No._____

IN THE

SUPREME COURT OF THE UNITED STATES

ALLIANCE FOR CALIFORNIA BUSINESS,

Petitioner,

v.

STATE AIR RESOURCES BOARD,

Respondent,

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Third Appellate District

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PETITION FOR WRIT OF CERTIORARI

KARL OLSON (SBN 104760)
SUPREME COURT BAR NO. 187154
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QUESTION PRESENTED

Whether, under a provision of the Clean Air Act, 42 U.S.C. § 7607(b)(1), the inclusion of a state regulation in an EPA-approved State Implementation Plan ("SIP") deprives state courts of their presumptive sovereign jurisdiction to determine whether the regulation is inconsistent with state law, where (a) 42 U.S.C. §7607(b)(1) does not unambiguously withdraw jurisdiction from state courts and (b) depriving state courts of their jurisdiction to determine whether a state regulation is inconsistent with state law would make the regulation effectively immune to facial state law challenges?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

The Court of Appeal of the State of California, Third Appellate District ("Court of Appeal") consolidated Petitioner Alliance for California Business's appeal with a separate case for purposes of oral argument and decision. The two cases involve overlapping parties. The parties are as follows:

Court of Appeal Case No. C082828

Plaintiff-Appellant:

Alliance for California Business

Defendants-Respondents:

State Air Resources Board
Mary D. Nichols
Richard Corey

Court of Appeal Case No. C083083

Plaintiff-Appellant:

Jack Cody

Defendants-Respondents:

State Air Resources Board
Richard W. Corey
Mary D. Nichols
Matt Rodriguez

RULE 29.6 STATEMENT

Petitioner Alliance for California Business has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION[1]

This case is an opportunity to settle an important question of law regarding the balance of power between state and federal governments in our nation.

In its operative complaint, petitioner Alliance for California Business ("Alliance") alleges that California's Truck and Bus Regulation, Cal. Code Regs., tit. 13, § 2025, is not lawful and should be enjoined to the extent that it requires certain vehicles to be equipped with diesel particulate filter ("DPF") devices. DPF devices damage engines, cause engine fires, and make vehicles unsafe to operate on California roads. The Alliance alleged that the Truck and Bus Regulation conflicts with state safety laws to the extent that it requires vehicle owners and operators to use DPF devices. *See* Cal. Veh. Code § 24002(a) ("It is unlawful to operate any vehicle or combination of vehicles which is in an unsafe condition, or which is not safely loaded, and which presents an immediate safety hazard.").

The California Court of Appeal, Third District, held that a provision of the federal Clean Air Act ("CAA"), 42 U.S.C. § 7607(b)(1), deprived the state courts of jurisdiction over all state law-based challenges to the Truck and Bus Regulation, because California Air Resources Board ("CARB") promulgates the Truck and Bus Regulation as part of a State Implementation Plan ("SIP") under the CAA, which the Environmental Protection Agency ("EPA") approved.

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[1] Petitioner Alliance for California Business joins in the arguments of Petitioner Jack Cody in his separate, concurrently filed Petition for Writ of Certiorari seeking review of the decision below.

The Court of Appeal has misinterpreted 42 U.S.C. § 7607(b)(1) and rendered a decision that conflicts with federal appellate case law. *See Indiana & Michigan Electric Company v. EPA*, 509 F.2d 839, 847 (7th Cir. 1975); *Sierra Club v. Indiana-Kentucky Elec. Corp.*, 716 F.2d 1145, 1148-55 (7th Cir. 1983). If this Court permits this ruling to take root in California, the effect will be to undermine the presumptive power of state courts to adjudicate state law claims, which has long been a hallmark of our federalist system.

First, the Court of Appeal undervalued the presumption of concurrent jurisdiction. From the inception of our system of government, unlike federal courts, state courts have had "jurisdiction in all cases arising under the laws of the Union" where jurisdiction is not "expressly prohibited." Alexander Hamilton, *The Federalist No. 82*. Even in matters that arise under federal law, state courts are presumed to have concurrent jurisdiction with federal courts, and "the presumption . . . 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." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981). 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 v. Levitt*, 493 U.S. 455, 470 (1990) (internal citations omitted, emphasis in original). This presumption applies to state law challenges to state agency actions. But the Court of Appeal all but disregarded it here. The Court of Appeal held that the CAA's language is clear enough about withdrawing state

court jurisdiction to rebut this presumption, even though it conceded that the CAA "is silent regarding the jurisdiction of state courts." Appendix ("App.") A-15.

The language of the CAA verifies that the Court of Appeal erred. Under 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." 42 U.S.C. § 7607(b)(1). The Court of Appeal held that 42 U.S.C. § 7607(b)(1) requires that all state law challenges to a regulation approved by the EPA Administrator as part of a SIP be brought in a federal court of appeals. But 42 U.S.C. § 7607(b)(1) only allows federal courts of appeals to review the decision to approve a SIP, and that decision does not hinge on a substantive analysis of whether the SIP, or any part of it, complies with state law. *See* 42 U.S.C. §§ 7410, 7607. In deciding whether to approve a SIP, the EPA Administrator does not consider whether the SIP is *actually* consistent with state law. *See* 42 U.S.C. § 7410. Instead, the EPA Administrator assesses whether the promulgating state agency has made sufficient "*assurances* that the State . . . is not prohibited by any provision of Federal or State law from carrying out such implementation plan[.]" *See, e.g.*, 42 U.S.C. § 7410(a)(2)(E) (emphasis added); *see also W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813-14 & n.13 (9th Cir. 1980) (holding that a Ninth Circuit challenge to air quality standards for pollutants, which the EPA Administrator approved under 42 U.S.C. section 7407(d), may raise only issues that were actually before the EPA Administrator, and acknowledging that the standards at issue could be challenged in

state court if they violated state law). The Court of Appeal's decision departed from other federal appellate decisions that invited – and, in at least one case, affirmed – state law challenges to EPA-approved regulations under the CAA.

Second, the Court of Appeal improperly read out of existence the Alliance's presumptive right to obtain judicial review of its claims. In both California and this Court, courts favor interpreting the law in a manner that subjects agency actions to judicial review – state courts hold that to make an agency's action unreviewable, the Legislature "have expressly so provided or otherwise clearly indicated such an intent." *Int'l Ass'n of Fire Fighters, Local 188, AFL-CIO v. Pub. Employment Relations Bd.*, 51 Cal.4th 259, 270 (2011); *see also Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 670-73 & n.3 (1986) (" 'The responsibility of enforcing the limits of statutory grants of authority is a judicial function; . . . [w]ithout judicial review, statutory limits would be naught but empty words.' ") (quoting B. Schwartz, *Administrative Law* (2d ed. 1984) § 8.1, p. 436). As one author who this Court quoted with approval explained decades ago:

> "An agency is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law. The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law, the law as it is found in the statute at hand, the statute book at large, the principles and conceptions of the 'common law,' and the ultimate guarantees associated with the Constitution. . . ."

Bowen, 476 U.S. at 672 n.3 (quoting L. Jaffe, *Judicial Control of Administrative Action* (1965), at p. 327). If the Court of Appeal's decision is permitted to stand, it will empower CARB, and other similarly situated state agencies around the nation, to automatically defeat state law and federal constitutional challenges to SIP regulations, because no court will have jurisdiction over them.

Judicial review of the Truck and Bus Regulation's consistency with California's safety laws illustrates why a right to seek judicial review of agency actions is so important. The Alliance's allegations, which should be accepted as true, set forth the serious dangers of DPF devices that CARB is requiring its members to use under the Truck and Bus Regulation: they destroy engines, cause fires, and endanger those who operate them. Without judicial review, the Alliance will be deprived of the right to test the Alliance's claims before an independent branch of government.

OPINION BELOW

The Judgment of the Superior Court of the State of California, County of Glenn, was entered on August 1, 2016. The Opinion of the California Court of Appeal, Third District, is reported as *Alliance for Cal. Bus. v. State Air Res. Bd.*, 23 Cal. App. 5th 1050 (2018), and was filed on May 29, 2018. The Supreme Court of California denied review on August 15, 2018.

The Superior Court's judgment is included at App. A64-A67. The Court of Appeal's decision is included at App. A3-A27. The Supreme Court of California's denial of review is included at App. A1-A2.

JURISDICTION

The Order of the Supreme Court of California denying review was entered on August 15, 2018. App. A1. The published decision of the California Court of Appeal, Third District, was entered on May 29, 2018. App. A2-A25. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Cal. Code Civ. Proc. § 1060

"Any person . . . who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and the declaration shall have the force of a final judgment. The declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought."

Cal. Gov. Code § 11350(a)

"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."

Cal. Veh. Code § 24002(a)

"It is unlawful to operate any vehicle or combination of vehicles which is in an unsafe condition, or which is not safely loaded, and which presents an immediate safety hazard."

42 U.S.C. § 7607(b)(1) (a provision of the Clean Air Act)

"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 chapter . . . which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit."

Cal. Code Regs., tit. 13, § 2025 (b), (d)(18), (d)(35), (d)(60), (e)-(g).

"§ 2025. Regulation to Reduce Emissions of Diesel Particulate Matter, Oxides of Nitrogen and Other Criteria Pollutants, from In-Use Heavy-Duty Diesel-Fueled Vehicles.

. . .

(b) *Scope and Applicability*

Except as provided in subsection (c), this regulation applies to any person, business, federal government agency, school district or school transportation provider that owns or operates, leases, or rents, affected vehicles that operate in California. The regulation also applies to persons that sell affected

vehicles in California and those described in section 2025(x). Affected vehicles are those that operate on diesel-fuel, dual-fuel, or alternative diesel-fuel that are registered to be driven on public highways, were originally designed to be driven on public highways whether or not they are registered, yard trucks with on-road engines or yard trucks with off-road engines used for agricultural operations, both engines of two-engine sweepers, schoolbuses, and have a manufacturer's gross vehicle weight rating (GVWR) greater than 14,000 pounds (lbs).

. . .

(d) *Definitions*

For purposes of this regulation, the following definitions apply:

. . .

(18) "*Diesel Particulate Filter*" means an emission control technology that reduces diesel particulate matter emissions by directing the exhaust through a filter that physically captures particles but permits gases to flow through. Periodically, the collected particles are either physically removed or oxidized (burned off) in a process called regeneration.

. . .

(35) "*Highest Level VDECS*" means the highest level VDECS verified by ARB under its Verification Procedure, Warranty and In-Use Compliance Requirements for In-Use Strategies to Control Emissions from Diesel Engines (Verification Procedure), title 13, CCR, sections 2700-2710, for a specific engine as of 10 months prior to the compliance date, which the diesel emission-control strategy manufacturer and authorized diesel emission-control strategy dealer agree can be used on a specific engine and vehicle combination without jeopardizing the original engine warranty in effect at the time of application.

(A) The highest level VDECS is determined solely on verified diesel PM reductions. Plus designations do not affect the diesel PM level assigned to a VDECS; that is, a Level 3 Plus is the same diesel PM level as Level 3.
(B) A Level 2 VDECS shall not be considered the highest level VDECS as long as a Level 3 VDECS can be retrofitted on a vehicle in the fleet.
(C) Level 1 devices are never considered highest level VDECS for the purpose of this regulation.
. . .
(60) "*Verified Diesel Emission Control Strategy*" (VDECS) means an emissions control strategy, designed primarily for the reduction of diesel PM emissions, which has been verified pursuant to the Verification Procedures. VDECS can be verified to achieve Level 1 diesel PM reductions (25 percent), Level 2 diesel PM reductions (50 percent), or Level 3 diesel PM reductions (85 percent). VDECS may also be verified to achieve NOx reductions. See also definition of highest level VDECS.
. . .
(e) *General Requirements*
Beginning with the applicable effective dates, a fleet owner must comply with the following requirements of this regulation:
(1) Except as otherwise provided below for specific classifications in sections 2025(e)(2) through 2025(e)(5), fleets must meet the following compliance schedule:
(A) Starting January 1, 2015, fleets must meet the requirements of section 2025(f) for all vehicles with a GVWR 26,000 lbs or less except for school buses.
(B) Starting January 1, 2012, for all vehicles with a GVWR greater than 26,000 lbs, excluding school buses, fleets must meet the requirements of section

2025(g) or fleets that report may instead comply with the phase-in option of section 2025(i).
(C) Fleets with one to three vehicles with a GVWR greater than 14,000 lbs may utilize the small fleet compliance option of section 2025(h) for vehicles with a GVWR greater than 26,000 lbs.
(2) Beginning January 1, 2012, fleets with school buses must comply with the requirements of section 2025(k) for all school buses in the fleet.
(3) Beginning January 1, 2021, all private utility vehicle owners must comply with the requirements of section 2025(l)(4).
(4) Beginning January 1, 2023 drayage trucks must comply with the requirements of section 2025(l)(1) through (3).
(5) All fleets may utilize the credit provisions of section 2025(j), the provisions of agricultural vehicles and log trucks of section 2025(m), the compliance options for work trucks, vehicles operating exclusively in the NOx exempt areas, or any of the other extensions, delays, and exemptions of section 2025(p).
(6) If some of the vehicles within the fleet are under the control of different responsible officials because they are part of different subsidiaries, divisions, or other organizational structures of a company or agency, the fleet owner may elect to have the vehicles that are under the control of different responsible officials report and comply independently of other vehicles in the fleet owner's general fleet if choosing to comply with the requirements of section 2025(g) or the phase-in option of section 2025(i) for the segment of the fleet under the control of the different responsible officials. However, all vehicles owned by the fleet owner must be reported for the fleet to use the credits for fleets that have downsized in section

2025(j)(1), or the credits for the early addition of newer vehicles in section 2025(j)(3).
(7) Except personal, non-commercial, unregistered motor vehicles, or vehicles otherwise not required to obtain authority to operate, the following is required for all fleet owners who elect to utilize the phase-in option of section 2025(i) and the small fleet option of section 2025(h), the credit provisions of section 2025(j) for early PM retrofits, early addition of newer vehicles, advanced technology vehicles, alternative fueled vehicles, and vehicles with heavy-duty pilot ignition engines, the agricultural vehicle provisions of section 2025(m), or the exemptions, delay, and extensions of section 2025(p):
(A) A valid California motor carrier of property number; or
(B) A valid identification number assigned by the United States Secretary of the Department of Transportation; or
(C) A valid operating authority number issued by the Public Utilities Commission; or
(D) Other applicable valid operating authority number approved by the Executive Officer.
(8) All information specified in section 2025(r) must be reported to the Executive Officer.
(9) Records must be kept as specified in section 2025(s).
(10) Once a vehicle is required to be in compliance with this regulation, it must remain in compliance at all times that it is operating in California. Once a vehicle has a PM retrofit installed, it may not be removed unless approved by the Executive Officer.
(11) If the calculated number of engines required to be brought into compliance with a percentage for any compliance option, and the result is not equal to a whole number, the number shall round up to a whole number when the fractional part of the required

number of engines is equal to or greater than 0.5, and round down if less than 0.5.

(12) In cases where public funds contributed to the purchase of the vehicle, repower of the engine, or retrofit of the engine, the vehicle will not be counted when determining compliance with PM BACT during the period that the funding program does not allow the vehicle to be counted towards compliance, unless allowed by the funding program guidelines applicable to the particular source of public funds used for the purchase, nor shall the engine be included in the total fleet for purposes of determining the percent of the fleet that is complying with PM BACT.

(f) *Engine Model Year Schedule Requirements for Lighter Vehicles*

Fleets owners must comply with the schedule in Table 1 for all the lighter vehicles in the fleet and meet the record keeping requirements of section 2025(s). Fleet owners do not need to meet the reporting requirements of section 2025(r). School buses are not subject to the requirements of this subsection and must meet the requirements of section 2025(k).

(1) Except as provided in (3) below, all lighter vehicles must be equipped with a 2010 model year emission equivalent engine pursuant to the following schedule in Table 1:

Table 1: Compliance Schedule by Engine Model Year for Vehicles with a GVWR 26,000 lbs or less

Compliance Date as of January 1	Existing Engine Model Year	Requirements
2015	1995 & older	
2016	1996	

2017	1997
2018	1998
	2010 model year emission equivalent
2019	1999
2020	2003 & older
2021	2004-2006
2022	N/A
2023	All engines

(2) Any engine that meets PM BACT prior to January 1, 2014, does not have to be upgraded to a 2010 model year emissions equivalent engine until January 1, 2023 as long as the vehicle remains in the fleet, The fleet owner must meet the reporting and record keeping requirements of sections 2025(r) and 2025(s) for all lighter vehicles in the fleet no later than January 31, 2015.

(3) Fleet owners that comply with Table 1 for some trucks in the fleet may also use the provisions for agricultural vehicles in section 2025(m) or any of the exemptions, delays, and extensions of section 2025(p)(1) through (7) for other lighter trucks in the fleet. Sections 2025(p)(8), 2025(p)(9), and 2025(p)(10) only apply to heavier trucks.

(4) Fleet owners can limit the number of replacements required by Table 1 each year provided the following conditions are met:

(A) The fleet complies with the prior year requirements and the number of lighter trucks in the fleet has not increased since January 1, of the prior year.

(B) At least 2 lighter vehicles and more than 25 percent of the lighter vehicles in the fleet as of January 1 of the prior year, have been retired and replaced with 2010 model year equivalent engines by January 1 of the current year.

(C) The fleet owner must report information about all lighter vehicles that were in the fleet as of January 1 of the compliance year and the prior year. Owners must meet the reporting and record keeping requirements of section 2025(r) and (s) to use this option.

(g) *Engine Model Year Requirements for Heavier Vehicles*

Fleet owners must comply with the schedule in Table 2 for all heavier vehicles in the fleet and must comply with the record keeping requirements of section 2025(s). Fleet owners are not required to meet the reporting requirements of section 2025(r). A fleet may meet PM BACT by installing the highest level VDECS or by having an engine equipped with an OEM diesel particulate filter. A fleet may meet the 2010 model year emissions equivalent engine requirement by replacing the engine or vehicle with one with a 2010 model year engine or later, retrofitting the engine with a VDECS that achieves 2010 model year equivalent emissions, or by replacing a vehicle with one that has a future compliance deadline. Fleet owners may alternatively choose to comply using the phase-in option of section 2025(i) or as specified in 2025(g)(3) below.

(1) Starting January 1, 2012, all heavier vehicles in the fleet must meet PM BACT and upgrade to a 2010 model year emissions equivalent engine pursuant to the schedule set forth in Table 2 below.

Table 2: Compliance Schedule by Engine Model Year for Vehicles with GVWR greater than 26,000 lbs

Engine Model Year	Compliance Date Install PM Filter by	Compliance Date 2010 Engine by

1993 & older	N/A	January 1, 2015
1994 – 1995	N/A	January 1, 2016
1996 – 1999	January 1, 2012	January 1, 2020
2000 – 2004	January 1, 2013	January 1, 2021
2005 – 2006	January 1, 2014	January 1, 2022
2007 or newer	January 1, 2014 if not OEM equipped	January 1, 2023

(2) A 2007 model year emissions equivalent engine complies with the BACT requirements until January 1, 2023.
(3) From January 1, 2012 until January 1, 2014, any fleet may optionally choose to meet PM BACT according to the following:
(A) 2003-2004 model year engines and 1993 model year and older engines by January 1, 2012.
(B) 2005-2006 model year engines and 1994-1999 model year engines by January 1, 2013.
(C) All engines by January 1, 2014.
(D) After January 1, 2014, this option expires and the fleet must comply with general requirements of section 2025(e).
(E) Fleet owners choosing this option must comply with the reporting and record keeping requirements of sections 2025(r) and (s).
(4) Any engine with a diesel particulate filter that meets PM BACT prior to January 1, 2014, does not have to be upgraded to a 2010 model year emissions equivalent engine until January 1, 2023 as long as the vehicle remains in the fleet. Fleet owners must comply with the reporting and record keeping requirements of sections 2025(r) and (s) and report no later than January 31, 2015 for all of the heavier vehicles in the fleet.
(5) Fleet owners may utilize the exemptions and extensions of sections 2025(p) and 2025(m) for heavier vehicles.

(6) Fleet owners may use the extension based on the unavailability of highest level VDECS of section 2025(p)(9) for 1996 model year or newer engines.
(7) Fleet owners can limit the number of replacements required by Table 2 each year provided the following conditions are met:
(A) The fleet complies with the prior year requirements and the number of heavier trucks in the fleet has not increased since January 1, of the prior year.
(B) At least 2 heavier vehicles and more than 25 percent of the heavier vehicles in the fleet as of January 1 of the prior year, have been retired and replaced with 2010 model year equivalent engines by January 1 of the current year.
(C) The fleet owner must report information about all heavier vehicles that were in the fleet as of January 1 of the compliance year and the prior year. Owners must meet the reporting and record keeping requirements of section 2025(r) and (s) to use this option.

STATEMENT OF THE CASE

The Truck and Bus Regulation, Cal. Code Regs., tit. 13, § 2025, provides that certain commercial motor vehicles in California must comply with certain emissions standards, and must equip Verified Diesel Emission Control Systems ("VDECS") identified and approved by CARB. Individuals and businesses that are members of the Alliance – and thousands of other individuals and businesses in California and elsewhere – must retrofit their vehicles with expensive and dangerous DPF devices to meet these standards, or face substantial penalties and fines imposed by CARB.

DPFs are inherently damaging to the engines of the vehicles that equip them and, in some instances, extremely dangerous to persons and property. Over time, particulate matter accumulates on DPFs, which increases pressure in the engine, degrades engine components, generates extreme heat in the engine, and causes fires both in and around the engine. App. A73-A78, A81-A84. This increased pressure and heat can cause "de-rating" – a sudden, dramatic decrease in an engine's horsepower – while a DPF-equipped vehicle is in transit. *Id.* To periodically dispel accumulated particulate matter, DPFs rely on a process called "regeneration," which superheats the DPF to approximately 1100 degrees to 1400 degrees Fahrenheit and expels particulate buildup from the exhaust system, which CARB warns can cause fires if regeneration occurs close to flammable materials, such as roadside vegetation. App. A73-A78, A81-A84. DPF-equipped vehicles often have sensors installed that are meant to alert drivers to excessive particulate buildup and direct them to initiate the regeneration process, but those sensors often fail, due to the heat and pressure that DPFs cause. App. A73-A75. The DPFs have caused engine malfunctions and failures throughout California, as well as fires that destroy the vehicle and can damage nearby property. App. A73-A78, A81-A84. By requiring that DPF devices be equipped by certain commercial vehicles, CARB has endangered their operators, all of the citizens who drive on California's public roads, and property owners who live alongside them. App. A73-A78, A81-A88, A94-A97.

The Alliance promotes business interests throughout California. App. A9. Its membership includes truck owners and operators subject to the Regulation, as well as various other individuals, such

as small to mid-sized business owners, farmers, and ranchers who rely upon affordable, reliable and safe transportation of their commercial and agricultural products. App. A9, A69-70. The Alliance sued CARB, its chair, and executive officer based on, among other things, the serious safety problems presented by the mandated installation and use of DPF devices on heavy duty diesel engines. App. A9. The only cause of action of the Alliance at issue seeks a declaration that the Regulation, and the related Verification Procedure, to the extent that either requires the installation of a DPF device, are inconsistent with the safety requirements in, inter alia, California Vehicle Code section 24002. App. A9, A69-A70, A93.

In the trial court, CARB moved for judgment on the pleadings on the grounds that the regulations contained an exemption procedure that the Alliance should have, but failed to, avail itself of, and that the trial court lacked jurisdiction due to a failure to exhaust administrative remedies.[2] App. A10. The trial court granted the motion on different grounds, concluding that: "Alliance failed to state a legally sufficient cause of action because the Regulation and Verification Procedure, 'by their express terms,'

[2] The trial court rightly declined to rule on this issue, because the exemption procedure under section 2025(q)(5) is available only to truck owners. Cal. Code Regs., tit. 13, § 2025 (q)(5) (explaining that the regulation applies to "fleet owner[s]" looking to "install[] or operate[]" a retrofit DPF). Thus, a large number of the Alliance's members as well as the Alliance itself are ineligible for the remedy potentially offered by section 2025(q)(5). *See* Cal. Code Regs. tit. 13, § 2025(q)(5); App. A68-A71, A96-A98; *see, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982) (holding that organization had standing to seek to redress harm it had suffered directly); *NAACP v. Button*, 371 U.S. 415, 428 (1963) (holding that organization had standing to seek to redress harm to itself and its members).

negate the allegations in the complaint and do not place Alliance's members in the position of violating health and safety laws' " – a line of reasoning that CARB itself would later disavow on appeal. App. A10. The Alliance appealed, and the Court of Appeal consolidated the Alliance's appeal with Cody's and affirmed the trial court in both cases based solely on a completely different, dark horse jurisdictional argument – namely, that that the CAA had eliminated the subject matter jurisdiction of the state courts of California over this case. App. A10, A14-A25.

The principal statutory pillar of the Court of Appeal's decision is section 307(b) of the CAA, which is codified at 42 U.S.C. section 7607(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. *See* 42 U.S.C. § 7410(a). The EPA is required to approve any SIP that meets minimum criteria that are meticulously set forth in the statute. 42 U.S.C. § 7410(k)(3); 40 C.F.R. Part 52. Pursuant to 42 U.S.C. § 7607(b)(1),

> 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.

The Court of Appeal held that this means "section 307(b)(1) vests exclusive and original jurisdiction over th[is] challenge[] to the Regulation incorporated and approved as part of California's SIP in the Ninth

Circuit Court of Appeals." App. A6. Under the Court of Appeal's decision, this jurisdictional preemption extends to not only challenges to the Truck and Bus Regulation, but also challenges to other related and even subsequently added or amended regulations, such as the Verification Procedure set forth in California Code of Regulations, title 13, sections 2700-2711, that "flow[] from the Regulation." App. A26.

REASONS FOR GRANTING THE PETITION

A. The Presumption of Jurisdiction in State Courts Can Only Be Rebutted by Clear and Unmistakable Evidence That Congress Intended to Withdraw It, and the Court of Appeal Erred by Finding Such Evidence Here

Under our federalist system of government, states and their judicial systems have inherent general jurisdiction to hear disputes arising under the laws of the United States, including challenges to the Truck and Bus Regulation like the Alliance's that are based on state law. " '[I]f exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it.' " *Tafflin*, 493 U.S. at 459 (internal citation omitted). "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." *Gulf Offshore Co.*, 453 U.S. at 478.

That is consistent with federal courts' repeated recognition of the compelling comity and federalism

interests in allowing state courts to decide state law questions. In *Erie Railroad v. Tompkins*, 304 U.S. 64, 78-79 (1938), this Court embraced Justice Field's presentation of these interests:

> [T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States — independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

The Court of Appeal misconstrued 42 U.S.C. section 7607(b), which is not and cannot be read as a clear and unmistakable statutory directive that California courts cannot adjudicate state law challenges to the Regulation like Petitioner's. 42 U.S.C. section 7607(b) does not – and cannot, without being read in a way that is contrary to its plain language, arbitrary, and unreasonable – limit jurisdiction in the manner that the Court of Appeal has stated.

To ascertain whether 42 U.S.C. section 7607(b) withdraws the jurisdiction of California courts to hear this case with sufficiently unmistakable clarity, the Court should employ its well-established framework for statutory interpretation. It is axiomatic that "when the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." *Hartford Underwriters Ins.*

Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) (citations and internal quotation marks omitted). However, even if the language is clear, it should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend. *See id.* If the statutory language permits more than one reasonable interpretation, courts may take into consideration other factors, such as the intention of the drafters. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant," and courts should be "reluctant to treat statutory terms as surplusage in any setting." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citations and internal quotations marks omitted).

The plain language of 42 U.S.C. section 7607(b) indicates it has *not* withdrawn the jurisdiction of state courts to hear this lawsuit, and at least leaves the issue uncertain enough to keep the presumption of concurrent jurisdiction intact. Far from clearly and unmistakably withdrawing the jurisdiction of state courts, the Court of Appeal conceded that 42 U.S.C. section 7607(b) "is silent regarding the jurisdiction of state courts." App. A15. 42 U.S.C. section 7607(b) provides that a lawsuit seeking to challenge an EPA Administrator's decision to approve a SIP may be brought "only" in the Court of Appeals for the appropriate circuit, as the Court of Appeal observes, but says nothing about whether that requirement transfers to federal courts the right of state courts to decide whether a regulation promulgated in connection with the SIP violates state law.

42 U.S.C. section 7607(b) contains other language that limits its scope. It permits a Ninth Circuit challenge to "an action of the [EPA] Administrator": here, the approval of a SIP proposed by CARB. As the Ninth Circuit held in deciding a related question in an air quality standards matter before it under 42 U.S.C. section 7607(b)(1), "Whether or not the California State Air Resources Board (ARB) violated state law, [the Ninth Circuit] may consider that issue only if it is relevant to our review of the Administrator's promulgation of the attainment status designations." *See W. Oil & Gas*, 633 F.2d at 814. While CARB had to provide "assurances" that the Truck and Bus Regulation complied with California law to secure EPA approval here under 42 U.S.C. section 7410(a)(2)(E), the EPA Administrator was never asked to assess, and accordingly never passed upon, the Truck and Bus Regulation's substantive consistency with California law. *See* 42 U.S.C. § 7410(a). That leaves to state courts the task of resolving whether the regulations approved as part of the SIP are consistent with state law.

The Court of Appeal's interpretation of 42 U.S.C. section 7607(b) would have arbitrary and unreasonable results. Because the EPA Administrator was not required to pass upon whether the Truck and Bus Regulation was consistent with California law in approving the SIP (nor would it have been possible to do so, as the EPA Administrator had no way to know what dangers DPF devices which had not yet been tested would pose), the Alliance could not have challenged, and cannot now challenge, the Truck and Bus Regulation in the Ninth Circuit on state law grounds. *See* 42 U.S.C. § 7410(a); *W. Oil & Gas*, 633 F.2d at 814. If the Court of Appeal's decision is permitted to stand, the Truck and Bus Regulation – and other similar

regulations promulgated by state agencies throughout the nation – will be above the law; a result so unreasonable, arbitrary, and offensive to basic principles of comity and federalism that Congress cannot have intended it when it enacted the CAA.[3]

The rule against surplusage supports a reading of 42 U.S.C. section 7607(b) that preserves state court jurisdiction over state law challenges to state regulations, contrary to the Court of Appeal. App. A19. The Court of Appeal's interpretation reads out of existence 42 U.S.C. section 7607(b)'s language limiting that provision to challenges to an action of the EPA Administrator, as opposed to challenges to the regulations that the EPA Administrator has approved themselves. If Congress had intended 42 U.S.C. section 7607(b) to trample principles of comity and federalism and immunize state regulations against state law challenges in this way, it would have limited challenges to the approved regulations rather than the EPA Administrator's decision.

The Court of Appeal relied on case law that does not answer the question presented here: whether the CAA or any related statute withdraws *from state courts* their presumptive jurisdiction to adjudicate whether state regulations are consistent with state law. That includes *Cal. Dump Truck Owners Ass'n. v. Nichols*, 784 F.3d 500 (9th Cir. 2015) ("*Dump Truck*"), a principal basis for the Court of Appeal's decision, which held that a *federal preemption* challenge to the Truck and Bus Regulation fell within 42 U.S.C. section 7607(b). *Id.* at 508.

[3] The decision below also means that CARB can amend its EPA-approved regulations without going back to the EPA, while still claiming the protection of 42 U.S.C. section 7607(b).

In *Dump Truck*, a dump-truck-owners trade association ("Truck Association") brought an action in federal district court, claiming that the Truck and Bus Regulation was preempted, under the Supremacy Clause of the United States Constitution, by the Federal Aviation Administration Authorization Act ("FAAAA"), which prohibits states from enacting certain regulations concerning "motor carriers" and property transportation. *Id.* at 502-03. The Truck Association "sought a declaration that the FAAAA preempted the Regulation and an injunction against its enforcement by CARB." *Id.* at 503. After cross-motions for summary judgment, the district court dismissed the lawsuit, holding that it lacked "subject matter jurisdiction under § 307(b)(1) of the Clean Air Act (CAA), 42 U.S.C. § 7607(b)(1)" and that "even if it retained jurisdiction, dismissal was proper under Federal Rule of Civil Procedure 19 because the EPA was a necessary and indispensable party." *Id.* at 502-04. The Truck Association appealed. *Id.* at 504.

On appeal, the Ninth Circuit affirmed the district court's decision, holding that the district court lacked subject matter jurisdiction over the matter under 42 U.S.C. section 7607(b), which it explained "channels review of final EPA action exclusively to the courts of appeals." *Id.* at 506 (internal citation and quotation marks omitted). The court explained that "invalidation of an EPA-approved SIP may only occur in the federal appellate courts on direct appeal from the Administrator's decision" and that because the Truck Association's lawsuit sought "to prohibit the EPA's enforcement of the SIP, the practical, and therefore legal, effect of the Truck Association's suit is to challenge both the EPA and the SIP." *Id.* at 504, 507 (internal citation and quotation marks omitted).

The Court of Appeal erred by relying on *Dump Truck* because it is distinguishable in several material respects. First, notwithstanding the Court of Appeal's decision in this case, the Alliance's lawsuit does not in fact challenge California's SIP or the EPA's approval of the SIP insofar as it seeks a declaration that the Truck and Bus Regulation and the Verification Procedure, to the extent that they require DPF devices, are inconsistent with California's safety laws. App. A69-A70. The Court of Appeal's decision suggests that the Truck and Bus Regulation itself requires the installation of DPF devices. App. A6-A8. Not so. The provisions of the Truck and Bus Regulation cited by the Court of Appeal merely require that a VDECS be installed on diesel vehicles to which the Truck and Bus Regulation applies and define the term "diesel particulate filter." *See* Cal. Code Regs., tit. 13, § 2025(b), (d)(18), (d)(35), (d)(60), (e)-(g). Thus, contrary to the Court of Appeal, systems other than DPFs could satisfy the Truck and Bus Regulation's VDECS requirement.

Second, unlike in *Dump Truck*, 784 F.3d at 502, 507-08, where the plaintiff argued that the Truck and Bus Regulation was entirely preempted by federal law and invalid (thus "effectively eviscerat[ing] the SIP"), the Alliance is simply arguing that requiring California vehicles to be equipped with DPF devices under the Truck and Bus Regulation conflicts with California's safety laws. Finally, unlike in *Dump Truck*, where the plaintiff challenged an EPA-approved regulation in *federal* court based on *federal* law, this lawsuit is a *state* court challenge based on *state* law to the actions of a *state* agency. *See id.* Multiple federal appellate courts have held that state law challenges to a SIP may be brought in state court and are not

jurisdictionally preempted by 42 U.S.C. section 7607(b). To the extent that *Dump Truck* can be interpreted as running counter to this principle, it should be overruled.[4]

The Seventh Circuit Court of Appeals has squarely addressed whether state courts have jurisdiction over state law challenges to a state regulation included in an EPA-approved SIP under 42 U.S.C. section 7607(b), and, contrary to the Court of Appeal, it answered in the affirmative. In *Indiana & Michigan Electric Company v. EPA*, 509 F.2d 839, 844 (7th Cir. 1975), petitioners sought to invalidate the EPA's approval of a SIP, arguing that it was technologically and economically infeasible to comply with the SIP. The Seventh Circuit held that it lacked jurisdiction. *Id.* at 845. However, it recognized that petitioners could challenge the "reasonableness" of the underlying regulation in state court:

> [Petitioners] have a right to challenge the reasonableness of state plans in state courts, and as the respondent concedes, "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." [Citation.]

Id. at 847. The petitioners brought a new lawsuit in state court, and prevailed on the grounds that the promulgation of one underlying regulation, APC-13,

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[4] Petitioner joins in the analysis of *Dump Truck* outlined in Cody's concurrently filed Petition for Writ of Certiorari, and particularly in the conclusion that 42 U.S.C. § 7607(b)(1) in no way cuts off concurrent state court jurisdiction to review constitutional violations under state regulations.

violated an Indiana statute. *Indiana Environmental Management Bd. v. Indiana-Kentucky Elec. Corp.*, 181 Ind. App. 570, 571-72 (1979). Later, the Seventh Circuit held that the state's invalidation of APC-13 made it unenforceable in federal court:

> 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. Indiana-Kentucky Elec. Corp., 716 F.2d 1145, 1148 (7th Cir. 1983); *see also Clean Water Action Council of Northeastern Wis., Inc. v. EPA*, 765 F.3d 749, 751 (7th Cir. 2014) ("We conclude . . . that the venue and filing provisions of § 7607(b) are not jurisdictional.").

The Ninth Circuit reached the same conclusion in a similar context. In *Western Oil & Gas*, 633 F.2d at 813-14, the Ninth Circuit held that a state law challenge to an EPA-approved air quality regulation issued by CARB under a related statute could and should have been brought in state court. The Ninth Circuit "refuse[d] to compel the Administrator, on remand, to review the California designations for compliance with California law. State law must provide the remedy petitioners seek." *Id.* at 814. It elaborated:

> The petitioners do not explain why the State's submission of the attainment status designations to the EPA terminated any possibility of relief in the state courts. While §

> 7607 appears to provide the exclusive method for judicial review of the Administrator's promulgation, we see no reason why this should affect the petitioners' rights under state law to challenge the ARB's preparation of the area designations it submitted to the EPA. In fact, § 7407 specifically provides for the states' revision of their original attainment status lists. 42 U.S.C. § 7407(d)(5) (Supp.II 1978).

Id. at 814 n.14.

The Court of Appeal made an attempt to distinguish these cases on the grounds that *Sierra Club* involved a procedural challenge, which, in its view, made it applicable in "a very narrow context . . . not at issue here." App. A23-A24. But the cases themselves undermine that position. The Seventh Circuit did not hold that state courts may hear only procedural challenges; indeed, it never differentiated between procedural or substantive challenges for CAA purposes. The Ninth Circuit also declined to make such a distinction in *Western Oil & Gas*. Even Congress declined to make such a distinction in the text of 42 U.S.C. section 7607. The Court of Appeal does not, and cannot, explain why state procedural challenges should be treated differently than state substantive challenges. It does not even explain how this distinction should be applied as a practical matter, as – like substantive state law – many state procedural rules are established by the Legislature and go to the validity of the Regulation. To the extent that substantive or procedural challenges, " 'as a practical matter, challenge an [Agency's] final action,' " both categories of challenge do so equally. App. A17-A18 (quoting *Dump Truck*, 784 F.3d at 508 n.9).

The Court of Appeal refers to the Alliance's argument on this issue as "creative lawyering." App. A17. As a preliminary matter, since the Ninth Circuit's decision in *Dump Truck* issued after this lawsuit was filed and CARB failed to raise the jurisdictional argument at issue here until its Respondent's Brief, "creative lawyering" did not motivate the Alliance's position in this case. Furthermore, even if the Alliance were "practically challenging the Agency's approval of the Regulation," (App. A19), and had the "practical objective" of "invalidat[ing] and render[ing] unenforceable, in whole or in part, albeit on different grounds, a state regulation" (App. A5), as the Court of Appeal claimed, that is precisely what the Seventh Circuit approved in the *Sierra Club* cases and the Ninth Circuit invited in *Western Oil & Gas*.

In sum, the Court of Appeal misconstrued 42 U.S.C. section 7607 and undermined the comity and federalism interests that underlie the powerful presumption of general state court jurisdiction. The text of 42 U.S.C. section 7607 falls far short of being express and unmistakable enough to withdraw the jurisdiction of state courts to hear state law challenges to state regulations. Furthermore, the Court of Appeal's decision is in conflict with federal cases that directly address the CAA's state court consequences.

B. The Presumption of Jurisdiction in State Courts Is at Its Zenith Where Withdrawing Jurisdiction Would Permit an Agency to Evade Judicial Review, and the Court of Appeal Erred by Holding That CARB Had Overcome It

The Court of Appeal disregarded the strong presumption that it should not read a law as immunizing an agency's actions from judicial review. To immunize agency action from judicial review entirely, "the Legislature must have expressly so provided or otherwise clearly indicated such an intent." *Int'l Assn. of Fire Fighters, Local 188, AFL-CIO*, 51 Cal. 4th at 270-71; *see also Bowen*, 476 U.S. at 670-673 & n.3 (" 'The responsibility of enforcing the limits of statutory grants of authority is a judicial function; . . . [w]ithout judicial review, statutory limits would be naught but empty words.' ") (quoting B. Schwartz, *Administrative Law* (2d ed. 1984) § 8.1, p. 436). The Court of Appeal's reading of 42 U.S.C. section 7607(b) contradicts these principles.

For the same reasons that a challenge to the Truck and Bus Regulation under 42 U.S.C. section 7607(b) cannot be based on the federal constitution, as Cody explains in his separate Petition for Writ of Certiorari, a challenge to the Truck and Bus Regulation under 42 U.S.C. section 7607(b) cannot be based on its dissonance with state law. The EPA Administrator is not tasked with passing upon a state regulation's compliance with state law when approving it under 42 U.S.C. section 7410(a). As a result, the EPA Administrator's approval decision cannot be challenged on state law grounds in the Ninth Circuit under 42 U.S.C. section 7607(b).

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the Alliance respectfully requests that this Court grant its Petition for Certiorari. The Court of Appeal's decision is an unjustified intrusion into the rights of the states and an engraved invitation to CARB, the EPA, and state agencies throughout the nation to violate state law. The environmental values that the CAA is intended to protect are important, but the Court of Appeal's decision does far more than shield the Truck and Bus Regulation from lawsuits by stakeholders. It grants unrestrained and despotic power to respondent CARB, an arm of California's executive branch, by placing CARB regulations that conflict with state law beyond the reach of judicial review.[5] Neither the text, nor the purpose of the CAA, nor applicable precedent indicates that the CAA silently whisked away state courts' sovereign power to adjudicate whether regulations promulgated by state agencies violate or conflict with state law.

[5] Filing a challenge to a SIP in the Ninth Circuit based on an issue of state law would be an exercise in futility, for the reasons stated above. This Court should reaffirm the balance of power between state and federal courts, and confirm that state courts have the presumptive power to adjudicate state issues.

Respectfully submitted,

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

ALLIANCE FOR CALIFORNIA BUSINESS,

Petitioner,

v.

STATE AIR RESOURCES BOARD,

Respondent,

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Third Appellate District

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APPENDIX

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Court of Appeal, Third Appellate District – Nos. C082828, C083083

S249810

IN THE SUPREME COURT OF CALIFORNIA

En Banc

ALLIANCE FOR CALIFORNIA BUSINESS
Plaintiffs and Appellants,

v.

STATE AIR RESOURCES BOARD,
Defendant and Respondent

JACK CODY,
Plaintiffs and Appellants,

v.

STATE AIR RESOURCES BOARD ET AL.
Defendant and Respondent

The petitions for review are denied.

CANTIL-SAKAUYE
Chief Justice

Court of Appeal, Third Appellate District
Andrea K. Wallin-Rohmann, Clerk
Electronically FILED on 5/29/2018 by D. Welton,
Deputy Clerk

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Glenn)
(Sacramento)

No. C082828
(Super. Ct. No. 13CV01232)

No. C083083
(Super. Ct. No. 34201580002116CUWMGDS)

ALLIANCE FOR CALIFORNIA BUSINESS
Plaintiffs and Appellants,

v.

STATE AIR RESOURCES BOARD,
Defendant and Respondent

JACK CODY,
Plaintiffs and Appellants,

v.

STATE AIR RESOURCES BOARD ET AL.
Defendant and Respondent

APPEAL from a judgment of the Superior Court of Glenn County, Peter B. Twede, Judge. Affirmed.

Cannata, O'Toole, Fickes & Almazan, Therese Y. Cannata, Mark P. Fickes, and Zachary Colbeth for Plaintiff and Appellant Alliance for California Business.

Xavier Becerra, Attorney General, Robert W. Byrne, Senior Assistant Attorney General, Russell B. Hildreth and Nicholas Stern, Deputy Attorneys General for Defendants and Respondents State Air Resources Board.

APPEAL from a judgment of the Superior Court of Sacramento County, Timothy M. Frawley, Judge. Affirmed.

The Cullen Law Firm, Daniel E. Cohen and Noah M. Rich; Brian Leighton Law Offices and Brian Leighton for Plaintiff and Appellant, Jack Cody.

Xavier Becerra, Attorney General, Robert W. Byrne, Senior Assistant Attorney General, Randy L. Barrow, Linda Gandara, Courtney S. Covington, and Carolyn Nelson

Rowan, Deputy Attorneys General for Defendants and Respondents State Air Resources Board.

We consolidated these cases to address 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.) (Act). The Act authorizes the United States Environmental Protection Agency (Agency) to promulgate national primary and secondary ambient air quality standards. (*Id*., §§ 7408, 7409.) States, however, have the "primary responsibility for assuring air quality" and must each devise, adopt, and implement a state implementation plan (SIP) specifying how the state will achieve and maintain the national air quality standards. (*Id.*, § 7407(a).) The SIP is submitted to the Agency's administrator (Administrator) for

approval. (*Id.*, § 7410(a)(1), (a)(3)(B).) Once approved by the Administrator and codified in the Code of Federal Regulations, the SIP becomes federal law and may be enforced "by either the State, the [Agency], or via citizen suits." (*Bayview Hunters v. Metropolitan Transp.* (9th Cir. 2004) 366 F.3d 692, 695; *California Dump Truck Owners Ass'n. v. Nichols* (9th Cir. 2015) 784 F.3d 500, 503 (*Dump Truck*).)

The cases here seek the same relief and practical objective -- to invalidate and render unenforceable, in whole or in part, albeit on different grounds, a state regulation known as the Truck and Bus Regulation[1] (Regulation), which was approved by the Administrator as part of and incorporated into California's SIP. Plaintiff Jack Cody argues the Regulation violates the dormant commerce clause of the United States Constitution because it discriminates against out-of-state truckers by imposing a disproportionate compliance burden on them. Plaintiff Alliance for California Business[2] (Alliance) argues the Regulation is unlawful because part of its mandate conflicts with state and federal safety laws. Defendants, including the California Air Resources Board (Board), raised lack of subject matter jurisdiction under section 307(b)(1)[3] of the Act in both cases on appeal.[4]

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[1] "Regulation to Reduce Emissions of Diesel Particulate Matter, Oxides of Nitrogen and Other Criteria Pollutants, from In-Use Heavy-Duty Diesel-Fueled Vehicles." (Cal. Code Regs., tit. 13, § 2025.)

[2] Alliance confusingly uses variations of its name in its briefing. We use the name identified in its notice of appeal.

[3] All subsequent references to section 307(b)(1) shall be to that section in the Act. Section 307(b)(1) is codified at section 7607(b)(1) of title 42 of the United States Code.

[4] While the *Alliance* defendants did not raise it in the trial court, lack of subject matter jurisdiction may be raised for the first time on appeal. (*People v. Lara* (2010) 48 Cal.4th 216, 225.)

The pertinent question is a discrete issue of statutory interpretation: whether section 307(b)(1) vests exclusive and original jurisdiction over these challenges to the Regulation incorporated into and approved as part of California's SIP in the Ninth Circuit Court of Appeals. We conclude it does and affirm the judgments for lack of jurisdiction.

GENERAL BACKGROUND

To assist in a better understanding of the factual and procedural background of these cases and the discussion that follows, we begin with the general background of the regulatory framework underlying the Act and its jurisdictional provisions.

I

Regulatory Framework And Background

The Act "sets forth a cooperative state-federal scheme for improving the nation's air quality." (*Vigil v. Leavitt* (9th Cir. 2004) 381 F.3d 826, 830.) The Agency establishes the national air quality standards and the states devise, adopt, and implement a SIP to satisfy those standards. (*Ibid*.) The Board is the state agency responsible for carrying out this federal mandate in California. (Health & Saf. Code, § 39602.) SIP's evolve over time to account for new national air quality standards and emissions reduction technologies. (See 42 U.S.C. § 7410(a)(2)(H).)

The Administrator is required to approve the state's SIP submission if it complies with the provisions of the Act and applicable federal regulations. (42 U.S.C. § 7410(k); 40 C.F.R. § 52.02(a) (2017).) Among other things, the SIP must contain "enforceable emission limitations and other control measures, means, or techniques . . . as well as schedules and timetables for compliance," and provide "necessary assurances that the State . . . will have adequate personnel, funding, and authority

under State (and, as appropriate, local) law to carry out such implementation plan (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)(A), (E).)

In May 2011, the Board submitted the Regulation to the Agency for inclusion in California's SIP. (76 Fed.Reg. 40652, 40653 (July 11, 2011).) The Board had adopted the Regulation in 2008 to help California meet the national standards for fine particulate matter and ozone. (Cal. Code Regs., tit. 13, § 2025, subd. (a); *Dump Truck*, *supra*, 784 F.3d at p. 503.) The Regulation generally sets forth stated deadlines by which certain diesel vehicles operating in California must be retrofitted with diesel particulate filters[5] or upgraded to newer model engines with those filters. (Cal. Code Regs., tit. 13, § 2025, subds. (b), (d)(18), (d)(35), (d)(60), (e)-(g); 76 Fed.Reg., *supra*, at pp. 40654-40655.) The filters are verified by the Board, as required by the Regulation, pursuant to the Verification Procedure,[6] which sets forth the procedures and requirements for manufacturers to obtain verification of their filters. (Cal. Code Regs., tit. 13, § 2025, subd. (d)(18), (d)(35), (d)(60) & §§ 2700-2711.)

On July 11, 2011, the Agency published a proposed rule to approve California's request to incorporate the Regulation and other regulations into its SIP. (76 Fed.Reg., *supra*, at p. 40652.) The Agency

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[5] A diesel particulate filter is a highest level verified diesel emission control strategy (also known as "Highest level VDECS") to reduce diesel particulate emissions required by the Regulation for retrofitting pre-2007 engines. (Cal. Code Regs., tit. 13, § 2025, subds. (d)(18), (d)(35), (d)(60), (e)-(g).)

[6] "Verification Procedure, Warranty and In-Use Compliance Requirements for In-Use Strategies to Control Emissions from Diesel Engines." (Cal. Code Regs., tit. 13, §§ 2700-2711.)

explained the requirements and key concepts of the Regulation, including the requirements relating to the filters verified pursuant to the Verification Procedure. (*Id*. at pp. 40654-40656.) As part of its analysis, the Agency discussed the enforceability of the Regulation and found the state has adequate legal authority to implement the regulations. (*Id*. at pp. 40658-40659.) It further determined it "kn[e]w of no obstacle under Federal or State law in [the Board's] ability to implement the regulations." (*Id*. at p. 40658.)

On April 4, 2012, the Agency issued its final rule approving the Board's SIP submission, noting it received no comments on its proposed rule. (77 Fed.Reg. 20308-20314 (Apr. 4, 2012).) The Regulation was incorporated into California's SIP by reference. (40 C.F.R. § 52.220(c)(410) (2017).) In the final rule notice, the Agency reiterated the basis it used to evaluate the Regulation, including its determination that the state provided the necessary assurances required under the Act. (77 Fed.Reg., *supra*, at p. 20311.)

II

The Jurisdictional Statute

Section 307(b)(1) provides, in pertinent 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).) The petition "shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection

shall be filed within sixty days after such grounds arise." (*Ibid.*)

Section 307(b)(2) of the Act[7] states, in part, that an "[a]ction of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement." (42 U.S.C. § 7607(b)(2).) Further, section 307(e) of the Act[8] provides "[n]othing in this Act shall be construed to authorize judicial review of regulations or orders of the Administrator under this Act, except as provided in this section." (42 U.S.C. § 7607(e).)

PROCEDURAL AND FACTUAL BACKGROUND

I

Alliance

Alliance promotes business interests throughout California. Its membership includes truck owners and operators subject to the Regulation. Alliance sued the Board and its chair, executive officer, and board members in Glenn County Superior Court claiming safety concerns with the installation and use of the filters. After several law and motion rulings, Alliance's complaint was limited to a single cause of action for declaratory relief.

Alliance alleged the controversy concerns the "legality [of the Regulation], as designed, approved, and implemented by defendants," and that its members would suffer irreparable harm if the Regulation is implemented and enforced because they would be "forced to install an unproven, defective and dangerous technology, to wit the [filter]

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[7] All subsequent references to section 307(b)(2) shall be to that section in the Act. Section 307(b)(2) is codified at section 7607(b)(2) of title 42 of the United States Code.

[8] All subsequent references to section 307(e) shall be to that section in the Act. Section 307(e) is codified at section 7607(e) of title 42 of the United States Code.

device" or suffer fines, penalties, and lost revenue due to the inability to operate their trucks in California. In its request for relief, Alliance sought a declaration that the continued enforcement of the Regulation and Verification Procedure, in whole or in part, with respect to the filter requirement would place Alliance members "in the position of violating California public health and safety laws." It further sought an injunction prohibiting enforcement of the Regulation and the Verification Procedure "in their entirety, or at least as to the current [filter] device requirements."

Defendants filed a motion for judgment on the pleadings on two grounds: (1) the complaint failed to state facts sufficient to constitute a cause of action because subdivision (q)(5) of the Regulation provides a procedure by which an owner or operator of a diesel truck subject to the retrofit requirement may receive an exemption upon a showing that installation of a verified filter would violate state and federal health and safety laws; and (2) the court lacked jurisdiction because Alliance's members failed to exhaust their administrative remedies under subdivision (q)(5) of the Regulation prior to filing suit.

The court granted defendants' motion, finding Alliance failed to state a legally sufficient cause of action because the Regulation and Verification Procedure, "by their express terms," negate the allegations in the complaint and do not place Alliance's members in the position of violating health and safety laws. The court further found the truck owners and operators could obtain an extension of the retrofit deadline following an administrative determination that the filter cannot be installed safely or that it violates health and safety laws.

The court entered judgment in favor of the defendants. Alliance appeals.

II

Cody

Cody is an out-of-state professional truck driver who was issued a citation in October 2014 for operating a truck in California without a filter, in violation of the Regulation. This is Cody's fourth legal proceeding arising out of the citation and his fourth attempt to invalidate the Regulation for violation of the dormant commerce clause. Having failed in his original choice of venue, federal district court and the Ninth Circuit, and then in Sacramento Superior Court, he now brings this matter before us on appeal.

A

Federal Challenges

In 2014, Cody joined a suit by the Owner-Operator Independent Drivers Association, Inc. (OOIDA) and individual truck owner-operators against the Board to invalidate the Regulation, filed in the Eastern District of California. (*OOIDA v. Corey* (E.D. Cal. July 9, 2015, No. 2:14-CV-00186-MCE-AC) 2015 WL 4164649.) OOIDA and the individual truck owner-operators asserted a facial challenge on dormant commerce clause grounds, and Cody asserted an "as-applied" challenge on the same grounds. The Board filed a motion to dismiss for lack of jurisdiction, arguing, among other things, section 307(b)(1) vests exclusive jurisdiction over such claims in the Ninth Circuit and the case could not proceed absent joinder of the Agency, a necessary and indispensable party. (*OOIDA v. Corey*, *supra*, 2015 WL 4164649 at p. *5.)

The district court found the facial and as-applied challenges implicated the Agency's final action approving the Regulation as part of California's SIP and, therefore, under section 307(b)(1), the claims fell within the original and exclusive jurisdiction of

the Ninth Circuit. (*OOIDA v. Corey*, *supra*, 2015 WL 4164649 at p. *5, incorporating *OOIDA v. Corey* (E.D. Cal. Oct. 29, 2014, No. 2:14-CV-00186-MCE-AC) 2014 WL 5486699 at pp. *5-*6.) While the court dismissed the facial challenge by OOIDA and the individual truck owner-operators, [9]it transferred Cody's as-applied claim to the Ninth Circuit instead of dismissing it. The court did so because it was unclear whether Cody's claim was time-barred by the 60-day limit in section 307(b)(1) (Cody filed his claim approximately 42 days after issuance of the citation), and "because the complicated interplay of state and federal law raised unique jurisdictional questions in this procedural posture." (*OOIDA v. Corey*, *supra*, 2015 WL 4164649 at p. *6.)

Following the transfer to the Ninth Circuit, the Board moved to dismiss the claim for lack of jurisdiction based on the 60-day statute of limitations in section 307(b)(1). The Board argued Cody's challenge existed when the Agency approved the Regulation as part of the SIP and Cody raised no facts indicating his claim was based solely on grounds arising after the 60-day time frame. The Agency joined in the action and filed a motion to dismiss as well.

On January 27, 2016, the Ninth Circuit granted the motions to dismiss. The order did not include an opinion, but the court cited to section 307(b)(1) and its prior *Dump Truck* decision. In *Dump Truck*, the Ninth Circuit held that section 307(b)(1) vested exclusive jurisdiction over a constitutional

[9] OOIDA appealed the dismissal of its claims to the Ninth Circuit. The Ninth Circuit affirmed the district court's judgment because, " 'as a practical matter,' " the suit challenged the Administrator's final action in approving the Regulation as part of the SIP. (*OOIDA v. Corey* (9th Cir. 2017) 690 Fed.Appx. 479, 480.)

preemption claim seeking to invalidate the Regulation (following its approval as part of the SIP) in the Ninth Circuit. (*Dump Truck*, *supra*, 784 F.3d at pp. 502-504.)

B

State Challenges

On June 23, 2015, while the district court case was pending, Cody filed a petition for writ of mandate and complaint for declaratory relief against the Board, the Board's chair and executive officer, and the secretary for environmental protection in the California Environmental Protection Agency in Sacramento County Superior Court.[10] Cody's petition again challenged the October 7, 2014, Board citation. Cody had previously appealed the citation to the Board, requesting a hearing to introduce evidence that the citation was unconstitutional. The Board responded that the citation was issued correctly and the regulation "has been approved and is the law of the land in California." The Board further stated that "all citations issued are within the authority vested by the [Agency]."

Cody alleged the Regulation violates the dormant commerce clause because it disproportionately burdens out-of-state truckers and improperly regulates interstate commerce. He requested an order declaring the Regulation unconstitutional "on its face and/or as applied" and prohibiting the Board from enforcing the Regulation against him and "other similarly situated interstate truck owner-operators." Defendants filed a motion for judgment on the pleadings for lack of jurisdiction, asserting the Ninth Circuit has exclusive jurisdiction over Cody's claims under section 307(b)(1). Cody opposed the

[10] Cody was not "haled into state court for a violation of state law," as he asserts. Cody is the plaintiff.

motion, arguing state court jurisdiction was appropriate because he was asserting the constitutional claim as a defense to prosecution.

The trial court agreed with the defendants and granted the motion. Relying on *Dump Truck*, the court explained that, "[d]ue to the [Agency's] approval of the Regulation as part of California's SIP, [Cody's] complaint effectively challenges the validity of the SIP, and therefore is the type of action to which section 307(b)(1) of the [Act] applies." Cody appeals.

DISCUSSION

I

Standard Of Review

The lack of subject matter jurisdiction cannot be waived and may be raised at any time, even for the first time on appeal. (*People v. Lara*, *supra*, 48 Cal.4th at p. 225; *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 372.) Where the evidence is undisputed, subject matter jurisdiction is a legal question subject to de novo review. (*Dial 800 v. Fesbinder* (2004) 118 Cal.App.4th 32, 42.) Additionally, statutory interpretation is a question of law subject to de novo review. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 311.)

II

The Ninth Circuit Has Exclusive Jurisdiction Over These Cases

A

Where Section 307(b)(1) Applies, It Confers Exclusive Jurisdiction

The initial question is whether section 307(b)(1) grants the federal circuit courts of appeals original and exclusive jurisdiction over the actions enumerated therein. It does.

State courts are generally presumed to have concurrent jurisdiction with federal courts, subject to

the limitations of the supremacy clause of the United States Constitution. (*Burt v. Titlow* (2013) 571 U.S. 12, 19 [187 L.Ed.2d 348, 355].) This "presumption arises when the jurisdictional provision in question is silent as to the jurisdiction of state courts." (*Kingston Constructors, Inc. v. Washington Metropolitan Area Transit Authority* (1997) 14 Cal.4th 939, 948, italics omitted.) "Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly." (*Gulf Offshore Co. v. Mobil Oil Corp.* (1981) 453 U.S. 473, 478 [69 L.Ed.2d 784, 791].) Thus, where the presumption arises, it "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." (*Ibid.*)

While section 307(b)(1) is silent regarding the jurisdiction of state courts, the express language of the statute rebuts the presumption of concurrent jurisdiction. As in any case of statutory interpretation, we look to the words Congress used and give them their usual and ordinary meaning. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192.)

Here, the statute provides that the Administrator's approval of a SIP submission "may be filed *only in* the United States Court of Appeals for the [appropriate circuit]." (42 U.S.C. § 7607(b)(1), italics added.) "Only" means "solely" or "exclusively." (Merriam-Webster's Collegiate Dict. (11th ed. 2006) p. 867; cf. *Mims v. Arrow Financial Servs., LLC* (2012) 565 U.S. 368, 380 [181 L.Ed.2d 881, 895] [state jurisdiction not exclusive because statute did not provide action could be brought " 'only' in state court, or 'exclusively' in state court"].) Further, section 307(e) explicitly precludes judicial review except as provided in the Act. (42 U.S.C. § 7607(e).)

Thus, by the plain language of the statute, federal courts of appeals have original and exclusive jurisdiction over challenges to the Agency's actions enumerated in the statute.

Our conclusion is supported by the Supreme Court's interpretation of an analogous jurisdictional statute -- section 509(b)(1) of the federal Clean Water Act. Section 509(b)(1) of the Clean Water Act provides that challenges to seven categories of Agency action "may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person."[11] (33 U.S.C. § 1369(b)(1).) The Supreme Court found this jurisdictional statute vests original and exclusive jurisdiction over challenges to the seven categories of Agency action in the federal courts of appeals. (*Nat'l Ass'n of Mfrs. v. DOD* (2018) ___ U.S. ___ [199 L.Ed.2d 501, 512], citing *Decker v. Northwest Environmental Defense Center* (2013) 568 U.S. 597, 608 [185 L.Ed.2d 447, 458].) The directive found in section 307(b)(1) is even more explicit than the directive in section 509(b)(1) of the Clean Water Act, because it contains the "only in" language.

B

The Cases Fall Within Section 307(b)(1)'s Jurisdictional Mandate

We next evaluate whether Cody's and Alliance's claims are of the type Congress intended to channel to the federal courts of appeals. Relying on the sound

[11] Notably, section 307(b)(2) and section 509(b)(2) of the Clean Water Act have identical preclusion-of-review provisions, which mandate that any agency action reviewable under their respective preceding subdivisions (b)(1) "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." (42 U.S.C. § 3607(b)(2); 33 U.S.C. § 1369(b)(2).)

principles of statutory interpretation, we find they are subject to the jurisdictional mandate. The Act'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' " intent to preclude state court review in these cases. (*Thunder Basin Coal Co. v. Reich* (1994) 510 U.S. 200, 216 [127 L.Ed.2d 29, 43].)[12]

Cody and Alliance argue the jurisdictional mandate does not apply because they are challenging the validity and enforceability of the Regulation as a matter of state law -- not the SIP or the Agency's approval of the Regulation as part of the SIP. However, semantics do not inform our jurisdictional inquiry. Our analysis turns on the *effect* of their requested relief[13] and not on how Cody and Alliance chose to *frame* their challenges to the Regulation. Otherwise creative lawyering could override congressional intent, a result not permitted by law.

We agree with all pertinent federal appellate decisions that 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." (*Dump*

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[12] Notably, where it is unclear whether review jurisdiction falls within the statute's exclusive jurisdiction, ambiguity is resolved in favor of the jurisdictional mandate. (*General Elec. Uranium v. Dept. of Energy* (D.C. Cir. 1985) 764 F.2d 896, 903.)

[13] In evaluating subject matter jurisdiction, we focus on the claims for relief in the context of the allegations in the complaint. (2 Lambden at al., Cal. Civ. Practice (2008) Jurisdictional Effect, § 8:3, citing 2 Witkin, Cal. Procedure (4th ed.) Jurisdiction, §§ 22 to 31 ["The demand for relief is also used, in conjunction with the rest of the complaint, to determine whether an action has been filed in the appropriate jurisdiction"].)

Truck, *supra*, 784 F.3d at p. 507, italics added; *U.S. v. Ford Motor Co.* (6th Cir. 1987) 814 F.2d 1099, 1103 [invalidation of SIP may only occur in federal appellate courts]; *Com. of VA. v. U.S.* (4th Cir. 1996) 74 F.3d 517, 522 [plaintiff could not circumvent direct review in federal appellate court by framing its complaint as a constitutional challenge to the Act]; *State of MO. v. U.S.* (8th Cir. 1997) 109 F.3d 440, 441 [same].) Section "307(b)(1) channels review of final [Agency] action exclusively to the courts of appeals, regardless of how the grounds for review are framed." (*Com. of VA.*, at p. 523.)

We find *Dump Truck* particularly persuasive because like Cody's and Alliance's requests for relief here, the plaintiff in that case sought to render the Regulation invalid and unenforceable. The *Dump Truck* plaintiff sought such relief on the basis that the Regulation was preempted by the Federal Aviation Administration Authorization Act and thus violated the supremacy clause of the United States Constitution. (*Dump Truck*, *supra*, 784 F.3d at p. 503.) The plaintiff raised the same argument Cody and Alliance asserts here: "because it [wa]s challenging only the Regulation and not the SIP, § 307(b)(1) [did] not apply." (*Dump Truck*, at p. 505.) The Ninth Circuit disagreed.

The Ninth Circuit reviewed the scope of section 307(b)(1) and, relying on, among other cases, *Com. of VA.*, and *State of MO.*, determined the plaintiff's suit, "as a practical matter, challenge[d] the [Agency's] approval of a provision of California's SIP," subjecting it to the jurisdictional mandate. (*Dump Truck*, *supra*, 784 F.3d at pp. 505-507.) The court explained that "the SIP's effectiveness in attaining the [Agency's national air quality standards] is directly tied to its enforcement by [the Board], and would be vitiated if such enforcement were enjoined."

(*Id.* at p. 508.) Moreover, the constitutional claim "effectively challeng[ed] the [Agency's] determination that federal law does not prohibit the Regulation." (*Id.* at p. 507.) Thus, "the practical, and therefore legal, effect of the [plaintiff]'s suit [wa]s to challenge both the [Agency] and the SIP." (*Ibid.*) Accordingly, the plaintiff's suit had to be brought in the Ninth Circuit.

The *Dump Truck* decision and analysis are well-grounded in statutory interpretation, logic, and policy. We cannot divorce the Regulation from the Agency's SIP approval; the Regulation and SIP are inextricably intertwined. As a practical matter, if a California court invalidates the Regulation on substantive grounds, it would amount to an implicit repeal of the Agency's approved SIP because the Regulation is incorporated into the SIP by reference only. (40 C.F.R. § 52.220(c)(410).) Such a repeal would invalidate the Administrator's approval of California's SIP in state superior court rather than federal appellate court, rendering section 307(b)(1)'s exclusive jurisdiction mandate superfluous. We avoid statutory constructions that render words, phrases, or clauses superfluous. (*Klein v. United States of America* (2010) 50 Cal.4th 68, 80-81.)

Further, by seeking to enjoin the Board from enforcing the Regulation, Cody and Alliance are practically challenging the Agency's approval of the Regulation because the Board is enforcing the Regulation under the authority conferred upon it by the Act and the Administrator's approval of the Regulation as part of the SIP. (76 Fed.Reg., *supra*, at pp. 40658-40659; *Bayview Hunters v. Metropolitan Transp.*, *supra*, 366 F.3d at p. 695.) Indeed, in response to Cody's appeal of the citation, the Board responded, "all citations issued are within the authority vested by the [Agency]." Accordingly, we

again cannot divorce the Board's enforcement of the Regulation from its enforcement of the SIP.

To distinguish *Dump Truck*, the plaintiffs focus on the substance of their claims. Alliance argues section 307(b)(1) does not apply to state law claims. Cody argues his constitutional challenge does not implicate section 307(b)(1) because the Agency did not expressly opine on the commerce clause implications of the Regulation in its rulemaking, as compared to its express consideration of the preemption argument raised in *Dump Truck*. We are not persuaded. Section 307(b)(1) does not distinguish between or discuss the substantive grounds upon which a claim is jurisdictional. (See *State of MO. v. U.S.*, *supra*, 109 F.3d at p. 441 [the Act "makes no distinction between constitutional challenges and other challenges"].) Rather, section 307(b)(1) focuses on the effect of the claim. We do not insert what has been omitted or omit what has been inserted in a statute. (Code Civ. Proc., § 1858.) The substantive claims here directly challenge the Administrator's determination that the state has adequate legal authority to implement the regulations, triggering section 307(b)(1). (76 Fed.Reg., *supra*, at pp. 40658-40659.)

Moreover, exclusive jurisdiction to review administrative determinations includes jurisdiction over related legal issues pertaining to those decisions. (*Palumbo v. Waste Technologies Industries* (4th Cir. 1993) 989 F.2d 156, 161; *Connors v. Amax Coal Co., Inc.* (7th Cir. 1988) 858 F.2d 1226, 1231; accord *Media Access Project v. FCC* (D.C. Cir. 1989) 883 F.2d 1063, 1067-1068.) Even though the Agency did not expressly address the safety laws raised by Alliance or the commerce clause argument raised by Cody, such legal issues are surely related to the Agency's determination regarding enforceability and

adequate legal authority. Thus, such legal issues fall within the exclusive jurisdiction of the Ninth Circuit.

Our conclusion also furthers congressional intent. Our primary task in statutory interpretation "is to determine [Congress's] intent, giving effect to the law's purpose." (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037.) We construe the language in the context of the entire statutory frame work, with consideration given to the policies and purposes of the statute. (*Jones v. Superior Court* (2016) 246 Cal.App.4th 390, 397.)

The policies and purposes underlying the exclusive jurisdiction mandate of section 307(b)(1) are expediency and finality. "Congress wanted speedy review of [Agency] rules and final actions in a single court." (*Com. of VA. v. U.S.*, *supra*, 74 F.3d at p. 525; see *Harrison v. PPG Industries, Inc.* (1980) 446 U.S. 578, 593 [64 L.Ed.2d 525, 538] ["The most obvious advantage of direct review by a court of appeals is the time saved compared to review by a district court, followed by a second review on appeal"].) As our Supreme Court noted, exclusive federal jurisdiction also serves the distinct goal of promoting uniformity in the interpretation and application of those laws to which it applies. (*Cianci v. Superior Court* (1985) 40 Cal.3d 903, 913.)

Allowing Cody and Alliance to proceed with their cases in state court would undermine these policy objectives. The cases would proceed in different venues in state superior court and would then be subject to appeal in the court of appeal and possibly our Supreme Court. At the same time, others could pursue similar challenges to the Regulation in other state venues and in the Ninth Circuit (in accordance with *Dump Truck*), creating substantial potential for inconsistent judgments. As the Ninth Circuit

explained in *Dump Truck*: "This would frustrate Congress's goal of having prompt and final review of decisions regarding SIPs." (*Dump Truck*, *supra*, 784 F.3d at p. 511.) It would also undercut a major basis for the Act's jurisdictional scheme: " 'the concern for judicial economy; *to wit*, the risk of duplicative or piecemeal litigation, and the risk of contradictory decisions.' " (*Com. of VA. v. U.S.*, *supra*, 74 F.3d at p. 525.)

These concerns are amplified by the Agency's absence in these cases. The pending litigation would decide whether the Agency-approved Regulation violates the federal Constitution and state and federal safety laws, and whether the SIP's primary enforcement mechanism is, in fact, unenforceable. Thus, the Agency certainly has a concrete interest in the lawsuits and its rights could be affected by a judgment in either case. However, Congress did not waive the Agency's sovereign immunity and, therefore, it cannot be joined as a party to these state court actions. (See *United States v. Nordic Village* (1992) 503 U.S. 30, 33-34 [117 L.Ed.2d 181, 187-188].) Applying section 307(b)(1) to state challenges to the Administrator's SIP determinations under the Act ensures the Agency's interests and rights are protected because such challenges would be brought in federal court where the Agency may be joined.

We find none of Cody's or Alliance's remaining arguments availing. First, Alliance attempts to distinguish its claims from those in *Dump Truck* by arguing it is not seeking to "completely" invalidate the Regulation, but merely challenging "*how* the regulation is implemented by [the Board] and to the narrow issue of why the verified [filter] devices, at this time, have proven to be unsafe, and therefore conflict with other public safety laws; as such, members of the Alliance should not be mandated to

employ the [filter] technology." This argument belies the allegations in its complaint and appellate opening brief, wherein Alliance requests a declaration that the Regulation is invalid and unenforceable in whole or in part.

Cody and Alliance, like the plaintiff in *Dump Truck*, also rely on *Sierra Club v. Indiana-Kentucky Elec. Corp.* (7th Cir. 1983) 716 F.2d 1145 for the proposition that a challenge to a SIP-approved state regulation is not confined to exclusive jurisdiction in the federal courts of appeals. (*Dump Truck*, *supra*, 784 F.3d at p. 509.) As the Ninth Circuit pointed out, while *Sierra Club* stands for this proposition, it does so in a very narrow context relating to procedural challenges on state law grounds, which was not at issue in *Dump Truck* and is not at issue here. (*Dump Truck*, at p. 509.) The Seventh Circuit explained the narrowness of its determination, stating that "[o]nce a plan is adopted by the state and it *withstands any subsequent procedural challenge*, then § [307(b)(1)] provides that invalidation may occur only in the federal appellate courts." (*Sierra Club*, at p. 1152.) Accordingly, *Sierra Club* supports our conclusion here.

The feasibility and waiver cases upon which Cody relies are also inapplicable. The Administrator is not required to consider economic or technologic feasibility when approving a SIP. (*Indiana & Mich. Elec. Co. v. Environmental Pro. Agcy.* (7th Cir. 1975) 509 F.2d 839, 843-844; *Buckeye Power, Inc. v. Environmental Protection Agcy.* (6th Cir. 1973) 481 F.2d 162, 173 ["petitioners are not entitled to raise their claims of high cost-benefit, technological infeasibility and resource unavailability prior to the Administrator's approval of the state plans"].) Therefore, because feasibility claims do not fall within the jurisdiction of section 307(b)(1), they are

not subject to the preclusion-of-review provision of section 307(b)(2) and may be asserted as a defense in federal or state enforcement proceedings. (*Indiana & Mich. Elec. Co.*, at p. 844; *Buckeye Power*, *Inc.*, at p. 173.) In contrast to the feasibility cases, the Regulation's enforceability and the Board's legal authority to implement the Regulation are express factors applicable to the SIP approval process, and thus claims are subject to section 307(b)(1) and section 307(b)(2).**14** (42 U.S.C. § 7410(a)(2)(A), (E).)

The "waiver" cases (*Motor and Equipment Mfrs. Ass'n, Inc. v. E. P. A.* (D.C. Cir. 1979) 627 F.2d 1095; *Am. Trucking Ass'ns v. EPA* (D.C. Cir. 2010) 600 F.3d 624) do not arise within the context of SIP approvals either. Section 209 of the Act "requires the [Administrator] to waive federal preemption of motor vehicle emission control regulations for the State of California unless he makes certain findings that a waiver is inappropriate." (*Motor and Equipment Mfrs. Ass'n, Inc.*, at p. 1100.) Challenges to the Administrator's waiver decision are brought pursuant to the federal Administrative Procedure Act (5 U.S.C. § 551 et seq.) and not section 307(b)(1). (*Motor and Equipment Mfrs. Ass'n, Inc.*, at pp. 1105-1106.) Therefore, the waiver cases do not inform our interpretation of section 307(b)(1).

Finally, our interpretation does not violate due process, as Cody contends. Cody argues it is "a fundamental principle of administrative law" that he be permitted to raise his constitutional challenge as a defense in the Board's enforcement proceeding. He hyperbolically asserts "the trial court gave away, wholesale, the authority of every Superior Court judge in this state to vindicate the basic right to defend oneself in civil or criminal enforcement proceedings." The trial court did not draft the statute, it merely applied it. Because Cody's

constitutional challenge was subject to review under section 307(b)(1), the express preclusion-of-review provision of section 307(b)(2) applies. (42 U.S.C. § 7607(b)(2) [any "[a]ction of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement"].)

This preclusion-of-review provision does not foreclose all meaningful judicial review. Section 307(b)(1) expressly provides that an action may be brought more than 60 days after the SIP's approval if it "is based solely on grounds arising after such sixtieth day." (42 U.S.C. § 7607(b)(1).) "[R]estricting judicial review of [an] administrative determination to a single court" does not offend due process "so long as it affords to those affected a reasonable opportunity to be heard and present evidence." (*Yakus v. United States* (1944) 321 U.S. 414, 433 [88 L.Ed. 834, 853].) Cody had his day in court when the Ninth Circuit considered whether his constitutional claim was subject to the 60-day statute of limitations. The Ninth Circuit found it was. An appeal from that decision does not lie in state court.

C

Alliance's Verification Procedure Allegations Do Not Independently Support Its Declaratory Relief Cause Of Action

Alliance acknowledges the Verification Procedure imposes no requirements on truck drivers; it merely imposes requirements on manufacturers seeking to verify their filters under the Regulation. It claims, however, the Verification Procedure impacts truck drivers because the Verification Procedure conflicts with public safety laws and truck drivers are then required under the Regulation to install unsafe verified filters.

A declaratory relief action requires an actual controversy relating to the legal rights and duties of the respective parties. (Code Civ. Proc., § 1060.) Alliance's alleged controversy flows from the Regulation, not from the Verified Procedure. But for the Regulation, there would be no controversy to support a declaratory relief cause of action relating to the Verification Procedure because: (1) the Verification Procedure does not impose *any* requirements on Alliance or its members (i.e., truck drivers) (Cal. Code Regs., tit. 13, §§ 2700-2711); and (2) Alliance's claims regarding the Verification Procedure relates to the Verification Procedure "as a critical component of effective implementation of the [Regulation]." Therefore, Alliance's allegations regarding the Verification Procedure merely support its challenge to the Regulation, and are not independent grounds to give rise to a declaratory relief cause of action.

Moreover, the Agency approved the Regulation's requirements that the filters be verified pursuant to the Verification Procedure as part of its SIP approval. (76 Fed.Reg., *supra*, at p. 40654.) Therefore, a challenge to this requirement in the Regulation is subject to the jurisdictional mandate of section 307(b)(1) as well.

DISPOSITION

The judgments are affirmed for lack of subject matter jurisdiction. Respondents shall recover their respective costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

Robie, J.

We concur:

Raye, P. J

Duarte, J.

FILED
MAR 07 2016
GLENN COUNTY
CEO/CLERK OF THE SUPERIOR COURT
BY PRISCILLA BUTLER, Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

ALLIANCE FOR CALIFORNIA BUSINESS,
Plaintiff

v.

CALIFORNIA AIR RESOURCES BOARD, et al.
Defendants

Case No. 13CV01232

ORDER ON MOTION FOR JUDGMENT ON THE PLEADINGS

The Third Amended Complaint ("TAC") filed by Alliance for California Business ("ACB"), as modified by the Ruling on Motion to Strike filed June 15, 2015, challenges the legality of two regulations adopted by the California Air Resources Board ("CARB") to reduce emissions of particulate matter (PM) and nitrogen oxides ("NOx") from diesel trucks and buses. Specifically, the TAC alleges that CARB's Truck and Bus Regulation (Cal. Code Regs. , tit. 13, § 2025) creates public safety risks by requiring each owner of a truck operating on California roads with a diesel engine earlier than 2007 to retrofit the truck with a diesel particulate filter ("DPF") that has been verified as a diesel emission control strategy ("VDECS") under CARB's Verification Procedure.[1] (Cal. Code Regs., tit. 13, §§ 2700-271 1.). On the basis of these allegations, ACB seeks a declaration that "continued enforcement of both the Truck and Bus Regulation and the Verification Regulation, as amended, in whole or in part, places California truck owners, including ACB members, in the position of violating California public health and safety laws, such as, inter alia, the California Vehicle Code section 24002, the California Labor Code section 6400, and Cal/OSHA section 3328." ACB also seeks an injunction prohibiting CARB from enforcing the Truck and Bus Regulation and the Verification Procedure.

CARB has moved for judgment on the pleadings with respect to the TAC on two grounds. First, CARB asserts that the TAC does not state facts sufficient to constitute a cause of action against it (Code Civ. Proc., § 438, subd. (c)(l)(B)(ii)) because subdivision

[1] A DPF is the highest level VDECS under CARB's Verification Procedure and is the VDECS required by the Truck and Bus Regulation for retrofitting pre-2007 engines. (Cal. Code Regs., tit. 13, § 2025(d)(35), (g)(1).)

(q)(S) of the Truck and Bus Regulation provides a procedure b which an owner of a diesel truck subject to the retrofit requirement may receive an exemption upon a showing that retrofitting the owner's truck with a verified DPF would violate state and federal health and safety laws. Second, CARB asserts that the Court lacks jurisdiction of the TAC (Code Civ. Proc., § 438, subd. (c)(l)(B)(i)) because subdivision (q)(S) provides an administrative remedy that ACB members who own trucks subject to the retrofit requirement must, but did not, exhaust prior to filing this lawsuit.

As explained below, the Court grants CARB's motion without leave to amend on the ground that the TAC does not state a cause of action.

STANDARD OF REVIEW

In considering CARB's motion, the Court accepts as true and liberally construes all allegations of material fact in the TAC and any matters subject to judicial notice, including matters subject to mandatory judicial notice under Evidence Code section 451. (Code Civ. Proc., § 438, subd. (d); Hardy v. America's Best Home Loans (2014) 232 Cal.App.4th 795, 802.) The Court does not consider extrinsic evidence to support or contradict the facts alleged in the TAC unless the evidence is judicially noticeable. (Sykora v. State Department of State Hospitals (2014) 225 Cal.App.4th 1530, 1534.) The Court disregards allegations in the TAC which constitute conclusions of fact and/or law, opinions, or allegations contrary to law or judicially noticed facts. (See Bettencourt v. Hennessy Industries, Inc. (2012) 205 Cal.App.4th 1108, 1111.) If the facts alleged in the complaint do not support any valid cause of action against the defendants, the Court considers

whether the complaint could reasonably be amended to do so.[2] (Ibid.) Leave to amend is liberally allowed except when there is no reasonable possibility the defect in the pleading can be cured by amendment. (Ibid.)

ANALYSIS

The TAC sets forth allegations to establish that the installation of verified DPF devices in diesel trucks with pre-2007 engines creates significant health and safety risks and places ACB members in the position of violating California public health and safety laws. (See TAC, ¶¶ 1, 23c.) The allegations indicate that:

- DPFs operate at extremely high temperatures and, due to excessive pressure and heat buildup, can damage engines and cause fires (¶¶ 12a, 12b, 24a);
- Sensors installed to alert a truck driver of a DPF malfunction may fail, and without warning to the driver, the malfunction may cause the truck engine to lose power and slow down to a speed unacceptable and unsafe on a public road or highway (¶¶ 12a, 17b);
- Sparks and diesel particulate matter discharged from the truck exhaust as a result of DPF operations, particularly during the regeneration

[2] The Declaration of Therese Y. Cannata in Support of Plaintiffs Opposition to Defendants' Motion for Judgment on the Pleadings filed September 4, 2015, the Corrected Declaration of Therese Y. Cannata filed September 9, 2015, the Declaration of Hank de Carbone! filed October 16, 2015, and the Declaration of Tony Hobbs filed December 3, 2015 present extrinsic evidence in support of the allegations of the TAC, not additional facts that could be alleged to state a cause of action in a further amended complaint. Thus, the Court does not consider the declarations or the exhibits attached to the declarations in ruling on CARB's motion for judgment on the pleadings.

process to incinerate the PM collected by the filter, can precipitate fires in nearby brush and place nearby workers and other persons at risk of injury (¶¶12b, 17b);

- In-use compliance testing requirements for verification of DPFs were relaxed during 2013 amendments to the Verification Procedure, and safety testing of trucks retrofitted with DPFs is not required prior to verification and on-road use; safety is only addressed in recalls after catastrophic DPS failures (¶¶ 17a, 17g, 17h, 24c); and
- Instead of warning truck owners and drivers of the safety risks created by DPFs, CARB has issued warnings about the need to maintain DPFs (¶ 24f).

These allegations in the TAC substantially ignore the contents of the Truck and Bus Regulation and the Verification Procedure which are explicitly intended to ensure that the retrofit of diesel vehicles with verified DPFs are safe and compliant with state and federal health and safety laws. As CARB points out in its Motion for Judgment on the Pleadings, section 2025(q)(S) of the Truck and Bus Regulation provides a detailed administrative procedure for diesel truck owners to use in obtaining a determination that no highest level VDECS, i.e., DPF,[3] is available for retrofitting their pre-2007 trucks because the VDECS cannot be safely installed or operated in the trucks or would violate safety standards prescribed by the Division of Occupational Safety and Health within the Department of Industrial Relations or comparable state and federal health and safety laws. Upon a determination under section 2025(q)(S) that no highest level VDECS is

[3] See footnote 1 of this order.

available, the scheduled compliance deadline for retrofitting the trucks is extended for a year. (§ 2025(r)(11).) And truck owners may obtain an extension of the compliance deadline in a subsequent year by submitting documentation following the compliance deadline for the subsequent year which establishes the non-availability of a highest level VDECS or DPF with which their trucks may be safely retrofitted under state and federal health and safety laws.[4] (Ibid.)

Further, as pointed out by CARB in footnote 1 of its Supplemental Brief in Support of Motion for Judgment on the Pleadings, safety is considered throughout CARB's Verification Procedure. Pursuant to this regulatory procedure, CARB verifies the emission reduction capabilities of VDECSs, including DPFs intended for installation in pre-2007 diesel trucks that require retrofitting with a verified PDF under section 2025(g)(1) of the Truck and Bus Regulation. (Cal. Code Regs., tit. 13, § 2700.) Before CARB verifies a DPF for on-road use, the diesel engine or vehicle manufacturer applying for verification must demonstrate that the DPF has the capability not only to maintain emission reductions over time and distance but to do so safely:

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[4] The procedure in section 2025(q)(5) and (r)(11) by which an owner of a pre-2007 diesel truck may request an extension of the deadlines for retrofitting the truck with a DPF has been a part of the Truck and Bus Regulation since its adoption by CARS in 2009. (See Initial Statement of Reasons for Proposed for In-Use On-Road Diesel Vehicles, p. 32 (October 2008); Final Statement of Reasons for the Adoption of a Proposed Regulation to Reduce Emissions from In-Use On-Road Diesel Vehicles (December 2008), pp. 102, 103-105, 107, accessed at http://www.arb.ca.gov/regact/2008/truckbus08/truckbus08.htm.) Subsequent amendments of section 2025 have not substantively changed the extension procedure.

- An applicant for verification of a DPF must analyze potential safety and catastrophic failure issues related to the DPF and describe mitigation strategies for each issue, including uncontrolled regeneration, lack of proper maintenance, unfavorable operating conditions, high exhaust temperatures and sensor failure. (Cal. Code Regs., tit., §§ 2702(d)(2.7), 2706(w).)
- Field and laboratory testing conducted by the applicant to demonstrate the durability of the DPF in maintaining a reduced level of emissions over a period of time or distance must establish, among other requirements, that the DPF does not cause damage to the vehicle engine and that the backpressure caused by the DPF does not exceed the engine manufacturer's specified limits or result in any damage to the engine. (§§ 2701(d)(20), 2704(k)(4) and (5).)
- Field testing of the DPF by the applicant in a vehicle belonging to the group of diesel engines for which verification is sought must demonstrate its compatibility with the vehicle by, among other requirements, not causing engine damage or malfunction, not causing backpressure outside of the engine manufacturer's specified limits or engine damage, and not hindering the vehicle's ability to perform its normal functions. (§ 2705)(a)(l)(A), (B), 9 (C).)
- The applicant must provide detailed information about routine DPF maintenance for "end users" owning or operating a vehicle in which the DPF is installed, including information on procedures for resetting any backpressure monitors after maintenance procedures are completed, performance criteria to determine a proper state of maintenance, and prohibitions of specific maintenance practices which may damage the

DPF. (§§ 2701(a)(24), 2706(h), 2706(/).) The owner's manual prepared by the applicant must notify end users about the importance of maintaining both their vehicle engine(s) and the DPF(s) and potential safety concerns associated with DPF operation. (§ 2706(/)(12), (/)18.)

- CARB may deny an application for verification of a DPF upon a determination that the applicant has not satisfactorily demonstrated the safety of the DPF. (§ 2706(w).)

After CARB verifies a DPF, its safety continues to be an important consideration during in-use compliance testing required by the Verification Procedure. (§§ 2706(w)(2), 2709.) In the event that an in-use compliance report or other information provided by an applicant to CARB indicates that a DPF "has the potential to experience catastrophic failure or other safety related failure," CARB may require the applicant to recall the DPF; take remedial action, including replacement or repair of the DPF; and report on the impact of such replacement or repair on the vehicles retrofitted with the DPF with respect to such factors as backpressure, temperature, maintenance, performance and safety. (§ 2709(0), (p), (q)(4)-(5).)

In sum, CARB's Truck and Bus Regulation and Verification Procedure, by their express terms, negate the allegations of the TAC, that the retrofitting of pre-2007 diesel trucks with verified DPFs creates health and safety risks and places owners of the trucks in the position of violating health and safety laws. On its face, the Verification Procedure directly addresses DPF operational characteristics, such as high temperatures and increased engine pressure, that allegedly create the risks and does not allow verification and on-road use of DPFs unless their safety is established in a

rigorous and thorough application and testing process prior to any on-road use. Subsequent to verification, CARB continues to monitor the safety of DPFs through in-use compliance testing and, upon identification of a potentially unsafe condition, requires remediation to eliminate the safety risk, through a recall if the risk is potentially catastrophic. And, regardless of DPF verification, an owner or operator of a diesel truck subject to retrofitting with a DPF may obtain an annual extension of the retrofitting deadline under the Truck and Bus regulation upon an administrative determination that the DPF cannot be safely installed or violates state and federal health and safety laws.

Because CARB's Truck and Bus Regulation and Verification Procedure directly and completely contradict the factual allegations of the TAC essential to ACB's cause of action for declaratory and injunctive relief from these regulations, the Court concludes that the TAC fails to state a cause of action. Because ACB has not proposed facts that could reasonably cure this pleading deficiency and offers only extrinsic evidence in declarations that largely duplicate the allegations in the TAC, the Court further concludes that there is no reasonable possibility the deficiency can be cured by amendment.

In light of these conclusions, the Court need not and does not decide the other ground for CARB's motion for judgment on the pleadings, a lack of subject matter jurisdiction based on a failure by ACB's truck owner members to request an extension of the retrofit requirement and thereby exhaust their administrative remedy under section 2025(q)(5) and (r)(ll). CARB's motion for judgment on the pleadings

completely and timely[5] disposes of ACB's action on the ground that the TAC does not and cannot be amended to state a valid cause of action.

Accordingly, IT IS ORDERED that:

1. The Motion for Judgment on the Pleadings with respect to ACB's Third Amended Complaint, as modified by the Ruling on Motion to Strike filed June 15, 2015, is granted on the ground that the Third Amended Complaint fails to state facts constituting a cause of action against defendants.
2. Judgment shall be entered in favor of defendants.

Dated: 3.7.16

Hon. Peter B Twede
Judge of the Superior Court

[5] The motion was timely filed under Code of Civil Procedure section 438, subdivisions (e) and (f). It was also timely as a common law motion for judgment on the pleadings that may be brought at any time either prior to trial or at trial itself. (See Stoops v. Abbassi (2002) 100 Cal.app.4th 644, 650.)

FILED
JUL 13 2016
GLENN COUNTY
CEO/CLERK OF THE SUPERIOR COURT
BY PRISCILLA BUTLER,Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

ALLIANCE FOR CALIFORNIA BUSINESS,
Plaintiff

v.

CALIFORNIA AIR RESOURCES BOARD, et al.
Defendants

Case No. 13CV01232

RULING ON MOTION FOR RECONSIDERATION

Plaintiff Alliance for California Business ("ACB") moves for reconsideration of the Court's order granting the motion of defendant California Air Resources Board ("CARB") for judgment of the pleadings. That order was based on the Court's determination that plaintiff's Third Amended Complaint ("TAC") fails to state facts sufficient to constitute a cause of action against CARB. In particular, the Court determined that CARB's Truck and Bus Regulation (Cal. Code Regs., tit. 13, § 2025) and Verification Procedure (Cal. Code Regs., tit. 13, § 2700-2711), which together require the retrofitting of pre-2007 diesel trucks with a verified diesel particulate filter ("DPF"), negate the allegations of the TAC that the DPF retrofit requirement creates health and safety risks.

ACB seeks reconsideration of the Court's order granting judgment on the pleadings ("JOP order") on two bases: First, ACB moves for reconsideration under subdivision (a) of Code of Civil Procedure section 1008, alleging new or different facts and special circumstances. Second, ACB requests that the Court, pursuant to its inherent constitutional power, reconsider and correct its JOP order on its own initiative.

For the following reasons, the Court grants ACB's motion for reconsideration, reconsiders its JOP order, and affirms the order.

Section 1008 Motion

-- New or different facts?

ACB contends that CARB conceded the inherent dangerousness of DPFs during a recent rulemaking proceeding to establish an evaluation procedure for approving and making certain aftermarket DPFs

available for sale in California.[1] These aftermarket DPFs would be available to replace the DPFs with which engine manufacturers originally equipped on-road heavy-duty diesel engines, model years 2007 through 2009 ("OEM DPFs").[2]

In support of its contention, ACB quotes four passages from CARB's Initial Statement of Reasons for Proposed Rulemaking for the aftermarket DPF evaluation procedure. ("Initial Statement", accessible at http://www.arb.ca.gov/regact/2016/aftermarket2016/aftermarketisor.pdf.)

According to ACB, CARB concedes in these passages that DPFs, operating under normal conditions, inevitably deteriorate over time, become clogged with particulate matter and create excessive engine exhaust backpressures that cause engine malfunctions, engine damage and fires. ACB indicates that CARB has previously attributed such engine problems entirely to the failure of truck and bus owners and operators to properly maintain the DPFs and their vehicles.

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[1] The Court takes judicial notice of CARB's rulemaking documents for the aftermarket DPF evaluation procedure pursuant to ACB's request. The documents are accessible at http://www.arb.ca.gov/regact/2016/aftermarket2016/aftermarket216.htm.

[2] A "new aftermarket DPF" is defined in Appendix B to CARB's Initial Statement as a part constructed of all new materials that is intended to replace the DPF originally installed in a new 2007 through 2009 model year on-road heavy-duty diesel engine and that is designed and used to reduce the emissions from that engine. (See Appendix B, p. B-4, accessed at http://www.arb.ca.gov/regact/2016/aftermarket2016/aftermarketappb.pdf.) Thus, an aftermarket DPF approved by CARS pursuant to the proposed evaluation procedure would not satisfy the DPF retrofit requirement of the Truck and Bus Regulation for pre-2007 model diesel trucks.

Upon review of these four passages in context, the Court finds that none of the four passages contain concessions by CARB that DPFs are inherently dangerous and none of the passages constitute new or different facts warranting reconsideration of the JOP order.

The first passage quoted by ACB concerns CARB's reasons for establishing an evaluation procedure for approving aftermarket PDFs as replacements for OEM PDFs in model year 2007 through 2009 on-road heavy -duty diesel engines. CARB explains that an aftermarket PDF would provide diesel truck owners with OEM PDFs that wear out or are damaged after expiration of the OEM warranty period with a less expensive replacement option than a new OEM PDF. (Initial Statement, pp. 2-3.) CARB identifies and details the circumstances creating the need for OEM PDF replacement in the following paragraph, which contains ACB's quoted passage (highlighted in bold):

> "The DPFs on 2007-2009 model year HDDEs have now been in use for a number of years worldwide, and many have likely exceeded the OEM's warranty or OEM's extended warranty. **As these engines age, there is an increasing need to replace the OEM DPFs as the parts experience wear. Engine problems such as faulty turbochargers, bad fuel injectors, or malfunctioning EGR valves can negatively impact DPFs in several ways including catalytic poisoning, fouling or overloading the DPF, or causing thermal damage due to more frequent regeneration.** Failure to properly maintain the DPF, such as failing to clean the DPF or performing inappropriate

> cleaning, may also result in damage to the DPF. Vehicles occasionally suffer accidents (flooding, physical impacts etc.) which can also damage DPFs. All of these factors may result in a compromised DPF, although the vehicle itself may still be usable. However, without a functioning DPF the vehicle would have excessive PM emissions necessitating its replacement." (Initial Statement, p. 3.)

Read in its entirety, the foregoing paragraph indicates that, in addition to wear with usage over time, a DPF may require replacement as a result of various engine problems, a lack of proper DPF maintenance or vehicle accidents. (Ibid.) Contrary to ACB's contention (see ACB's Memorandum filed 3/2 1/2016, pp. 2-3, 8; ACB's Reply filed 4/8/2016, pp. 2-4, 6-7), CARB does not concede that DPFs normally or inevitably cause engine damage. To the contrary, CARB indicates that malfunctioning diesel engine components may damage the PDFs.

The second passage quoted by ACB appears in a section of the aftermarket DPF evaluation procedure requiring the "laboratory aging" of DPFs in preparation for emission and field testing. (See Initial Statement, pp. 9- 10, 43-47.) The DPFs are to be "aged" in conditions simulating actual usage so that their durability and continued ability to control emissions in real world operations can be demonstrated during testing. (Ibid.) CARB's rationale for requiring active regenerations[3] during

[3] "Regeneration" in the context of DPFs means the periodic or continuous combustion of collected particulate matter that is trapped in a DPF through an active or passive mechanism. Active regeneration requires a source of heat other than the exhaust itself to regenerate the DPF. (Cal. Code Regs., tit. 13, §

the aging cycle is set forth in the following paragraph, which includes the second passage quoted by ACB (highlighted in bold):

> "Rationale for section (g)(2)(B): This subsection is necessary to explain how to perform the active regenerations required as part of the aging cycle for engines originally certified with a [Diesel Oxidation Catalyst] plus DPF configuration. This configuration is different enough from other engine configurations that it requires separate consideration. The DOC component can alter DPF behavior and aging and, as such, should not be grouped with engines which do not have a DOC. **Regeneration can represent a potential failure mode and/or severe aging condition due to the high temperature conditions during the process and is critical to incorporate this in a robust aging cycle. Regular regeneration places significant stress on the DPF and the aftermarket DPF must be durable enough to withstand it."** (Initial Statement, p. 45.)

In this rationale, CARB straightforwardly acknowledges a potential risk that DPFs may fail in actual use due to the high temperatures required for regenerations and explains that regular regenerations must be incorporated into the aging cycle of aftermarket DPFs so that the filters' durability to withstand regenerations and operate effectively in actual use can be established during the evaluation procedure. Contrary to ACB's

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2701(37). See also Initial Statement, Appendix B, p. B-5, ("regeneration" defined).)

contention (see ACB's Memorandum filed 3/2 1/2016, pp. 2-3, 6, 8-9; ACB's Reply filed 4/8/2016, pp. 2-4, 6-7), CARB's rationale does not state, imply or concede that DPFs inevitably deteriorate with use in extremely high temperatures and cause engine damage and fires. Rather, the rationale indicates that aftermarket DPFs must demonstrate during testing and evaluation that they are durable enough to withstand the stresses of regeneration.

The third passage quoted by ACB appears in a section of the aftermarket DPF evaluation procedure that requires a laboratory-aged aftermarket DPF to be installed on an engine for which it is designed and to be operated in the field to demonstrate its durability and engine compatibility in actual service. (Initial Statement, p. 10.) During field testing, maintenance of the aftermarket DPF is prohibited, and the DPF must not cause engine damage, show inappropriate regeneration behavior or lose physical integrity. (Id., p. 47) CARB's rationale for the prohibition on maintenance during testing, which includes ACB's quoted passage (highlighted in bold print), provides:

> "Rationale for section (g)(3)(G): This subsection ensures that the engine and vehicle must be in excellent condition prior to starting the field service accumulation and that the aftermarket DPF does not require maintenance when deployed into the field. The point of the field demonstration is to show the device is durable and causes no issues with the engine. **An in-field problem would be difficult to determine if the device was the cause or the engine, or that the device causes another part on the engine to fail. As such the device must be able to**

demonstrate no issues during the field trials." (Initial Statement, p. 47.)

CARB's rationale makes clear that the aftermarket DPF is field tested to establish that it is durable, will not cause engine damage and can operate properly upon deployment to the field without additional maintenance. The language of the rationale provides no support for a concession by CARB that DPFs cause engine damage during normal operations.

The fourth passage quoted by ACB appears in a section of an appendix to the Initial Statement discussing the assessment required by the aftermarket DPF evaluation procedure to establish the compatibility of each DPF with the engine in which it is installed. (Initial Statement, Appendix D, p. D-5, accessed at http://www.arb.ca.gov/regact/2016/aftermarket2016/aftermarketappd.pdf) ACB quotes the following paragraph from this discussion:

> "As mentioned in previous sections, the trapped soot in the wall-flow DPF builds up over time, increasing the backpressure on the engine as it continues to operate. Operating the engine at excessive backpressure for extended periods will impact engine performance and eventually cause engine damage. Therefore the soot accumulation rate for the modified part must be similar to the OEM DPF. If the modified part accumulates soot faster, this would have an impact on engine operation and/or regeneration frequency. Frequent regeneration will increase the fuel consumption and risks of DPF failures. This Procedure requires tests for

> comparing the soot accumulation rates and backpressure changes of the modified part to the OEM DPF. Additional backpressure comparisons are required during the emission testing of the degreened DPF, lab-aged DPF, and field-aged DPF." (Ibid.)

In quoting this paragraph regarding engine damage caused by excessive backpressure on the engine attributable to accumulated particulate matter or soot trapped in the DPF, ACB omits the preceding paragraph indicating that the aftermarket DPF evaluation procedure includes a compatibility assessment "to ensure that the engine maintains expected backpressure,[4] appropriate DPF regeneration . . . . " (Ibid.) ACB also omits the subsequent paragraph indicating that during field trials of the aftermarket DPF pursuant to the evaluation procedure, the DPF "must not negatively impact engine durability or functionality, cause engine damage, alter engine behavior, or trigger any fault warnings or codes during operation." (Ibid.) These indications in the paragraph preceding and the paragraph following the paragraph quoted by ACB clarify that field testing aftermarket DPFs pursuant to the evaluation procedure is structured to determine the compatibility of the DPFs with the engines for which they were designed and to deny

[4] Section (g)(3)(C) of the proposed aftermarket evaluation procedure specifies that, among the criteria an aftermarket DPF must meet during a compatibility assessment, the DPF must not cause backpressure or temperature to exceed the engine manufacturer's specified limits or result in any damage to the engine. (Initial Statement, Appendix B, p. B-45, accessed at http://www.arb.ca.gov/regact/2016/aftermarket2016/aftermarketappb.pdf.)

approval of those DPFs unable to function without creating the potential engine problems described in the paragraph quoted by ACB. Thus, contrary to ACB's contention (see ACB's Memorandum filed 3/2 1/20 16, pp. 2-3, 6, 8-9; ACB's Reply filed 4/8/2016, pp. 1-4, 6-7), the quoted paragraph does not constitute a concession by CARB that DPFs inevitably cause engine damage in actual usage under normal operating conditions.

Not only does ACB incorrectly represent the four passages quoted from CARB's rulemaking record for an aftermarket evaluation procedure, ACB also incorrectly represents the four passages as new or different facts warranting reconsideration. Rather. in adopting the Verification Procedure in 2003 and in subsequently amending it several times, CARB has recognized that DPF regeneration poses potential risks of PDF and engine malfunctions, damage and failure due to high temperatures and excessive engine exhaust backpressure during DPF regeneration, and based on this recognition, CARB has established an evaluation procedure similar to that for the aftermarket PDF to ensure that a diesel emission control strategy ("DECS"), including a DPF, is approved for the retrofit of diesel engine vehicles only after demonstrating during extended and rigorous field testing that it can function efficiently and safely without engine damage, malfunction or failure. In particular, the Verification Procedure requires:

- A demonstration of compatibility during field testing between the DPF and a vehicle engine for which it is designed and for which verification is sought. (Cal. Code Regs., tit. 13, § 2705(a)(l),

originally adopted in 2003, p. 2 1.)[5] Compatibility is demonstrated if, during field testing, the DPF does not cause engine damage or malfunction, does not cause backpressure outside the engine manufacturer's specified limits, and does not hinder or detract from the vehicle's performance of its normal functions. (Ibid.)

- The measurement and recording of exhaust backpressure and temperature during extended and rigorous emissions and durability testing of a DPF to document and demonstrate that the backpressure caused by DPF operation and regeneration is within the engine manufacturer's specified limits or will not result in any damage to the engine. (Id., § 2706(f)(l), originally adopted in 2003 as former § 2706(d)(l), p. 25.) During durability testing, the physical integrity of the DPF must remain intact and fully functional; the DPF must not cause any damage to the engine or vehicle, and the backpressure must not exceed the engine manufacturer's specified limits. (Id., § 2704(k) (3), (4), (5), originally adopted in 2003 as former § 2704(i), pp. 19-20.)
- Installation of a backpressure monitor with the DPF to notify the vehicle operator when the backpressure limit identified by the engine manufacturer is approached. (Id., § 2706(f)(3), originally adopted in 2003 as former § 2706(d)(2), pp. 25-26.) The functionality and durability of the monitor must be demonstrated during field testing. (Id., § 2704 (j), adopted in 2009.)
- Analysis of potential safety issues, including uncontrolled DPF regeneration, and a detailed

[5] The original version of the Verification Procedure is accessible at http://www.arb.ca.gov/regact/dieselrv/finregrev.pdf The page numbers cited in this ruling for provisions of the Verification Procedure adopted in 2003 refer to this online version.

description of mitigation strategies for any potential safety issue identified. (Id., § 2702(d)(2.7), as amended in 2013, and § 2706(w), adopted in 20 13. A less detailed form of § 2702(d)(2.7) at p. 6 was originally adopted in 2003 and remained in effect until the 2013 amendment.)

- Pre-installation assessment to establish the engine to be retrofitted is compatible with the PDF, is in a proper state of maintenance, and is operating within the engine manufacturer's specifications. (Id., § 2706(t)(1), (4). See former § 2706(t) and (t)(4), adopted in 20 1 1.)
- Installation of a DPF in a vehicle at a location compliant with applicable safety standards such as, but not limited to, Federal Motor Carrier Safety Administration regulations on Parts and Accessories Necessary for Safe Operation, Exhaust Systems, 49 C.F.R. § 393.83. (Id., § 2706(u)(3).)
- Provision of information regarding DPF maintenance procedures for owners and operators of vehicles in which a DPF has been installed, including procedures for resetting backpressure monitors after maintenance is completed. (Id., § 2706(h). See former § 2706(f) at p. 26, adopted in 2003, requiring information regarding DPF maintenance, including backpressure monitor resetting procedure.)
- An Owner's Manual specifying, among other matters, required DPF maintenance procedures, the possible backpressure range imposed on the diesel engine of the vehicle in which the DPF is installed, instructions for reading and resetting the backpressure monitor, and an express statement of the importance of proper engine and DPF maintenance by the diesel engine owner or

operator to proper DPF functioning. (Id., § 2706(/), adopted in 2013. See former § 2706 (i) at pp. 27-28, adopted in 2003 and specifying these same matters with the exception of the express statement regarding importance of engine and DPF maintenance.)

Subsequent to the verification and approval of DPFs for the retrofit of compatible diesel engine vehicles, the Verification Procedure requires in-use compliance testing to confirm that the DPF continues to meet verification emission and durability requirements. (Id., § 2709(h). See former § 2709 (m) at p. 38, adopted in 2003, requiring DPF in-use compliance with § § 2706 and 2707, including backpressure limits and backpressure monitoring pursuant to former § 2706(d) and current § 2706(f)(1) and (f)(3).) In addition, CARB reviews warranty claims and other information about the in-use performance of verified DPFs and, upon determining non-compliance with emissions and durability requirements, may lower or revoke the verification. (Id., § 2709(s) and former § 2709(m) at p. 38, adopted in 2003 and renumbered as § 2709(s) and amended in 20 13. See § 2707(c) and former § 2707(c) at p. 32, adopted in 2003, requiring annual reports by DPF manufacturers of warranty claims).) If information reviewed by CARB about the in-use performance of a verified DPF raises issues of a catastrophic or other safety-related failure or a systemic defect, CARB is authorized to require the DPF manufacturer to recall and correct the defect. (Id., § 2709(p).)

In sum, the Verification Procedure reflects CARB's longstanding recognition of the potential safety risks presented by the retrofitting of diesel vehicles with DPFs, specification of strict durability and performance requirements for DPFs to minimize

and avoid those risks, and establishment of field testing requirements to verify that DPFs are able to meet those requirements in actual use, and tracks the in-use compliance of DPFs after their verification. Contrary to ACB's contention, CARB has made no new concession regarding the inherent danger of DPF retrofits in its Initial Statement for an aftermarket DPF evaluation procedure. Rather, the four passages quoted by ACB from the Initial Statement, construed in context, parallel CARB's previous recognition in the Verification Procedure of the potential safety risks presented by DPFs and sets the stage for an evaluation procedure that establishes the ability of aftermarket DPFs to function effectively and safely prior to their approval.

-- Special circumstances?

ACB contends that reconsideration of the JOP order pursuant to subdivision (a) of Code of Civil Procedure 1008 is also required because the Court based the portion of the JOP order related to the Verification Procedure on an argument raised initially by CARB in a footnote to a supplemental brief without providing ACB with an opportunity to respond to the arguments. ACB indicates that CARB first raised that argument in footnote 1 to a supplemental brief filed November13, 20 15, after ACB had completed its briefing, and that CARB's arguments in footnote 1 exceeded the scope of the supplemental brief on the issue of whether CARB had waived arguments in support of its motion for judgment on the pleadings related to section 2025(q)(5) of the Truck and Bus Regulation. According to ACB, it had no full and fair opportunity to show that the provisions of the Verification

Procedure do not negate or contradict ACB's allegations regarding the dangers created by DPFs.

As ACB points out, new circumstances justifying reconsideration pursuant to subdivision (a) of section 1008 may include a situation where a court rules against a party on the basis of an opposing party's supplemental points and authorities without providing the party against whom the court has ruled a full and fair opportunity to respond to the supplemental points and authorities. (See Gravillis v. Coldwell Banker Residential Brokerage Co. (2006) 143 Cal.App.4th 761, 772-773; Johnston v. Corrigan (2005) 127 Cal.App.4th 553, 556; Ko/lander Construction, Inc. v. Superior Court (2002) 98 Cal.App.4th 304, 3 14, overruled on another ground in Le Francois v. Goel (2005) 34 Cal.4th 1094, 1 107, fn. 5.) Whether such circumstances exist to justify reconsideration here presents a close question.

The text and associated footnote in CARB's supplemental brief, which the JOB order subsequently referenced and which ACB identifies as the circumstance warranting reconsideration, states:

> "The Truck and Bus Regulation and the Verification Regulation cannot conflict with the public safety laws because trucks that are shown to be unsafe to operate with retrofit diesel particulate filters are exempt under the safety exemption.[1]
>
> ---
>
> [1]There is no conflict, and, therefore, no valid legal challenge to the Board's regulations, because of the safety exemption. (See Cal. Code Regs., tit. 13, § 2025, subd. (q)(5).) ACB's members can comply with both the Board's regulations and the public safety laws by either retrofitting their trucks with filters or

> by demonstrating that it would be unsafe to retrofit them.
> Moreover, the filters are evaluated for safety before the Board verifies them. (Cal. Code Regs., tit. 13, §§ 2702, subd. (d)(2.7), 2706, subd. (w)(l).) Filter manufacturers must also demonstrate that their filters are "compatible" with particular truck models by showing that the filters do "not cause damage to the engine or engine malfunction," do "not cause backpressure outside of the engine manufacturer's specified limits," and do not prevent the trucks from performing their 'normal functions.' (Id., § 2705, subd. (a)(l).)"

This text and associated footnote reflect the explicit connection and interdependence between the Truck and Bus Regulation and the Verification Procedure in section 2025(q)(5), throughout the Truck and Bus Regulation, and I the TAC and its previous iterations -- a connection and interdependence that makes consideration of both regulations immediately relevant and essential to a determination of whether, as a matter of law, the DPF retrofit requirement is consistent with state and federal safety laws. By its plain terms, the Truck and Bus Regulation requires the retrofit of diesel engines with a "Verified Diesel Emission Control Strategy" or "VDECS" which has been verified pursuant to the Verification Procedure. (Cal. Code Regs., tit. 13, § 2025(d)(18), (d)(35), (d)(60), (g)-(k), (q)-(r).) Section 2025(q)(5) itself provides a procedure for owners of diesel vehicles or fleets to obtain an extension of the VDECS retrofit requirement for particular vehicles upon a showing that any VDECS impairs the safe operation of the vehicle; i.e., a VDECS "(A) cannot be safely installed or operated in a particular vehicle

application; or (B) its use would make compliance with the occupational safety and health requirements . . . impossible."

Similarly, the allegations of the TAC explicitly tie the Truck and Bus Regulation to the Verification Procedure in alleging the dangers presented by the DPF retrofit requirement, in challenging the validity of the requirement, and in requesting declaratory and injunctive relief. (TAC, ¶¶ 10, 12, 12a, 14, 14c, 17, 17a, 17b, 17f, 17g, 17h, 23c, 24, 24c, and "Relief Requested" ¶¶ 1, 2.) And ACB's opposition to CARB's motion for judgment on the pleadings echoes many of these allegations intertwining the two regulatory provisions in one cause of action. (See Plaintiff's Opposition to Defendants' Motion for Judgment on the Pleadings, filed 9/4/2015, pp. 6: 13-8: 3 (indicating that CARB promulgated the Verification Procedure "parallel to the Truck and Bus Regulation" and "as an integral part of its implementation").)

Read in this framework, the text and associated footnote in CARB's supplemental brief present section 2025(q)(5) of the Truck and Bus Regulation and various sections of the Verification Procedure as interdependent regulatory provisions supporting CARB's argument that the regulations do not conflict with public safety laws as a matter of law. The text and footnote do not raise an argument independent of that raised by section 2025(q)(5). Indeed, the DPF public safety issues to be addressed in subsections (A) and (B) of section 2025(q)(5) largely coincide with the DPF performance and safety issues addressed by the Verification Procedure. (See, e.g., §§ 2704(k) (3), (4), (5); 2705 (a)(1); 2706(f)(1), (f)(3); 2706(u)(3)(B); 2706(w).)

Nonetheless, the text and associated footnote in CARB's supplemental brief may have been relatively inconspicuous and poorly timed to reasonably prompt

a response by ACB before or on December 1 1, 20 15, when the Court heard further argument by the parties on CARB's motion for judgment on the pleadings. Therefore, to assure that ACB has had a full and fair opportunity to respond to the substance of the text and associated footnote in CARB's supplemental brief, the Court grants ACB's motion for reconsideration and proceeds to reconsider its JOP order in light of the briefing in support of ACB's motion for reconsideration.[6]

Reconsideration

ACB contends that the Court's JOP order improperly concluded that the safety provisions of the Verification Procedure negate or contradict the factual allegations of the TAC. ACB explains that, in considering CARB's motion for judgment on the pleadings, the Court was required to accept as true its allegations that the installation of DPFs in vehicles pursuant to the Truck and Bus Regulation creates health and safety risks because DPFs are inherently dangerous: they operate at very high temperatures, particularly during regeneration, and lead to excessive backpressure, causing engine malfunctions, damage and fires. ACB points to four passages in CARB's Initial Statement of Reasons for the aftermarket DPF evaluation procedure as concessions by CARB that DPFs are dangerous in normal operating conditions, inevitably deteriorating over time and causing engine malfunctions, damage and fires. According to ACB, CARB concedes that the

[6] Because the Court grants ACB's motion for reconsideration pursuant to subdivision (a) of section 1008, the Court need not respond to ACB's request that the Court reconsider the JOP order on its own initiative pursuant to its inherent constitutional power.

safety provisions of the Verification Procedure do not prevent DPF deterioration and deficiencies from occurring and resulting in these harms, even when owners and operators of vehicles retrofitted with verified DPFs adequately maintain the vehicles.

Further, ACB indicates that CARB verified 33 DPFs prior to the amendment of the Verification Procedure in 2013 which added or expanded most of the safety provisions. Thus, ACB argues, the safety provisions could not have been applied to the 33 DPFs to abate their inevitable deterioration and harm to engine functionality and vehicle safety.

Lastly, ACB proposes to amend the TAC with allegations that section 2025(q)(S) of the Truck and Bus Regulation and various sections of the Verification Procedure are ineffective in ensuring DPF safety because DPF devices are inherently dangerous, as illustrated by:

- CARB's concessions in the rulemaking documents for an aftermarket DPF evaluation procedure;
- Investigative findings by Cal-Fire Battalion Chief Richard Lopez that certain roadside bush fires had been caused by DPF fragments expelled from the exhaust system of a passing vehicle;
- An insurance investigator's belief that a truck fire occurring during DPF regeneration was caused by DPF's high temperatures during regeneration, and the insurance company's determination that the fire was most likely from the exhaust treatment system; and
- A trucking company which has had to replace 20 turbochargers on its trucks during the last five years, after the Truck and Bus Regulation required the company to equip seven of its

twelve trucks with DPFs, and which had to replace only three turbochargers during the previous four years.

Upon considering the foregoing arguments regarding the sufficiency of the TAC's factual allegations to state a cause of action and ACB's proposed amendment of the TAC, the Court again concludes that the provisions of the Verification Procedure contradict and negate the factual allegations of the TAC that DPFs are inherently dangerous and inevitably cause engine malfunctions, engine damage and engine fires. These allegations disregard and/or misstate the provisions of the Verification Procedure that minimize and avoid potential DPF risks and thereby ensure the safety of using verified DPFs to meet the retrofit requirement of the Truck and Bus Regulation.

The TAC currently alleges that DPFs installed in diesel trucks and buses pursuant to the retrofit requirement of the Truck and Bus Regulation cause various engine malfunctions, damage and fires as a result of high temperatures required for DPF regeneration, excessive engine exhaust backpressure due to DPF clogging, and sensors which fail to timely alert truck operators of excessive backpressure and temperatures. The TAC further alleges that the Verification Procedure does not require comprehensive safety testing of DPF devices prior to verifying them for on-road use and, instead, relies on the recall provisions of the Verification Procedure as amended in 20 13 to address a severe safety issue "long after Californians have been exposed to the risks inherent in these technologically flawed devices." (TAC, ¶ 17h. See ACB's Opposition to Defendants' Motion for Judgment on the Pleadings, filed 9/4/2015, pp. 6: 13-8: 3.) ACB's proposed

amendment of the TAC in light of the JOP order alleges that the safety provisions of the Verification Procedure are ineffective in ensuring safe DPF operation.

Neither the current TAC allegations nor the proposed TAC amendment takes into account the specific requirements of the Verification Procedure that manage and avoid the potential risks of DPFs, including high temperatures, clogging, excessive backpressure and undependable monitors or sensors. Since 2003, CARB has responded in the Verification Procedure to these potential risks with stringent DPF performance standards and rigorous testing requirements to minimize and avoid the risks. CARB has not, as ACB assumes, conceded in the Verification Procedure or in the recent rulemaking proceeding for an aftermarket DPF evaluation procedure that the potential risks are inevitably realized as DPFs deteriorate with on-road use.

Before verification is granted and on-road use is permitted pursuant to the Verification Procedure, each DPF must complete extended durability testing in the field and demonstrate that the DPF remains physically intact and fully functional, well mounted with no signs of leakage or other visibly detectable problems; does not cause any damage to the engine or vehicle; does not cause engine malfunction or detract from the vehicle's ability to perform its normal functions; and does not cause backpressure to exceed the engine manufacturer's specified limits or result in engine damage. (Cal. Code Regs., tit. 13, § § 2704(e), (k); 2705(a)(l); 2706(f)(l).) For in-field durability testing, a third-party such as the owner or operator of the vehicle used must report in writing on overall performance, maintenance required, problems encountered, and the visible condition of the DPF following the testing period. (Id., § 2704(f).)

And the DPF manufacturer must prepare detailed DPF and engine maintenance instructions for owners of vehicles in which the DPF is to be installed. (Id., § 2706(h), (l).)

If a DPF can cause exhaust backpressure to increase overtime, the DPF manufacturer must submit information describing how to reduce the backpressure and must provide for the installation of a backpressure monitor to notify the vehicle operator of high backpressure conditions both when the high backpressure limit is approached and when the limit is reached or exceeded. (Id., § 2706(f)(2), (f)(3).) The functional durability of a backpressure monitor for a DPF must be established by additional testing after the DPF has completed durability testing. (Id., § 2704(j).)

Specifically with respect to DPF safety, the DPF manufacturer applying for verification must give consideration to safety and catastrophic failure in the design of the DPF. (Id.,§§ 2702(d)(2. 7), 2706(w).) The manufacturer must provide an analysis of all potential safety and catastrophic failure issues associated with the use of the DPF, including but not limited to the effects of uncontrolled regeneration, improper maintenance, high exhaust temperatures, and sensor failures. (Ibid.) For any potential safety or catastrophic failure issue identified, the manufacturer must provide a detailed description of safety measures to mitigate the risk. (Ibid.) On the basis of the analysis and other information, CARB may require additional safety testing and design modifications of the DPF and may deny verification if a satisfactory demonstration of safety is not made. (Ibid.)

After verification, a DPF may be installed in a vehicle only by an authorized party in accordance with the terms and conditions of its verification. (Id.,

§ 2706(q), (t), (u).) A pre-installation assessment must demonstrate that the DPF is compatible with the vehicle's engine and that the engine is in a proper state of maintenance and operating within the manufacturer's specifications. (Ibid.) And the location of the DPF must comply with applicable safety standards, including the standards of the Federal Motor Carrier Safety Administration for the safe operation of exhaust systems. (Ibid. See 49 C.F.R . § 393.83 (a).)[7]

Also after verification, in-use compliance testing must be conducted to demonstrate that the DPF is intact and functioning in actual use as originally verified. (Id., § 2709, (h), (l)-(o).) CARB may revoke verification and may initiate a recall when a DPF fails in-use compliance testing, warranty claims for the DPF exceed 4 percent of its sales and leases, verification requirements are not observed, or other relevant information indicates that the DPF has the potential for catastrophic failure or other safety related failure. (Id., § 2709(0), (p).)

Finally, contrary to ACB's contention, the amendment of the Verification Procedure in 2013 to add and clarify several of its provisions affecting DPF safety does not render those DPFs verified before 2013 unsafe.[8] Most of the provisions affecting

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[7] Ironically, ACB argues in its motion for reconsideration that DPFs violate 49 C.F.R. § 393.83(a), a regulation of the Federal Motor Carrier Safety Administration that is specifically included in section 2706(u)(3)(B) of the Verification Procedure as a DPF requirement. (See ACB's memorandum in support of its motion for reconsideration, filed 3/21/2016, at p. 1, and ACB's reply memorandum, filed 4/8/2016, at p. 5.)

[8] ACB's request for judicial notice filed March 21, 2016, identifies 33 diesel emission control strategies verified before the 2013 amendments of the Verification Procedure. Many of these strategies were verified for stationary and off-road uses, not for use in on-road vehicles. For example: Catalytic Exhaust

the safe operation of DPFs, including performance standards for DPF functionality and durability and rigorous testing to ensure that the standards are met, were adopted in 2003. Further, in-use compliance testing is required for all verified DPFs, and CARB monitors continuing in-use compliance with verification requirements by reviewing DPF warranty claims and other information relevant to DPF functionality, durability, and safety.

In sum, the Verification Procedure, by its plain terms, establishes performance standards and safety requirements for DPFs that directly address the potential risks and related safety issues identified in the TAC's current and proposed allegations as the cause of engine malfunctions, damage and fires, including high temperatures, excessive backpressure, and defective sensors. To avoid these potential risks and safety issues in on-road use, each DPF must be designed to comply with the performance standards and safety requirements of the Verification Procedure, must demonstrate its compliance with the standards and requirements in rigorous testing prior to verification, and must continue to demonstrate its compliance after verification and during actual on-

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Products Ltd. Dieselytic SXS-SC DPF, verified for stationary generators and off-road engines; Clariant Corporation EnviCat® DPF, verified for stationary generator; Engine Control System Combifilter, verified for off-road use; ESW Clean Tech Phoenix, verified for off-road use; Global Emissions Systems, Inc. (GESi) 6000DPF, verified for stationary and off-road uses; HUSS FS-MK Off-Road; Johnson Matthey CRT, verified for stationary generator; Engine Control System AZ Purimuffler/Purifier, offroad use; Rypos, Inc. ADPF, stationary use; Rypos ActiveDPF/C, verified for rubber tired gantry crane for container handling; Viscon California, LLC, off-road use; Vycon REGEN System, off-road use; and others. (See http://www.arb.ca.gov/diesel/verdev/vt/cvt.htm.)

road use with proper maintenance by truck and bus owners and operators.

Because these provisions of the Verification Procedure along with section 2025(q)(S) of the Truck and Bus Regulation are judicially noticeable pursuant to subdivision (b) of Evidence Code section 452 and directly contradict the TAC's factual allegations regarding inherent DPF dangers that violate federal and state safety laws, the factual allegations need not be accepted as true b y the Court in determining CARB's motion for judgment on the pleadings. (Code Civ. Proc. § 430.30.) Instead, the Court may find, and does find, that the Verification Procedure along with section 2025(q)(S) of the Truck and Bus Regulation negate the TAC's factual allegations and that the TAC fails to state a valid cause of action.[9]

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[9] As indicated in this ruling, the amendment proposed by ACB does not avoid the conflict of the TAC's current factual allegations with the Verification Procedure. The Court sustains the objections by CARB to the declarations filed by ACB in support of these proposed allegations. (See Supplemental Declaration of Therese Y. Cannata, filed 4/8/2016, ¶ 2 (proposing new allegation 12.1); Declaration of Jason Daniels, filed 4/8/2016; Declaration of Bud Caldwell, filed 4/8/2016.) The Court also notes that most of these proposed allegations do not accurately reflect the declarations and other evidence cited in the allegations:

- The Cal Fire Battalion Chief indicated during his deposition that he did not know what a DPF or a diesel particulate filter is. (Id., ¶ 2 (proposed allegation 12.lc. See Declaration of Therese Y. Cannata Regarding Sufficiency of Plaintiff's Further Response to Special Interrogatory No. 5, filed 12/10/2015, Exhibit B, p. 17 (deposition pp. 62-63).)
- The insurance company's claims investigation report on a truck fire occurring during DPF regeneration states inconsistently and uncertainly that "[a]t this time the cause of the fire is the exhaust treatment system but the cause

Accordingly, the Order on Motion for Judgment on the Pleadings filed herein on March 7, 20 16, is affirmed. Counsel for CARB is directed to prepare, serve and submit a proposed judgment pursuant to rule 3. 13 12 of the California Rules of Court.

Dated: 7.13.16

Hon. Peter B Twede
Judge of the Superior Court

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can not be determined." (Id.,¶ 2 (proposed allegation 12.ld). See Declaration of Jason Daniels, filed 4/8/2016, Exhibit B).

- The replacement of 20 turbochargers in Northgate Express diesel trucks during the last five years is attributed to the DPF retrofit requirement of the Truck and Bus Regulation by the co-owner on the basis information and belief and without identifying whether any of the turbochargers were replaced in trucks not covered by the DPF retrofit requirement. (Id., ¶ 2 (proposed allegation 12.1e). See Declaration of Bud Caldwell, filed 4/8/2016.)

FILED
AUG 08 2016
GLENN COUNTY
CEO/CLERK OF THE SUPERIOR COURT
BY PRISCILLA BUTLER, Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

ALLIANCE FOR CALIFORNIA BUSINESS,
Plaintiff

v.

CALIFORNIA AIR RESOURCES BOARD, et al.
Defendants

Case No. 13CV01232

NOTICE OF ENTRY OF JUDGMENT IN FAVOR OF DEFENDANTS

Judge: Hon. Peter B. Twede
Trial Date: n/a
Action Filed: November 8, 2013

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on or about August 1, 2016, the Court entered Judgment in Favor of Defendants, as attached and incorporated by reference

Dated: August 8, 2016

Kamala D. Harris
Attorney General of California
Russell B. Hildreth
Deputy Attorney General

ATTACHMENT

CONFORMED
AUG 01 2016
GLENN COUNTY
CEO/CLERK OF THE SUPERIOR COURT
BY KRISTIN MARTINS, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF GLENN

ALLIANCE FOR CALIFORNIA BUSINESS,
Plaintiff

v.

CALIFORNIA AIR RESOURCES BOARD, et al.
Defendants

Case No. 13CV01232

JUDGEMENT IN FAVOR OF DEFENDANTS

Judge: Hon. Peter B. Twede
Action Filed: November 8, 2013

On March 7, 2016, the Court GRANTED without leave to amend the Motion for Judgment on the Pleadings of defendants California Air Resources Board, Mary D. Nichols in her official capacity as Chair of the Board of the California Air Resources Board, and Richard Corey in his official capacity as

Executive Officer of the California Air Resources Board (collectively, CARB). On July 13, 2016, the Court GRANTED plaintiff Alliance for California Business's (ACB's) motion for reconsideration, RECONSIDERED its Judgment on the Pleadings order, and AFFIRMED the order on the Judgment on the Pleadings. For the reasons stated in the "Ruling on Motion for Reconsideration," dated July 13, 20 16, and in the "Order on Motion for Judgment on the Pleadings," dated March 7, 2016, CARB is entitled to judgment in this matter. Accordingly,

IT IS ORDERED THAT:

1. Judgment is entered in favor of CARB as prevailing party and against plaintiff ACB.
2. CARB shall be awarded its costs in the amount of $ _____.
3. Pursuant to Government Code section 6103.5, ACB shall pay costs to the Glenn County Superior Court in the amount of $ 1,665.00.

Dated: AUG 01 2016

PETER BILLIOU TWEDE
THE HONORABLE PETER B. TWEDE,
JUDGE OF THE SUPERIOR COURT

CONFORMED
FEB 23 2015
GLENN COUNTY
CEO/CLERK OF THE SUPERIOR COURT
BY DEBBOE WILLEY, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF GLENN

ALLIANCE FOR CALIFORNIA BUSINESS,
Plaintiff

v.

CALIFORNIA AIR RESOURCES BOARD, et al.
Defendants

Case No. 13CV01232

THIRD AMENDED COMPLAINT FOR DECLARATORY RELIEF (Code of Civ. Proc. § 1060; and Gov't Code § 11350)

Plaintiff Alliance for California Business alleges for this Complaint herein as follows:

AN OVERVIEW

1. Plaintiff Alliance for California Business is a non-profit, voluntary membership California corporation whose purpose is to protect and promote business interests throughout California, including Glenn County, of single owner/operators of trucks, business owners, farmers and ranchers, whose livelihood is tied to having affordable, safe, reliable truck(s), which are readily available for transporting goods from rural counties to production and distribution points throughout the state. Defendants' promulgation of the Diesel Particulate Filter ("DPF") implementation regulations, along with amendments in 2011 and 2013, and now proposed for passage in 2014, require ACB members, on an constantly changing timetable and set of conditions, to install or purchase new trucks with DPF devices that are "verified" or "certified" by the California Air Resources Board ("CARB"). These regulations, as amended, stand in violation of the Administrative Procedures Act ("APA"), requiring the inclusion in the decision-making process of all relevant information, including that which may undercut CARB staff's positions. The DPF implementation regulations, specifically and as a whole, place plaintiff's members at risk of physical harm because these devices are extremely unsafe and economic harm because the DPF device is mechanically unreliable and therefore extremely costly to maintain. In addition, these regulations place plaintiff's members in the position of violating California public health and safety laws (*e.g.* Vehicle Code section 24002, Labor Code section 6400, and

Cal/OSHA section 3328). In addition, the DPF device offers no net environmental benefits, as now reported in CARB sponsored studies, because during the regeneration process, as herein alleged and discussed, the DPF device releases diesel particulate matter and ultrafine particulate matter and the cleaning and disposal process of the captured soot generates hazardous waste. These corresponding environmental and economic impacts of the DPF devices production of air pollution and hazardous waste were never disclosed to the public. The review and decision-making process in 2011 and 2013, and more recently in 2014, did not include the foregoing information, depriving plaintiff and other members of the public of a meaningful and lawful public review process.

THE PARTIES

2. Plaintiff Alliance for California Business ("ACB") is, and at all times mentioned herein was, a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote business interests throughout California, including Glenn County, of truck owners and operators who provide transportation of agricultural products and other commercial goods from the rural communities to points of production and distribution locally and throughout California. ACB strives to protect and improve the availability of affordable transportation of products to California businesses and consumers through responsible stewardship of California's resources, including air quality. ACB's members include single owner/operators of trucks, owners of small and medium sized trucks fleets, and business owners who provide or rely upon affordable, reliable, and safe

transportation of commercial and agricultural products. ACB's 300-plus members include small and medium sized businesses, whose primary source of livelihood is their truck(s). ACB's members include farmers and ranchers who depend on the continued availability of local, affordable, reliable, and readily available hauling for delivering goods from rural counties to production and distribution points throughout the state. Many of ACB's members are subject to the continuing jurisdiction of this Court.

3. Defendant California Air Resources Board ("CARB") was established by the California Legislature in 1967 and is overseen by the California Environmental Protection Agency, an agency of state government in the State of California.

4. Defendant Mary D. Nichols is Chairman of the California Air Resources Board and is named in her official capacity. Defendant Richard Corey is the Executive Officer of the California Air Resources Board and is named in his official capacity. Together, they oversee and manage the day-to-day operations of CARB, and supervise CARB staff.

5. The present members of the California Air Resources Board are Daniel Sperling, Phil Serna, John Eisenhut, Barbara Riordan, John R. Balmes, M.D., Hector De La Torre, Sandra Berg, Ron Roberts, Alexander Sherrifs, M.D., John Gioia, and Judy Mitchell. The Board members are not named as defendants herein. They are referred to collectively as "the Board Members."

6. Plaintiffs are ignorant of the true names and capacities of defendants sued as Does 1 through 20, inclusive, and therefore sue these defendants by such

fictitious names. Plaintiffs will amend this complaint to allege their true names and capacities when ascertained.

7. Plaintiffs are informed and believe, and thereon allege, that at all times herein mentioned, defendants, including the Doe defendants, and each of them, were agents, servants, alter egos and/or employees of their defendants, and in doing the things hereinafter alleged, were acting within the scope of their authority as agents, servants, and employees, and with the permission and consent of their co-defendants.

JURISDICTION AND VENUE

8. This Court has jurisdiction over the matters alleged in this complaint under Code of Civil Procedure sections 187 and 1060, and Government Code section 11350.

9. Venue is proper in this Court pursuant to California Code of Civil Procedure section 393 and 395, because some part of the cause of action, herein alleged, arose in the County of Glenn, California.

GENERAL ALLEGATIONS

10. Defendants Mary Nichols and Richard Corey, in their capacities as Chairperson and Executive Officer, respectively, of CARB, have promulgated and now direct enforcement of a regulation known as the "Regulation to Reduce Emissions of Diesel Particulate Matter, Oxides of Nitrogen and Other Criteria Pollutants, from In-Use Heavy-Duty Diesel-Fueled Vehicles" ("Truck and Bus Regulation"), which is codified in California Code of Regulations,

Title 13, Article 4.5, Chapter 1, section 2025, *et seq*., and the "Verification Procedure, Warranty and In-use Compliance Requirements for In-use Strategies to Control Emissions from Diesel Engines" ("Verification Regulation"), which is codified in the California Code of Regulations, Title 3, Ch. 14, section 2700, *et seq*.

11. The Truck and Bus Regulation initially required that, beginning on January 1, 2012, on a schedule set by CARB, on and off road trucks with diesel engines be replaced, repowered and/or retrofitted with a diesel emission control strategy, the most common of which is the Diesel Particulate Filters ("DPFs"). The Verification Regulation initially focused on the extent to which the DPFs effectively captured diesel particulate matter. The DPF devices were hailed by CARB, in countless public statements and Executive Orders, as an inexpensive, easy to install, device that could be implemented on all diesel powered engines throughout the State of California within just a few years, and it would thereby improve air quality in the Los Angeles and San Joaquin areas. Within the first full year of the implementation of the Truck and Bus Regulation and the Verification Regulation, in 2009, CARB became aware that its assumptions were based on a set of facts that did not and would not exist over time.

12. Through a combination of regulatory pronouncements – ranging from advisory news releases to executive orders to regulatory amendments, CARB has been repeatedly extended, postponed and altered the regulations related to the DPF requirements and compliance schedule and the DPF verification process. Over time, CARB has publicly acknowledged that the DPF is expensive to

install and maintain mechanically unreliable, and the warranties are inadequate both as to time, mileage and scope of coverage.

a. The DPF has been repeatedly the source of chronic and catastrophic mechanical engine failures, creating extreme danger to the drivers, passengers, other vehicles on the road, and nearby residents (at the scene of a truck accident or fire). When the DPF begins to clog or malfunction, it can cause engine damage and even fires due to excessive pressure and heat buildup in the engine. Sensor devices, installed to alert the truck driver of a DPF failure, commonly fail and cause a situation referred to as "de-rating," which means that the engine's horsepower becomes significantly limited, or shuts off completely. This can happen suddenly and without warning to the driver while he or she is driving on the highway or during a critical service operation. The "de-rating" phenomenon is among the reasons why CARB and other agencies exempt emergency vehicles (ambulances and fire trucks) from the DPF requirement. Undetected DPF failures, which are the most common in retrofitted DPF devices, means that the device malfunctions unbeknownst to the truck driver or owner, and wreaks havoc on other critical engine parts, including the turbocharger, the doser, the fuel injectors and the axis turbine generator.

b. The DPF, as installed on buses and trucks throughout the nation and in California, has been well documented to be the source of fires. Engine fires have erupted causing accidents and property damage. Even in absence of a malfunction, the DPF device is inherently unsafe because it operates at extremely high temperatures at all times,

and especially during the regeneration process (which burns the soot that collects inside the device). As a result, drivers are warned to be careful about where they park the vehicle during regeneration – it cannot be near brush that could catch fire or asphalt that could melt. Workers must not be near the device during regeneration, which can spew sparks, fire, diesel particulate matter, and ultrafine particulate matter to the surrounding area. For newer models of trucks that have the DPF devices installed, the trucks drivers report the discharge of excessive diesel particular matter (black soot) onto the truck roof and windows, and on vehicles driving near the trucks during the regeneration process. Bus fires, included chartered buses and school buses, have had repeated engine fires and engine malfunctions due to the DPF devices. These fires erupt without warning during the operation of a bus on the highway and public road, and spread extremely quickly throughout the bus, giving drivers mere seconds to pull over and evacuate a bus load of passengers. The risk to teachers and students for travel to school-sponsored events is serious and potentially deadly.

13. CARB's failure to consider the economic and environmental impacts of the DPF device is made more apparent in a recent study, funded by CARB. Released in July 2013, and discussing emissions from the DPF undergoing the regeneration process, required to burn off the soot trapped in the filter, the study states: "More technical information is needed concerning "Parked" regenerations, since a *large amount* of PM mass and a *very large number* of ultrafine volatile and semi-volatile particles are released in the immediate vicinity of the truck diesel engine. A clearer understanding of the emitted PM composition, toxicity, and exposure potential is

needed if DPFs are found to increase average vehicle total particle number emissions when regeneration is included in testing protocols. By knowing more information concerning PM physical properties, and the time and space distribution of these particles researchers can begin to understand and evaluate the possible health effects." *See* Dwyer, *Measurement of Emissions from both Active and Parked Regenerations of a Diesel Particulate Filter from Heavy Duty Trucks*. (http://www.arb.ca.gov/research/veh-emissions/dpf-regen/11-329_final_report_small_wind_tunnel_7_28_13_dwyer.pdf). CARB is sponsoring a similar study that is underway in 2014. More recently, at the April 2014 CARB meeting to consider new regulations to delay DPF implementation requirements, defendant Mary Nichols expressed her concerns about the continued viability of the DPF device. For close to a decade now, CARB has purported to know the answer to these important questions – *i.e.* whether the DPF is safe and provides an important benefit to public health and the environment, thereby serving the intent and purpose of California air quality laws. Now, after millions of dollars spent by California businesses, consumers, and state regulatory agencies, CARB, in a near regulatory whisper, acknowledges that the DPF is neither safe nor beneficial to the environment.

14. Most of the amendments to the Truck and Bus Regulation and the Verification Regulation have centered on the DPF device implementation, including, *inter alia*:

a. In 2010, CARB proposed significant amendments the Truck and Bus Regulation, which

became effective on December 14, 2011 ("2011 Amendments"). The 2011 amendments to Truck and Bus Regulation significantly altered the DPF requirements and schedule of compliance for trucks with diesel engines, expanding deferrals and exemptions, acknowledging the unanticipated economic impact, and acknowledging that the installation and maintenance of the DPF device was complex and costly. Specifically, CARB slowed down the compliance schedule for the installation of DPF devices on certain categories of vehicles and deferred other categories while CARB considered further applications by trade groups and government agencies for waivers and exemptions. In 2012, CARB issued a pamphlet on DPF maintenance, acknowledging a laundry list of maintenance requirements for the devices to prevent malfunction and fires ("A Truck Driver's Guide to Care and Maintenance of Diesel Particulate Filters (DPFs)"). Notably, on page 5 of the Maintenance Pamphlet, the following admonishment is written by CARB: "Actively regenerated DPFs should not be parked near flammable materials when the regeneration takes place. The DPF gets very hot and could cause combustibles to catch on fire." Following this publication, CARB staff went on tour throughout California and met with different communities during which it continued to extol the virtues of the DPF as well as answer questions relating to DPF performance, safety and reliability. It was around this time that plaintiff began to communicate with other truck drivers and owners, and learned the DPF failures and the incidents of engine fires associated with the emissions systems were not anecdotal but rather epidemic throughout the state. This coupled with testimonials of DPFs reaching dangerous temperatures and melting down, sometimes causing

fires and accidents, moved ACB and its members into action.

b. As well, CARB has issued, over the years, and as recently as November 2013, formal, published advisories and Executive Orders, which have modified the Truck and Bus Regulation, particularly with respect to the requirements associated with the DPF devices, including delaying enforcement requirements.

c. Defendants Mary Nichols and Richard Corey, in their capacities as Chairperson and Executive Officer, respectively, of CARB, have promulgated and now direct enforcement of a regulation known as the "Verification Procedure, Warranty and In-use Compliance Requirements for In-use Strategies to Control Emissions from Diesel Engines" ("Verification Regulation"), which is codified in the California Code of Regulations, Title 3, Ch. 14, section 2700, *et seq*. The Verification Regulation is a critical component of effective implementation of the Truck and Bus Regulation as it imposes requirements on the manufacturers and installers of the DPF. Similar to the Truck and Bus Regulation, the Verification Regulation is the subject of repeated amendments, the most recent of which took effect on October 1, 2013.

d. In early 2014, CARB issued proposed further amendments to the Truck and Bus Regulation ("2014 Amendments"). These amendments seek to grant a reprieve to truck and bus owners and operators as it further extends certain deadlines for compliance, in light of the financial hardship of many Californians straining under the weight of a still-struggling economy and

high unemployment statewide. The public comment period soon followed as required by the APA, and culminated on April 24, 2014 when CARB held a public hearing at which many affected Californians, including ACB members, spoke about the possible catastrophic effects of the DPF requirement as now implemented by CARB, and as proposed by CARB under still further amendments.

15. The Board Members meet at locations throughout the state, to review and approve the proposals and recommendations of CARB staff and consider public comments on CARB activities. The Board Members, in effect, serve as the liason between members of the public and the state regulators who implement CARB policy and enforce the Truck and Bus Regulation.

16. However, ACB is informed and believes that many of the Board Members are often placed in the untenable position of approving policies, rules and regulations based on incomplete information, and that CARB staff, at the direction of the executive officers of CARB, knowingly withhold such information. ACB is informed and believes, and herein alleges, that some Board members, who have demonstrated their willingness to adhere to the policy recommendations of CARB's executive officers, receive such information discreetly. Other Board members are excluded from the information circle. This policy and practice of CARB's executive officers deprives the Board Members and members of the public of the opportunity to make an informed decision on matters that significantly impact the citizens of this state, including the members of ACB. This policy and practice also impacts the ability of the citizens participating in the public review process

to confirm that CARB has completely and fully responded to the objections and concerns presented by professionals and stakeholders. In many instances, CARB's executive officers as well as CARB staff acting at their direction, have given conclusory and insufficient responses to comments that it chose to consider while ignoring compelling evidence that the matter before the CARB requires further investigation and consideration.

17. In the case of both the Truck and Bus Regulation and Verification Regulation, defendants Nichols and Corey, and CARB staff acting at their direction, have withheld and suppressed information from Board members and the public, concerning, the defects and flawed design of DPFs, as well as the absence of a commercially acceptable warranty for the product's use, replacement and repair, especially as it affects and causes damage to other parts of the truck engine. Defendants Nichols and Corey, and CARB staff acting at their direction have further withheld and suppressed information from Board members and the public, concerning the environmental impact of the use of DPFs in the State of California. Specifically, based on information and belief, ACB alleges as follows:

a. CARB's primary interest in the DPF device, when testing it and "verifying" it for sale in California, is that it must actually achieve a reduction of 85% or better of soot release from the engine. CARB does not test nor concern itself with other mechanical and safety problems caused by the use of a DPF, and has not pursued a competent investigation of such problems nor issued appropriate and timely warnings to the California truck owners required to purchase the devices.

Following receipt of public comment at a April 2014 hearing to discuss proposed amendments to the Truck and Bus Regulation, defendant Nichols acknowledged the inadequacy of testing of the device's potential safety flaws and voiced her concern for the overall long-term viability of DPF usage in no uncertain terms. The Board voted to approve the amendments, which grant more time for DPF compliance, but still CARB has not disclosed to the public during the rulemaking process its accumulated knowledge of DPF failures and dangers.

b. A typical DPF costs between $18,000 and $20,000, and comes with a warranty that is significantly shorter than the projected lifetime of the truck fitted with the DPF. That warranty does not cover damage to other parts of the truck caused by the DPF. In sharp contrast with the image of a durable, reliable, sturdy diesel truck, a truck fitted with a DPF device is a traveling menace on the highways of California, capable of suddenly stalling on the highway due to computer-driven shut down mechanisms (tied to the DPF functions) and causing fires on or near the truck during the "regeneration process" (which is when the device heats up to anywhere from approximately 1100 to 1400 Fahrenheit to "burn off" soot). CARB has volumes of information concerning actual incidents of fires caused by DPFs and other DPF related malfunctions that it has not shared with Board members or the public. CARB has weakly acknowledged the risk of fire from the DPF device, but publicly denies that it has actually happened, and has concealed CARB's own investigations about this problem. These fires and other mechanical failures place truck drivers, passengers and local communities at grave risk of injury and property destruction. Moreover, the

pollution that CARB purports to reduce by use of the DPF is increased by the resulting fires or the need to tow the stalled truck to a qualified mechanic. More important, defendants Nichols and Corey, and other CARB staff acting at their direction, were informed through their technical advisors about these problems, including the fire hazards, during the review process of the Truck and Bus regulation, and throughout the implementation of the DPF requirement, yet failed to permit a public review of the problem or recommend delayed implementation until the problems are resolved. Recent successive actions by CARB, which serve to delay implementation of this onerous regulation, nonetheless further ratify and enforce the DPF implementation requirement in the face of mounting evidence that such implementation creates significant health and safety risks tied to everyday truck use with these devices installed.

c. The DPF device is not designed to operate effectively for short hauls because the engine does not generate sufficient heat to burn off the soot. The solutions vary and include:

(i) Driving the empty truck or bus at higher speeds and longer distances to burn off the soot, which serves no commercial purpose and results in significant increases of fuel, energy to make that fuel, and increased air pollution. It also increases the cost of operating and maintaining equipment for ACB members, as well as other private citizens and public agencies. This increased air pollution and energy use have a negative environmental impact.

(ii) The use of expensive devices that the owner/operator has to plug into when the truck is

not in use. The overnight use of energy to burn off the soot with the plug in system could light and air condition a 1500 square foot house. This increased air pollution and energy use have a negative environmental impact.

(iii) Another option is to bring the filter to a repair facility to remove and clean the soot out of the filter. However, the DPF cleaning facilities are located in urban areas – often requiring round trip travel of up to 200 miles, unrelated to the truck's normal business use, and the loss of one or more days of business use for the truck in question. This increased air pollution and energy use have a negative environmental impact.

d. If the filter reaches a certain point of soot collection, the truck can, without warning, require regeneration. Thus, if the warning light for regeneration flashes during operation of the truck, the driver has just minutes to pull over to a safe area (*i.e.* one that has no grass or brush that could catch fire), and then must stop all operation of the truck for a period of time while the DPF completes its regeneration cycle. When doing so, the driver must ensure that the truck is parked in an area that is not susceptible to fire when exposed to extremely high heat from the DPF device during the regeneration process. If the driver fails to notice or heed the warning light, the truck engine may simply turn off or slow down to a speed unacceptable and unsafe for any public road or highway. In many instances, when this happens, the truck cannot be restarted and must be towed to a repair shop. Additionally, the DPF causes damage to other parts of the truck engine, which cannot be anticipated or prevented. However, the majority of California's truck mechanics are

untrained to repair these complicated devices. The outcome is that a truck is out of use for an extended period of time. The repairs could include the replacement of the DPF and other parts of the engine that were damaged by the DPF. These repairs to the other parts of the engine, if caused by the DPF, are not under any warranty. The cost to truck owners is exponential with continued use of the DPF.

e. Even assuming that the DPF functions without incident, it must be periodically cleared of ash that is generated from the regeneration process – created by the burning of the soot. The ash is hazardous waste and more finely particulated (*i.e.* capable of becoming airborne) than the soot. The facility that conducts this cleaning utilizes a massive amount of energy to essentially cook off the soot and ash embedded in the DPF. The facility also generates significant quantities of hazardous waste in the process, which must be managed and ultimately disposed of at authorized hazardous waste management facilities in the State of California. The handling of the finely particulated soot and white ash resulting from this process can become airborne at or near the site as well as during tranportation, exposing workers and communities near such cleaning facilities to hazardous waste. California citizens are thus unknowingly required to trade the potential of airborne soot for an significant increase in energy production pollution and a new form of hazardous waste, which is now being created at exponential rates as the Truck and Bus Regulation takes effect throughout the state.

f. Defendants Nichols and Corey, and other CARB staff acting at their direction, did not disclose the significant flaws in the DPF technology

to the Board Members or members of the public during any of the many hearings leading up to the adoption of the Truck and Bus Regulation and Verification Process (or during the rulemaking process related to the subsequent 2011, 2013 and 2014 amendments) or with respect to the issuance of advisories and Executive Orders concerning the DPF and related compliance deadlines.

g. Defendants Nichols and Corey, and other CARB staff acting at their direction, did not disclose the significant flaws in the DPF technology to the Board Members or members of the public during any of the many hearings leading up to the adoption of the Verification Regulation (or during the rulemaking process related to the subsequent 2011 and 2013 amendments) or with respect to the issuance of advisories and Executive Orders concerning the DPF and related compliance deadlines. In response to pressure exerted upon it by manufacturers of DPF devices concerned by low sales figures, CARB, by its 2013 amendments to the Verification Regulation, effectively relaxed the in-use testing requirements for manufacturers before becoming verified. As a result of a "streamlined" testing schedule, the 2013 amendments granted authority to CARB's Executive Officer to issue recalls in a last-ditch effort to provide recourse to Californians injured by faulty DPFs, all the while knowing that DPF use had the potential to result in "catastrophic failure". In its Initial Statement of Reasons for the 2013 Amendments, CARB explained its rationale as follows:

> *The proposed amendments would provide financial savings to all applicants by reducing the amount of required in-use compliance*

testing by up to one-half and allow additional sales before this testing is required. The addition of functional in-field tests and the alternative test schedule further reduces the costs associated with the in-use compliance requirements. Streamlining the in-use compliance process and providing additional time for applicants to complete their conditional verifications provides even greater financial flexibility. The addition of recall provisions and clarifications to the warranty reporting requirements are necessary to maintain the stringency of the Procedure and to protect end-users.

h. Defendants Nichols and Corey, and other CARB staff acting at their direction, withheld evidence of the likelihood of catastrophic failure resulting from DPF use, while pressing forward in its enforcement of the Truck and Bus Regulation. Instead of using the Verification Requirement to require comprehensive safety testing of DPF devices prior to issuing on-road use approval, CARB instead relies on the recall provisions of the Verification Regulation as amended in 2013 to provide a means to address a severe issue of safety method long after Californians have been exposed to the risks inherent in these technologically flawed devices. In its Initial Statement of Reasons for the 2013 Amendments, CARB rationalized this approach as follows: *The intent of the proposed recall provisions is to require corrective action by an applicant to the Procedure for a systemic defect of their DECS family or to address issues of safety or catastrophic failure.*

i. Defendants Nichols and Corey, and other CARB staff acting at their direction, did not

disclose a voluntary recall it required by undertaken by Cleaire in September 2012, the manufacturer of the faulty Longmile DPF, until September 2013, choosing in the intervening year not to inform compliant Californians that the Longmile DPF they had installed on their truck(s) pursuant to the Truck and Bus requirement in fact posed danger of catastrophic failure and constituted a veritable safety risk.

j. Defendants Nichols and Corey, and other CARB staff acting at their direction, have similarly not yet disclosed to compliant Californians a voluntary recall it required be undertaken by SK Innovation Co. Ltd, the manufacturer of the faulty Econix DPF, in January 2014, despite entering into a settlement agreement in which a recall was one of the conditions of settlement.

k. Defendants Nichols and Corey, armed with the knowledge of these recalls as well as of the inherent flaws in DPFs as verified by CARB and the danger posed to the Californian trucking community as well as innocent bystanders on California's roadways through continued enforcement of the Truck and Bus Regulation, nonetheless continue to enforce certain portions of the regulation not effected by subsequent amendments.

l. Defendants Nichols and Corey, and other CARB staff acting at their direction, have withheld and suppressed information concerning the economic impact of a regulatory policy during the initial rulemaking period leading up to the original Truck and Bus Regulation as well as the rulemaking periods relating to the subsequent 2011 and 2014 Amendments, requiring untested and ill-designed

technology, on all California truck owners. The filters will not last the lifetime of the truck and as such, it is not a one-time $20,000 expediture to retrofit a truck with a filter. The DPF device has only been subjected to scrutiny for its filtering capabilities, leaving to chance and countless repair nightmares the actual day-to-day negative effect of using the filter on a truck.

m. Defendants Nichols and Corey, and other CARB staff acting at their direction, prior to approving amendments to both the Truck and Bus Regulation and the Verification Regulation, have failed to properly assess the potential for the adverse economic impact that the implementation of the DPF requirement would have on small businesses or the strong likelihood of catastrophic failure of many of these devices, and in doing so ignored the risks inherent in this technology, which has been implemented on trucks following shortened in-use testing periods following the 2013 Amendments to the Verification Regulation.

n. Defendants Nichols and Corey, and other CARB staff acting at their direction, have provided inconsistent and inaccurate figures when disclosing to the affected community the critical issue of how many trucks will be impacted by these regulations and more recently, how many trucks are now equipped with the DPF and traveling the highways of California, placing the drivers and other travelers at grave and immediate risk when and if the DPF fails.

18. Defendants Nichols and Corey, and other CARB staff acting at their direction, have withheld and suppressed information concerning the defects

and flawed design of CARB-approved DPFs for, and, again, the absence of a commercially acceptable warranty for the products use, replacement and repair. As a result, when, under the requirements of the Truck and Bus Regulation, a truck owner replaces an old truck with a new truck, the new product is mechanically unsound and unpredictable for commercial use, again due to the DPFs, which in the new designs are mechanically tied to the operation of the engine in such a way that they could never be removed. The repair problems are often so obscured by the complicated technology of the engines that the repairs take longer and cost more than for older trucks. The warranties cover only a fraction of the anticipated life of the new truck. Truck owners are thus saddled with the huge debt of a new truck that is frequently rendered out of use due to repairs and maintenance that cannot be readily diagnosed and repaired. Defendants Nichols and Corey, and other CARB staff acting at their direction, have withheld and suppressed information concerning the economic impact of a regulatory policy requiring California truck drivers to incur huge debt for truck replacement of equipment that is flawed and extremely costly to maintain. There is added cost for every truck owner and operator when a truck is out of use. And, in the case of single owner/operators, the loss of use is a cessation of all earning activities during the truck's "down time."

19. Defendants Nichols and Corey, and other CARB staff acting at their direction, have withheld and suppressed information concerning the regulatory and economic debacle of mandating a "one size fits all" regulatory scheme for trucks throughout the State of California, notwithstanding the fact that northern counties, such as Glenn County, Shasta

County, Butte County, and others have significantly better air quality than Southern California counties. While ACB and its members wholeheartedly support clean air and cleaner diesel trucks, the Truck and Bus Regulation is an extreme and economically risky response to far less pervasive and urgent air quality issues in the rural counties of Northern California, including Glenn County. Simply stated, the air is cleaner in these counties. As a result, less drastic regulatory action is more appropriate. Annual smoke opacity testing, also now required under California law, is one such requirement and has been proven to have a high correlation to measurements of diesel particulate material emissions. Thus, if a truck passes the smoke opacity testing requirements set by CARB, the added benefit of retrofitting the truck with a DPF is minimal.

20. Defendants Nichols and Corey, and other CARB staff acting at their direction, have actively engaged in the dissemination of misinformation concerning the availability of funding (grants and loan guarantees) for purchasing DPFs and truck replacement. CARB staff, purporting to speak for defendant Nichols, repeatedly represented to several ACB members that there was grant money available for DPFs and truck replacement in the smaller rural counties in Northern California, including Glenn County. However, individual ACB members could not obtain the funding. Local Air Quality Districts reported that they had nowhere near the grant dollars that CARB staff claimed were supposed to be available. Moreover, for those who obtained grant money, the grants given were treated as taxable income and the recipients received a Form 1099 after receiving the money. As facts emerge, it has become apparent that the most of the grant money from

CARB has gone to owners of trucks that traveled in the San Joaquin corridor and southward. Local haul truck owners in Northern California have very little access to grant money. Defendants Nichols and Corey did not disclose this geographic preference policy to Board Members and members of the public when asking for approval of regulations requiring truck owners for the entire state to either purchase DPFs or replace their trucks.

21. Defendants Nichols and Corey, and other CARB staff acting at their direction, have withheld and suppressed information concerning the significant economic impact of the Truck and Bus Regulation, as amended most recently in 2011 and by more recent Executive Orders, on seasonal owner/operators who provide affordable and prompt short hauls from the local farms to the production facilities. Stone fruit, walnut, pistachio olives, and other vegetable crops, as well as many dairy products, have an extremely short window of time for transport from the field to production facilities. A delay of just a few hours can cause damage to crops and other agricultural products. These truck owners typically own and operate one or two trucks for crop hauling during the harvest season. Most members purchase used trucks to be used for years, and have lengthy mortgages on their trucks. The trucks typically cost at least $150,000 to purchase, but have a useful life of several decades if maintained properly. Available retrofit technology costs tens of thousands of dollars to purchase and install for each truck. Many ACB members do not have the financial resources to purchase and install retrofit technology for their trucks or afford the associated and constant repair problems that arise once the trucks are retrofitted. These truck owners will either close or

lose their businesses. Local agricultural business and support industries will suffer immeasurable economic harm upon the loss of affordable and readily available hauling for agricultural products.

22. Defendants Nichols and Corey, and other CARB staff acting at their direction, have withheld and suppressed information concerning the improvement of air quality throughout the state by implementation of the opacity testing requirement and the extent to which the correlation of soot reduction through cleaner fuels and other technologies have and can achieve the results intended by the DPF requirements without the associated environmental harm and disasterous economic impact on truck drivers. Defendants Nichols and Corey, and other CARB staff acting at their direction, have withheld and suppressed information concerning the number of truck owners impacted by these rules and the superior air quality of certain regions making it environmentally unnecessary to impose the Truck and Bus Regulations, and in particular the DPF requirement, in those communities.

23. Defendants Nichols and Corey, and other CARB staff acting at their direction, have withheld and suppressed information concerning the public safety risks as well as the significant environmental and economic impacts of the requirement that California trucks have the DPF device installed or be subjected to fines and penalties and ultimately deprived of the right to operate the truck.

a. By the terms of the Truck and Bus Regulation, and starting in January 2014, CARB, assisted by other state agencies, will commence

policing the entire state to stop and inspect trucks. Thus, ACB's members are presented with a Hobson's choice of installing a dangerous and destructive device on their trucks or losing the right to own and operate the truck that has no DPF device installed. ACB members have tried, without success, to discuss these issues with CARB staff, who insist that the implementation will proceed on schedule and without exceptions. CARB staff have conveyed to ACB members that this directive is "from the top" at CARB, which plaintiff believes to be defendants Nichols and Corey. Most recently, ACB members attended the April 24, 2014 public hearing by CARB to consider the adoption of further proposed amendments to the Truck and Bus Regulation, during which time ACB and other members of the public stated their concerns over the issues of reliability and safety posed by implementation of the DPF device. In response to repeated public comments relating to concerns over safety, defendant Nichols *closed* the public comments portion of the meeting with a statement about the need for more comprehensive testing of the DPF, especially with regard to safety and reliability. The response should have been to *direct* more testing and studies before subjecting Californians to a regulatory requirement that does more harm than good for the environment and citizens of the state.

b. Defendants Nichols and Corey, and other CARB staff acting at their direction, refuse to acknowledge or consider this compelling evidence, in part because it is not news to them, and in part because their regulatory objectives myopically focus on one component of the environment (the reduction of soot in the air) without consideration of the significant environmental and economic impact of

the implementation of CARB rules, policies and regulations. Defendants Nichols and Corey, and other CARB staff acting at their direction, have, at all relevant times, remained singularly focused on the rapid adoption and implementation of the Truck and Bus Regulation, and in particular the DPF retrofitting requirement. They consciously and systematically ignored the complex questions of science, technology, economics and law presented by this regulatory scheme, and by doing so, have run afoul of important legal requirements meant to protect citizens from overreaching and ill considered regulatory actions, including, *inter alia*, the California Administrative Procedures Act, California Government Code section 11340, *et seq*. ("APA").

c. CARB's Truck and Bus regulation, as amended in 2011, and the Verification Regulation, as amended in 2013, places California truck owners, including ACB members, in the position of violating California public health and safety laws, such as, *inter alia*, the California Vehicle Code section 24002, the California Labor Code section 6400, and Cal/OSHA section 3328. The Board was never presented with all relevant information before being asked to approve such regulations, and members of the public, including ACB members, were deprived of a meaningful and lawful public review process of the Truck and Bus Regulation.

24. Notably absent from CARB's official disclosures and the official rulemaking files, for both its Truck and Bus Regulation and the related DPF Verification and Warranty Regulation, was significant information that CARB had accumulated about the DPF device, including, *inter alia*:

a. That CARB has known since at least 2009 that all of the DPF devices had to potential to overheat and cause fires, as well as other damage to the truck engine. CARB was notified as early as 2009 and again in September 2011 about instances of the DPF causing fires. In 2009, East Bay Municipal Utility District ("EBMUD") reported fires caused by the Econix filter. In September 2011, CARB was notified and investigated two fires caused by the Cleaire filter.

b. That CARB was in discussions with two of the manufacturers of "CARB verified" DPF devices (the Econix and Cleaire Longmile brand filters) to issue recall notices. The Cleaire recall was announced in January 2013 and the Econix recall was disclosed as part of a settlement with CARB in January 2014. Both recalls recited risks that the filters would cause truck fires.

c. That CARB initiated in 2012 an amendment to the regulations pertaining to the DPF verification procedure, and included provisions for recall due to "potential for castrophic failure or safety related failure." And yet, CARB has still failed to require, as part of its verification process, any testing of trucks with DPF filters as it pertains to safety of drivers and the California public highway users. This amendment was final and adopted in October 2013.

d. That CARB was aware that the DPF devices had significant repair problems and failure rates, and yet permitted CARB verified vendors to provide warranties that were significantly shorter than the lifetime of the truck.

e. That the DPF device during the

regeneration process produced *and released* a white ash substance that was believed by CARB to be hazardous waste and dangerous to human health.

f. That CARB has never officially warned truck owners, drivers or consumers of these dangers, despite staff investigations for the past five years concerning the unexplained and significant increase, in California, in the number of truck fires that appear to be centered near the DPF filter and have not been investigated as to cause. Instead, CARB has elected to issue vague warnings about the need to maintain the DPF filters.

e. That CARB has repeatedly stated "unofficially" unsupported estimates of the number of trucks that will be impacted by the DPF filter requirement, the number of trucks that have been retrofitted with DPF filters, and the number of trucks remaining to be brought into compliance. As a result, CARB has not ever, and cannot presently, provide any meaningful estimate of the economic impact of the Truck & Bus Regulation, and its amendments in 2011, 2013, and soon to be in 2014.

FIRST CAUSE OF ACTION
Declaratory Relief
(As Against All Defendants)

25. Plaintiff incorporates by reference paragraphs 1 through 24 of this Complaint as if fully set forth herein.

26. An actual controversy has arisen and now exists between plaintiff ACB and defendants regarding the legality, as designed, approved, and implemented by defendants, of the Truck and Bus

Regulation, as amended in 2011, and in particular the requirement that trucks either be retrofitted by January 1, 2014 with DPF devices or be "turned over" (*i.e.* taken out of use or replaced) as a condition of lawful operation on the roads of the State of California. Notably, replacement of a truck, necessarily means operating a truck fitted with a DPF device. Plaintiff thus desires a declaration of its members' rights under the laws of the State of California.

27. Unless restrained and enjoined, defendant will implement and enforce the Truck and Bus Regulation, resulting in irreparable harm to ACB members.

28. Plaintiff and its members will suffer irreparable harm and injury if the illegal Truck and Bus Regulation is permitted to be enforced, including, inter alia: (a) being forced to install an unproven, defective and dangerous technology, to wit the DPF device; (b) being subjected to fines, penalties and the unlawful taking of their private property, to wit their trucks, if by January 2014, they are operating a truck on California highways without a DPF device installed; and (c) the resulting loss of their businesses and livelihoods, which in turn will proximately cause some members to be at risk of losing their trucks, homes, cars, and the ability to purchase the basic necessities of life.

29. Plaintiff has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in this complaint, in that there is no other legal remedy to prevent or enjoin the implementation of the Truck and Bus Regulation as amended in 2011 and the Verification Regulation as

amended in 2013.

RELIEF REQUESTED

1. As to the First Cause of Action, for a declaration that continued enforcement of both the Truck and Bus Regulation and the Verification Regulation, as amended, in whole or in part, places California truck owners, including ACB members, in the position of violating California public health and safety laws, such as, *inter alia*, the California Vehicle Code section 24002, the California Labor Code section 6400, and Cal/OSHA section 3328.

2. That this Court issue a preliminary and/or permanent injunction prohibiting defendants, and each of them, from enforcing the Truck and Bus Regulation and the Verification Regulation, as most recently amended and in their entirety, or at least as to the current DPF device requirements, as now required under the 2011 amendments and the 2013 amendments, whether by requiring installation of retrofitted DPF devices or as a condition of operating trucks and other diesel engine machinery within the state, pending defendants' compliance with the APA and all other California laws impacted by said regulatory requirement(s).

3. Plaintiff be awarded attorneys fees' and costs of suit incurred in this action for responding to and protecting plaintiff's rights in connection with the harm caused by defendants.

4. For such other and further relief as the Court may deem just and proper.

Dated: February 20, 2015

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