan Electric Company*, petitioners sought to invalidate the EPA's approval of a SIP, arguing that it was technologically and economically infeasible to comply with the SIP. *Ind. & Mich. Elec. Co. v. Evntl. Prot. Agency*, 509 F.2d 839, 845 (7th Cir. 1975) ("*Indiana & Michigan*"). In line with this Court's later decision in *Union Electric Co. v. Environmental Protection Agency*, 427 U.S. 246 (1976) ("*Union Electric*"), the Seventh Circuit held that it lacked jurisdiction to hear the challenge. *Indiana & Michigan*, 509 F.2d at 845. The court held that petitioners could, however, raise those issues during an enforcement proceeding. *Id.* Furthermore, the court invited petitioners to challenge the underlying regulation in state court:

> [P]etitioners have a right to challenge the reasonableness of state plans in the state courts, and . . . if part of a state implementation plan is held invalid by a state court, the state would have to revise that part. Should the state fail to do so, the [EPA] Administrator must propose and promulgate a revision.

Id. at 847 (quotation marks omitted). Petitioners successfully challenged the SIP in state court on procedural grounds,[1] and, during a subsequent case, the Seventh Circuit held that the state's invalidation of the SIP rendered it unenforceable in federal court:

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[1] *Ind. Envtl. Mgmt. Bd. v. Ind.-Ky. Elec. Corp.*, 393 N.E.2d 213, 214 (Ind. Ct. App. 1979).

> Because administrative actions taken without substantial compliance with applicable procedures are invalid, it is as if Indiana never submitted [the regulation]. Since a valid [regulation] was never submitted, EPA's adoption of [the regulation] cannot be given effect since EPA approved a provision which was invalid when submitted to the agency.

Sierra Club v. Ind.-Ky. Elec. Corp., 716 F.2d 1145, 1148 (7th Cir. 1983); *see also Clean Water Action Council of Ne. Wis., Inc. v. U.S. Envtl. Prot. Agency*, 765 F.3d 749, 751 (7th Cir. 2014) ("We conclude . . . that the venue and filing provisions of § 7607(b) are not jurisdictional.").

The California Court of Appeal distinguished *Sierra Club*, stating that the Seventh Circuit's reference to procedural challenges establishes "a very narrow context . . . which . . . is not at issue here." *Alliance*, 23 Cal. App. 5th at 1066, 234 Cal. Rptr. 3d at 34. However, the court's distinction bears no relevance here, because no such "procedural challenge" language appears in Section 7607(b)(1). Indeed, there is no language in the statute withdrawing *any* concurrent state court jurisdiction. Again, the states' concurrent jurisdiction is naturally preserved under the CAA, unless Congress has explicitly "*withdraw*[*n*]" such jurisdiction. *Tafflin*, 493 U.S. at 469-70. Congress has made no such explicit withdrawal of jurisdiction here.

Moreover, the California Court of Appeal failed to explain why procedural challenges would be any more acceptable—for jurisdictional purposes—than

any other kind of challenge, because, according to the court, both types of challenges, "'*as a practical matter*, challenge an [Agency's] final action, including its approval of a SIP.'" *Alliance*, 23 Cal. App. 5th at 1063, 234 Cal. Rptr. 3d at 31 (quoting *Cal. Dump Truck Owners Ass'n v. Nichols*, 784 F.3d 500, 507 (9th Cir. 2015)). In fact, the California Court of Appeal stated that, no matter how Cody framed his appeal, "semantics do not inform our jurisdictional inquiry." *Id.* "Cody . . . [is] practically challenging the Agency's approval of the Regulation," and Cody seeks the "practical objective" of "invalidat[ing] and render[ing] unenforceable, in whole or in part, . . . a state regulation." *Id.* at 1054, 234 Cal. Rptr. 3d at 25. This "practical objective," however, is precisely what the Seventh Circuit explicitly permitted in *Sierra Club*. No matter how the California Court of Appeal framed its opinion, the court unmistakably split with the Seventh Circuit—the only other appellate court in the country to decide this precise issue.

II. Cody Could Not Have Challenged the Constitutionality of the Regulation Under Section 7607, and There Must Be a Meaningful Opportunity for Judicial Review of Agency Action.

The California Court of Appeal's decision was based on the premise that the EPA is empowered to, and actually does, assess the constitutionality of a SIP prior to granting approval. According to the court, because the EPA approved the Regulation as part of the SIP, Cody should have presented his arguments

regarding the constitutionality of the Regulation to the Ninth Circuit within 60 days of EPA approval under Section 7607 in order to forestall his subsequent prosecution for driving into California without an $18,000 filter on his truck. This premise is demonstrably flawed. Section 7607 channels to the federal courts of appeals "petition[s] for review of *action of the* [*EPA*] *Administrator*" in approving SIPs, among other actions. 42 U.S.C. § 7607(b)(1) (emphasis added). The action of the EPA Administrator in reviewing a SIP is strictly limited. A SIP must meet thirteen criteria. *See* 42 U.S.C. § 7410(a)(2)(A)-(M). As long as a state complies with these "minimum criteria," the EPA *must* approve the plan. *Id.* § 7410(k)(2). The EPA's limited role in approving a SIP is best described as a "ministerial function of reviewing SIPs for consistency with the Act's requirements." *Luminant Generation Co., L.L.C. v. U.S. Envtl. Prot. Agency*, 675 F.3d 917, 921 (5th Cir. 2012).

At the heart of the instant case is Section 7410(a)(2)(E), which requires a SIP to include "necessary assurances that the State . . . is not prohibited by any provision of Federal or State law from carrying out such implementation plan." 42 U.S.C. § 7410(a)(2)(E). This provision does not empower the EPA to review the adequacy of the state's legal analysis, nor does it require the EPA to conduct any legal analysis of its own; all the EPA is authorized to do is determine whether the state has *assured* the EPA that the SIP at issue is not prohibited by any provision of federal or state law. Here, unsurprisingly, there was no discussion during

the rulemaking proceedings regarding the Commerce Clause implications of the Regulation.[2]

These distinctions are crucial. Congress carefully limited the scope of the EPA's review in light of the separation of powers between the executive and judicial branches, and the agency's limited expertise in resolving issues of law. The D.C. Circuit articulated the rationale behind this policy in an analogous case involving a challenge to the EPA's decision to grant a waiver of federal preemption to a state regulation. *Motor & Equip. Mfrs. Ass'n, Inc. v. E.P.A.*, 627 F.2d 1095, 1100-01 (D.C. Cir. 1979) ("*MEMA*"). The D.C. Circuit observed that the Administrator did not have the expertise to rule on questions of law, and that the EPA

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[2] EPA did however conclude that the Regulation was *not* preempted by federal law, stating: "Notwithstanding the preemption provisions of the CAA . . . we do not believe that preemption represents an obstacle to implementation by California with respect to these three particular regulations." *See Approval & Promulgation of Implementation Plans*, 76 Fed. Reg. 40,652, 40,658 (July 11, 2011). The Board cannot have it both ways. It cannot maintain that state court jurisdiction *is* preempted by federal law, when it previously requested and obtained a ruling by EPA that the regulation itself was *not* preempted. Moreover, the Regulation was enacted pursuant to California law in 2008, three years prior to the SIP proceeding. In short, the Board did not need authorization from the EPA in order to promulgate or enforce the Regulation because, as the EPA observed, the Regulation "would still be enforceable, under State law, regardless of EPA's action to approve or disapprove" it. *See Approval & Promulgation of Implementation Plans*; *California Air Resources Board—In-Use Heavy-Duty Diesel-Fueled Truck & Bus Regulation, & Drayage Truck Regulation,* 77 Fed. Reg. 20,308, 20,312 (April 4, 2012).

was required to grant the waiver as long as certain minimum criteria were met:

> That he like every other administrative officer owes allegiance to the Constitution does not mean that he is required to issue rulings of constitutional dimension. Resolving questions of constitutional scope is the most important of judicial functions, "one that even the judiciary is reluctant to exercise." . . . Here the Administrator operates in a narrowly circumscribed proceeding requiring no broad policy judgments on constitutionally sensitive matters.

Id. at 1114-15 (quoting *Panitz v. District of Columbia*, 112 F.2d 39, 41 (D.C. Cir. 1940)). As particularly relevant here, *MEMA* further instructed that any constitutional challenges could be freely raised in the state courts of California: "If petitioners dislike the substance of the CARB's regulations . . . then they are free to challenge the regulations in the state courts of California." *Id*. at 1105; *accord Am. Trucking Ass'ns, Inc. v. E.P.A.*, 600 F.3d 624, 631 n.1 (D.C. Cir. 2010) ("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."). The California Court of Appeal summarily dismissed the applicability of these cases because, the court stated, they involved waivers, not SIPs. *Alliance*, 23 Cal. App. 5th at 1051, 234 Cal. Rptr. at 35. Once again, the court's distinction makes no difference. In both waiver and SIP proceedings, the Administrator must grant approval as long as the requisite criteria are met. And in both proceedings, the criteria do not

permit the Administrator to decide questions of law. In sum, there is simply no reason to oust the state courts of their concurrent jurisdiction on such a fallow distinction.

These conclusions are bolstered further by this Court's decision in *Union Electric*, in which an electric utility company petitioned for review of the EPA's decision to approve a SIP. 427 U.S. at 252-53. There, the utility company argued that the SIP established compliance measures that were economically and technologically impossible to comply with. *Id.* Even though the petition was timely lodged directly in the Eighth Circuit Court of Appeals, pursuant to Section 7607, the court dismissed the petition, reasoning that, because Section 7607 is limited to actions of the EPA Administrator, and "claims of economic and technological infeasibility could not properly provide a basis for the Administrator's rejecting a plan, such claims could not serve at any time as the basis for a court's overturning an approved plan." *Id.* at 254. Thus, the Eighth Circuit lacked jurisdiction to consider a pre-enforcement challenge to the regulation based on claims of economic and technological infeasibility. *Id.* This Court affirmed on the ground that the Administrator cannot consider any factors other than those explicitly specified under Section 7410:

> [Section 7410] provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator "shall approve" the proposed state plan. The mandatory "shall" makes it quite clear that the Administrator is not to be concerned with

> factors other than those specified, . . . and none of the . . . factors appears to permit consideration of technological or economic infeasibility.

Union Electric, 427 U.S. at 257-58. As relevant here, constitutional questions are also not enumerated under the statute, and are likewise not matters of concern to the Administrator.

Thus, contrary to the principles articulated in *MEMA* and *Union Electric*, the Court of Appeal opined that "Section 307(b)(1) does not distinguish between or discuss the substantive grounds upon which a claim is jurisdictional." *Alliance*, 23 Cal. App. 5th at 1064, 234 Cal. Rptr. 3d at 32. However, this is precisely what Section 307(b)(1) (42 U.S.C. § 7607(b)(1)) does. The EPA may not determine whether a SIP actually is supported by state or federal law, nor may a petition for review challenge such a determination. The EPA's role is limited to determining whether the SIP contains "assurances" to that effect. 42 U.S.C. § 7410(a)(2)(E). In sum, the EPA did not, and could not, make any findings on the constitutionality of any regulations embedded in the SIP. Based on the foregoing, because Cody could not have brought a petition for review of a decision that the EPA never made, he never could have challenged the constitutionality of the Regulation in the Ninth Circuit.

In the final analysis, the federal and state Constitutions both require at least some form of judicial review. *See, e.g.*, *Weinberger v. Salfi*, 422 U.S. 749, 762

(1975) (holding that "a serious constitutional question of the validity of the statute" would be raised if the statute foreclosed all judicial review). Therefore, "[t]here remains . . . an important question: If [Cody was] not entitled to raise [his constitutional] claims . . . prior to the Administrator's approval of the state plan[], at what point can these claims be asserted?" *See Buckeye Power, Inc. v. E.P.A.*, 481 F.2d 162, 173 (6th Cir. 1973). Again, the answer is clear: Cody had the inalienable right to invoke the jurisdiction of the courts of the state that sought to impose fines and penalties upon him for violating that state's regulations—*California*.

III. Cody's As-Applied Challenge Was Permissible and Timely.

The SIP was approved by EPA in April 2012. However, Cody was not cited for violating the Regulation until two years later—in October 2014. It was therefore fundamentally unfair to penalize Cody for not seeking pre-enforcement review of issues that were not even addressed in the EPA rulemaking under Section 7607(b)(1)—*two years before* he was ticketed. Indeed, the Court of Appeal's decision would prevent *any* review, in *any* court, for *every* interstate trucker who joined the industry *after* the expiration of the deadline in Section 7607—into virtual perpetuity. These truckers never had any conceivable opportunity to challenge the SIP, yet the Court of Appeal's ruling retroactively eliminates their due process rights against unconstitutional enforcement of the Regulation. How can it possibly be said that they had *their* day in court?

The D.C. Circuit expressly acknowledged the propriety of an as-applied challenge notwithstanding the draconian provision in 42 U.S.C. § 7607(b)(2) that actions "with respect to which review could have been obtained under paragraph (1) shall not be subject to review in civil or criminal proceedings for enforcement." *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998) ("[I]f the issues later become justiciable, as a result for instance of an enforcement action, the petitioner may then raise those issues, notwithstanding the portion of § 7607(b)(2) just quoted."); *see also Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 266 F. Supp. 2d 1101, 1120 (N.D. Cal. 2003) ("[I]t is clear that when an agency applies a regulation to a defendant in an enforcement proceeding, that party may challenge the validity of the regulation even if the regulation was promulgated long before."); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991) ("If . . . a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger.").

In *Commonwealth Edison Co. v. U.S. Nuclear Regulatory Commission*, the Court reasoned:

> The Hobbs Act's sixty-day restriction must mean at least that direct pre-enforcement challenges to rules brought after the expiration of the time limit are generally beyond the court's jurisdiction. *However, the cases interpreting*

> *the section establish that indirect challenges to the rule brought when the rule is applied to a particular individual are within the court's jurisdiction*.

830 F.2d 610, 613-16 (7th Cir. 1987) (emphasis added); *see also Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885, 891 (8th Cir. 1977) ("[P]laintiff must assert its claims as a defense or counterclaim in any action brought by the Administrator of EPA. . . ."); *Indiana & Michigan*, 509 F.2d at 845 ("[S]ince we hold that a plan's technological feasibility and economic impact need not be considered by the Administrator in approving a state plan . . . , it follows that Section 307(b)(2) does not preclude petitioners from presenting technological feasibility and economic impact arguments in the course of enforcement proceedings."); *Buckeye Power*, 481 F.2d at 172-73 ("Since we have determined that there could not have been an adequate hearing on individual claims such as those presented by the petitioners herein prior to approval of the state plans, the claims can be asserted as a defense in either federal or state enforcement proceedings.").

This procedure has also been endorsed by the EPA itself. *See, e.g.*, *Promulgation of Air Quality Implementation Plans; Arizona*, 81 Fed. Reg. 21,735, 21,744 (April 13, 2016) ("To the extent that the commenters are raising an 'as applied' claim of unconstitutionality, any such claim can be raised in the future in the context of a specific application of the statute in an enforcement action."); *State Implementation Plans: Response to Petition for Rulemaking*, 80 Fed. Reg. 33,840, 33,868

(June 12, 2015) (same); *cf. Approval of Application to Administer the National Pollutant Discharge Elimination System (NPDES) Program; Texas*, 63 Fed. Reg. 51,164, 51,188 (Sept. 24, 1998) ("EPA [does not] have the authority to determine the Constitutionality of laws passed by the Texas Legislature.").

IV. There Are No Supreme Court Decisions Precluding Constitutional Review of Regulations Approved in SIPs.

The California Court of Appeal concluded that Cody's constitutional defense was jurisdictionally barred because "the scope of section 307(b)(1)'s jurisdictional requirement 'extends to claims that, *as a practical matter*, challenge an [Agency's] final action, including its approval of a SIP." *See Alliance*, 23 Cal. App. 5th at 1063, 234 Cal. Rptr. 3d at 31 (citing *Cal. Dump Truck Owners Ass'n v. Nichols*, 784 F.3d 500 (9th Cir. 2015) ("*Dump Truck*")); App. 18. This conclusion is unsupported by any decisions of this Court, and is especially unsound when applied to the questions of concurrent state jurisdiction underlying this case. In *Dump Truck*, the Ninth Circuit upheld the district court's dismissal of the plaintiff's challenge to the Regulation under the preemption provisions of the Federal Aviation Administration Authorization Act ("FAAAA"), 49 U.S.C. § 14501(c)(1), reasoning that the Board had provided the assurances necessary for approval of the SIP under 42 U.S.C. § 7410(a)(2)(E), specifically, that it was not prohibited from "carrying out the Regulation by 'any provision of Federal or State Law.'" *Dump Truck*, 784

F.3d at 510 (quoting *Approval & Promulgation of Implementations Plans; California Air Resources Board—In-Use Heavy-Duty Diesel-Fueled Truck & Bus Regulation, & Drayage Truck Regulation*, 77 Fed. Reg. 20,308, 20,311, 20,313 (April 4, 2012)). However, again, at no point in the rulemaking proceeding did the Board, or the EPA, purport to conduct any analysis of the Commerce Clause implications of the Regulation; nor did the EPA opine as to the constitutionality of the Regulation or the Board's potential future enforcement of the Regulation against interstate truckers, in violation of the Commerce Clause. Rather, the EPA consulted the Section 7410 checklist to determine whether the Board provided these assurances—nothing more.

In reaching its general conclusion that Section 7607 applies to all federal suits implicating the validity of a SIP, regardless of whether the EPA had actually addressed those claims in approving the SIP, *Dump Truck* cited to three circuit court cases—none of which support that conclusion. The court's reliance on *Virginia v. United States*, 74 F.3d 517 (4th Cir. 1996) ("*Virginia*"), and *Missouri v. United States*, 109 F.3d 440 (8th Cir. 1997) ("*Missouri*"), was misplaced because both of those cases arose out of the alleged failure of Virginia and Missouri to comply with EPA regulations. *Virginia*, 74 F.3d at 523; *Missouri*, 109 F.3d at 441-42. After the EPA took enforcement action against both states, they sued the EPA in federal district court, arguing that portions of the CAA were unconstitutional. *Virginia*, 74 F.3d at 522; *Missouri*, 109 F.3d at 441. Because the states' claims arose from the administrative

actions of the EPA—a fact that both states acknowledged—the district courts dismissed the suits for lack of jurisdiction, and the Fourth and Eighth Circuits affirmed. *Virginia*, 74 F.3d at 522-23; *Missouri*, 109 F.3d at 441-42. Both of these cases, therefore, stand for the proposition that a suit challenging an action of the EPA, in federal court, is subject to the jurisdictional requirements of Section 7607.

The Ninth Circuit's reliance on *New England Legal Foundation v. Costle*, was also misplaced because it touched on Section 7607 only indirectly; the court's central concern was whether the appellants could maintain a "federal common law nuisance action[] based on the emission of chemical pollutants into the air [by a private party]." 666 F.2d 30, 32 (2d Cir. 1981). The Second Circuit held that such a suit could not be maintained for two reasons. First, the EPA had approved the behavior complained of by issuing a variance to New York's SIP, and "[c]ourts traditionally have been reluctant to enjoin as a public nuisance activities which have been considered and specifically authorized by the government." *Id.* at 33. The court held that the appellants had an adequate remedy at law—namely, a suit under Section 7607—so equitable relief was not warranted. *Id. Costle* thus stands for the proposition that a federal suit challenging a decision the EPA Administrator explicitly made—in the case of *Costle*, the decision to grant a variance to New York's SIP—is subject to Section 7607.

Dump Truck also cited two other circuit court cases; however, one of those cases agreed that the state courts

have at least limited jurisdiction, and the other is not on point. As discussed above, *Sierra Club v. Indiana-Kentucky Electric Corp.*, rejected the argument that EPA approval of a SIP cut off state court jurisdiction entirely, allowing, at minimum, procedural challenges. 716 F.2d 1145, 1152 (7th Cir. 1983). *Dump Truck*'s reliance on *United States v. Ford Motor Co*., 814 F.2d 1099 (6th Cir. 1987) is also misplaced. There, Michigan regulatory authorities and Ford entered a consent decree in state court modifying a SIP. The court held first, that Michigan could not renege on its obligation to seek EPA approval of any modifications to its initial SIP; and second, that review of the EPA's action on the state's modification request could only be filed in federal circuit court. *Ford*, 814 F.2d at 1103. But that is not the case presented here. The question presented here is whether Section 7607(b)(1) cuts off concurrent state court jurisdiction to review constitutional violations under state regulations.

Dump Truck also fails to support the California Court of Appeal's conclusion that Cody is precluded from asserting a constitutional defense to fines and penalties in California state court because he failed to seek review of the EPA's SIP approval in a federal court of appeals within 60 days of the EPA's action under 42 U.S.C. § 7607(b)(1). *Alliance*, 23 Cal. App. 5th at 1064, 234 Cal. Rptr. 3d at 32, App. 20-21. *Dump Truck* involved a federal preemption challenge to the Regulation in a citizen suit brought by California based truckers. It did not involve an "as-applied" challenge to a

citation imposing fines and penalties against interstate truckers under the Regulation, and it certainly did not hold that a trucker such as Cody would be precluded from raising a constitutional defense against fines and penalties because he failed to challenge the SIP decision years before he was cited.

There is also no legitimate rationalization for the California Court of Appeal's conclusion that Cody had his "day in court" in a separate case in which Cody sought relief in federal court under 42 U.S.C. § 1983—as a plaintiff. *Alliance*, 23 Cal. App. 5th at 1058-59, 1068, Cal. Rptr. 3d at 28-29, 35, App. 11-13, 27. There, the Ninth Circuit dismissed those claims in an order, with no opinion, citing *Dump Truck*, and section 307(b)(1). *Id*. In citing the jurisdictional provisions of section 307(b)(1), the Ninth Circuit sent an unmistakable telegraph that Cody should never have even been permitted to pass through the courthouse doors of a *federal* court, much less get his day in *that* court. The fact that the Ninth Circuit repudiated federal court jurisdiction however, does not answer the question presented here, *i.e.*, whether section 307(b)(1), expressly withdraws state court jurisdiction allowing Cody his day in California State court to raise constitutional defenses to fines and penalties which the State seeks to impose upon him for violating the Regulation. That is an issue that was not presented to—nor decided by—the Ninth Circuit.

This Court has opined that a "serious constitutional question" would arise if it construed a statute "to deny a judicial forum for constitutional claims." *Bowen*

v. Mich. Acad. of Family Physicians, 476 U.S. 667, 681, n.12 (1986); *see also Weinberger*, 422 U.S. at 762 (holding that "a serious constitutional question of the validity of the statute" would be raised if the statute foreclosed all judicial review); *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974) (same); *cf. Yakus v. United States*, 321 U.S. 414, 433 (1944) (suggesting that due process requires the availability of judicial review); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) ("The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied. . . ."); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895, 922, n.113 (1984) ("[A]ll agree that Congress cannot bar all remedies for enforcing federal constitutional rights.").

As demonstrated herein, Cody never had a meaningful opportunity to mount a pre-enforcement challenge under Section 7607 in federal court. Now, the California Court of Appeal has foreclosed *any* possibility of judicial review of the constitutionality of the Regulation in state court. This decision is grievously antithetical to the most fundamental due process protections guaranteed by the United States Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL D. CULLEN, SR.
DANIEL E. COHEN
Counsel of Record
PAUL D. CULLEN, JR.
CHARLES R. STINSON
THE CULLEN
LAW FIRM, PLLC
1101 30th Street NW,
Suite 300
Washington, DC 20007
202-944-8600
dec@cullenlaw.com

BRIAN LEIGHTON
BRIAN LEIGHTON
LAW OFFICES
755 N. Peach Avenue,
Suite G-10
Clovis, CA 93611
559-297-6190

Dated: November 9, 2018