Nos. 25-881, 25-1481

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OUTDOOR POWER EQUIPMENT INSTITUTE,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents,

STATE OF CALIFORNIA, ET AL.,
Intervenors.

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, ET AL.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents,

STATE OF CALIFORNIA, ET AL.,
Intervenors.

On Petitions for Review of Notice of Decision of the
Environmental Protection Agency

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS AND VACATUR

Erica Klenicki
Caroline McAuliffe
NAM LEGAL CENTER
733 Tenth Street N.W.,
Suite 700
Washington, D.C. 20001

Christopher E. Tutunjian
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, TX 77002

Jeffrey H. Wood
BAKER BOTTS L.L.P.
700 K Street N.W.
Washington, D.C. 20001
(202) 639-7732
jeff.wood@bakerbotts.com

Counsel for Amicus Curiae The National Association of Manufacturers

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in all fifty states and in every industrial sector. Manufacturing employs nearly 13 million people, contributes $2.9 trillion to the economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation, fostering the innovation that is vital for this economic ecosystem to thrive. The NAM is the voice of the manufacturing community and leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

For domestic manufacturing to spur economic growth in the United States and enhance the nation's global economic competitiveness, a stable and predictable regulatory regime for manufactured products is necessary. In the Clean Air Act ("CAA"), Congress intended to create such a scheme for the regulation of nonroad engines and vehicles that are sold in interstate commerce. States are preempted from taking regulatory action, but the Environmental Protection Agency ("EPA") may

[1] All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). No party's counsel authored this brief in whole or in part, and no entity or person, aside from *amicus*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

authorize the State of California to adopt regulations in certain circumstances. Congress included protections for industry in this scheme—most notably, California must receive EPA's authorization before the State may go forward with regulating. The NAM is concerned that EPA's authorization here removes the protection Congress intended for manufacturers like the NAM's members.

A successful domestic manufacturing base also requires a regulatory regime that is consistent with technological realities. Manufacturers are well-equipped to innovate in response to new regulations. But what they are asked to do must be technologically feasible. The NAM is concerned that EPA's decision here asks the NAM's members to do what is not possible at this time. Manufacturers need adequate lead time before compliance, which EPA failed to ensure here. The NAM, as the representative of the manufacturing industry, is uniquely positioned to discuss the broad, real-world implications of EPA's action.

SUMMARY OF ARGUMENT

Under Section 209(e) of the CAA, Congress preempted State regulation of emission standards for nonroad engines and vehicles. But, for some nonroad engines and vehicles, EPA may authorize the State of California to adopt and enforce emissions regulations if the State satisfies certain conditions. In 1990, the California Air Resources Board ("CARB") adopted emission standards for small off-road engines ("SORE") and has regularly amended these SORE regulations since then.

CARB defines SORE as off-road, small spark-ignition ("SSI") engines that meet certain power and use requirements. 1-ER-6 n.3. SORE is predominantly used in lawn and garden equipment, as well as portable generators, pressure washers, and air compressors. *Id.*

EPA has granted various authorizations for CARB to adopt and enforce these regulations on seven prior occasions. 1-ER-6 n.4. Most recently, CARB adopted amendments to the SORE regulations in 2016 ("2016 SORE Amendments") and 2021 ("2021 SORE Amendments"). Generally, the goal of the Amendments is to transition all SORE from using gas-based SSI engines to zero-emission equipment ("ZEE") in the form of battery power. Concluding the requirements of Section 209(e) were satisfied, EPA granted authorization to CARB's SORE Amendments.

The NAM offers two reasons why EPA's authorization of the 2016 and 2021 SORE Amendments should be vacated. First, EPA violated Section 209(e)'s plain language by evaluating lead time from the date of CARB's adoption of the regulations rather than from the date of EPA's authorization. Section 209(e) creates a scheme in which California's regulations are preempted and ineffective until EPA grants authorization. By measuring lead time from adoption rather than authorization, EPA circumvented this statutory scheme and eliminated critical protections Congress intended for manufacturers. Measuring lead time in this way forces businesses into an untenable dilemma: incur potentially irrecoverable

compliance costs before knowing whether EPA will authorize the regulations or wait and risk immediate compliance obligations upon authorization. This methodology also gave California greater regulatory authority than EPA itself possesses—EPA cannot promulgate emissions regulations with immediate effect and no lead time, yet EPA validated exactly such a scheme for California. EPA's departure from the statutory scheme is harmful to manufacturers, and this Court should restore the statute's protections by enforcing Section 209(e)'s plain text.

Second, EPA's determination that compliance with the SORE Amendments is technologically feasible is arbitrary and capricious. Transitioning SORE from gas-powered to battery-powered equipment is a complicated process involving the complete redesign and reconfiguration of powertrains, coordination with numerous separate engine component manufacturers in this non-integrated industry, and a timeline of 6-8 years for manufacturers to transition all product lines. EPA erroneously concluded that because ZEE technology exists in the market and some companies have already developed ZEE products, no additional lead time was necessary. But this reasoning conflates the existence of technology with the ability of all regulated manufacturers to develop, test, certify, and produce compliant products. Moreover, ZEE technology is simply not available for most commercial SORE, which requires significantly more battery power due to more frequent and extended operation. EPA's own joint report with the Department of Energy

("DOE") recognized that commercial equipment is the "notable exception" to electrification trends and faces barriers related to cost, weight, charging downtime, and charging infrastructure. EPA's authorization cannot be squared with its own findings that battery usage is not feasible for all forms of SORE.

This Court should grant the petitions for review and vacate EPA's authorization decision.

ARGUMENT

I. EPA's evaluation of lead time from the date of CARB's adoption of the regulation violates Section 209(e)'s plain language and results in serious consequences for industry.

A key issue—and the critical flaw—in EPA's authorization decision is its calculation of lead time from the date of CARB's adoption of the SORE Amendments rather than from the date of EPA's authorization. This approach violates Section 209(e)'s plain language and strips away the protections Congress intended for manufacturers like the NAM's members. This Court should reject flawed methodology that results in serious consequences for industry.

A. Under Section 209(e), State regulation of emissions from nonroad sources is preempted, but when certain conditions are met, EPA may authorize California to adopt and enforce regulations.

"The Clean Air Act Amendments of 1990 created a scheme for the regulation of emissions from nonroad sources such as lawnmowers, bulldozers, locomotives, and marine vessels." *Pac. Merch. Shipping Ass'n v. Goldstene*, 517 F.3d 1108, 1110 (9th Cir. 2008). "The amendments governing emissions from nonroad sources

reflect the basic structure of the Clean Air Act, which makes the States and the Federal Government partners in the struggle against air pollution, but sought to avoid an anarchic patchwork of federal and state regulatory programs." *Id*. (citation and internal quotation marks omitted). The 1990 amendments granted EPA the authority to promulgate "regulations containing standards applicable to emissions from … new nonroad engines and new nonroad vehicles." 42 U.S.C. § 7547(a)(3). In addition, under Section 209(e)(1), Congress expressly prohibited all States, including California, from "adopt[ing] or attempt[ing] to enforce any standard or other requirement relating to the control of emissions" from certain "new nonroad engines or nonroad vehicles," such as new engines used in construction and farm equipment, new engines smaller than 175 horsepower, and new locomotive engines. *Id.* § 7543(e)(1).

For other nonroad engines and vehicles, Section 209(e)(2) allows California in narrow circumstances to seek authorization from EPA "to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines if California determines that California standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards." *Id.* § 7543(e)(2)(A). But no authorization can be granted if EPA finds that:

(i) the determination of California is arbitrary and capricious,

> (ii) California does not need such California standards to meet compelling and extraordinary conditions, or
>
> (iii) California standards and accompanying enforcement procedures are not consistent with this section.

Id. § 7543(e)(2)(A)(i)-(iii). Other States can then adopt regulations identical to California's EPA-authorized ones. *Id.* § 7543(e)(2)(B).

"Section 209(e)(2) does not expressly preempt any state regulation," but "it does imply a preemption"—"if no state regulation were preempted, California would have no need to seek authorization for its regulations, and other states would not need to opt in to the California rules." *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1087 (D.C. Cir. 1996); *see also id.* ("Thus, the California authorization provision assumes the existence of a category of sources that are subject to preemption."). "In other words, states must be preempted from adopting any regulation for which California could receive authorization." *Id.* at 1087-88; *see also Pac. Merch. Shipping Ass'n*, 517 F.3d at 1113 ("For nonroad engines and vehicles not covered by § 209(e)(1), Clean Air Act § 209(e)(2) creates a sphere of implied preemption surrounding those regulations for which California must obtain authorization."). In short, "Section 209(e)(2) impliedly preempts standards and other requirements relating to the control of emissions from any nonroad vehicles or engines other than those referred to in section 209(e)(1)." *Nat'l Ass'n of Home Builders v. San Joaquin*

Valley Unified Air Pollution Control Dist., 627 F.3d 730, 735 (9th Cir. 2010) (cleaned up).

Thus, Section 209(e) creates a scheme under which all States are preempted from adopting and enforcing emissions standards and requirements for nonroad engines and vehicles, but for certain nonroad engines and vehicles, EPA—if certain conditions are met—may authorize California to adopt such regulations that other States may then adopt. Given this implied preemption, Congress envisioned a scheme where California's regulations are ineffective until EPA authorizes California to adopt them. Section 209(e)'s text is clear that EPA authorization is antecedent to California's ability to adopt and enforce emissions standards—"the Administrator shall … *authorize* California *to adopt and enforce* standards and other requirements relating to the control of emissions from such vehicles or engines." 42 U.S.C. § 7543(e)(2)(A) (emphases added); *see also Pac. Merch. Shipping Ass'n*, 517 F.3d at 1110 ("§ 209(e)(2) of the Clean Air Act allows California to seek authorization from the EPA to adopt"). In short, when California wants to adopt and enforce regulations that are otherwise preempted, it must seek authorization from EPA *first*, and *then* the State is permitted to give them effect.

B. Section 209(e) provides industry with critical protections.

By preempting California's regulation of nonroad engines and vehicles until the State receives authorization from EPA, Section 209(e) provides important

certainty and protection to industry. EPA recognized as much when it promulgated its rule interpreting the Section 209(e)(2)(A) criteria:

> At the same time, EPA does not believe that section 209(e) may be interpreted to permit California to enforce any nonroad regulations before receiving authorization. Were California to enforce its regulations before it receives authorization, it would defeat the protection section 209(e) was established to provide—that California's nonroad program only go forward if EPA authorizes it in accordance with the provisions of that section. Thus, EPA believes that while California may adopt nonroad regulations before receiving EPA authorization, its adoption must be conditioned upon EPA's authorizing those regulations under 209(e). In short, California may adopt, but not enforce, nonroad standards prior to EPA authorization.

Air Pollution Control; Preemption of State Regulation for Nonroad Engine and Vehicle Standards, 59 Fed. Reg. 36969, 36982 (July 20, 1994).

These protections are lost if California can adopt and put into effect regulations before receiving authorization, placing manufacturers in an untenable position. Their choices are to begin compliance efforts immediately or wait and see whether EPA authorizes the regulations. The former threatens irreversible financial harm—a business could incur serious financial costs of compliance only to learn that EPA declined to authorize the regulations. *Cf. Ohio v. EPA*, 603 U.S. 279, 291-92 (2024) (costs of complying with a regulation during legal challenge are "nonrecoverable") (citation and internal quotation marks omitted); *NFIB v. OSHA*, 595 U.S. 109, 120 (2022) (similar); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring) ("[C]omplying with a regulation later held

invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs."). And that compliance decision may not be feasible to reverse. The latter wastes precious time for getting into compliance and risks a potential enforcement action and penalty if EPA ultimately authorizes the regulations.

C. EPA's authorization of the SORE Amendments highlights the consequences of departure from the statutory scheme.

Here, the process for California's adoption and EPA's authorization of the 2016 and 2021 SORE Amendments highlights the harms industry incurs when Section 209(e) is not followed. California adopted SORE regulations in 2016 and 2021, but it did not submit an authorization request to EPA until December 20, 2022. 1-ER-7. The 2016 SORE Amendments had an effective date in 2018, and the 2021 SORE Amendments were scheduled to take effect mere days after the submission. 1-ER-36, 51. When EPA examined the authorization request, it calculated lead time from the date of adoption. 1-ER-36-37, 53.[2] And while California more or less stalled effectiveness of the 2021 SORE Amendments by a CARB executive order, that executive order would terminate upon EPA's grant of authorization, meaning compliance would be required essentially immediately. 1-ER-53-54. Lastly, EPA's

[2] As discussed below, *see infra* Section II, there must be sufficient lead time to permit the development of technology necessary to meet the standards and other requirements, giving appropriate consideration to the cost of compliance in the time frame provided.

decision was not issued until December 2024 or published in the Federal Register until January 2025.

The combination of basing lead time off of adoption date and allowing California to move forward with adoption and enforcement of its regulations before authorization circumvents Section 209(e)'s scheme and the protections it offers. Instead of ensuring "that California's nonroad program only go[es] forward if EPA authorizes it," EPA essentially allowed California's regulations to "go forward" before authorization. In substance, authorization here merely ratified what California had already done.

Adherence to the text of Section 209(e) requires that consummation of the adoption process for California's regulations cannot occur until authorization is granted. And if the regulations are not formally adopted until authorization, then lead time must be calculated as of the authorization date. Because Section 209(e) requires EPA's authorization before California can give its otherwise preempted regulations effect, calculating lead time from a date prior to authorization—that is, before the regulations have any legal effect—conflicts with the statute. Following these two statutory requirements will ensure that industry is not placed in an untenable position.

D. EPA's evaluation of lead time gives California greater regulatory authority than EPA has.

Another concern with EPA's methodology here is that it effectively permits California to accomplish and put into effect what EPA itself could not do under its own standard-setting authority. When EPA promulgates emission standards for new motor vehicles or motor vehicle engines under Section 202, it must allow those regulations to "take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." 42 U.S.C. § 7521(a)(2). Similarly, when EPA issues standards for nonroad engines and vehicles under Section 213, it must let them "take effect at the earliest possible date considering the lead time necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period and energy and safety." *Id.* § 7547(b).

But California is not so limited. By measuring lead time from CARB's adoption date instead of EPA's authorization—that is, when the authorized regulation can actually go into effect under Section 209(e)—EPA validates a regulatory scheme under which compliance can be expected at the very moment CARB's regulations can go into effect. EPA could not promulgate an expensive technology-forcing regulation that requires immediate compliance in this way. Yet EPA seems to believe California can do so in its place.

And not only that—under the process followed here, California can also pick who reviews its authorization request. As it did so here, CARB can adopt regulations and wait for what it views as a favorable political climate to pursue approval from EPA. Instead of a scheme where California must seek authorization before regulating, California can not only regulate first and but also wait and pick what it views as the opportune time to request authorization. This is a serious aggrandizement of California's regulatory authority under Section 209(e).

* * *

EPA's lead time analysis is incompatible with Section 209(e) and therefore "not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Nw. Envtl. Advocs. v. EPA*, 537 F.3d 1006, 1014 (9th Cir. 2008) (agency action is "not in accordance with law" when it conflicts with language of statute). In addition, the departure from the statute results in serious harm to industry. This Court should correct EPA's consequential error.

II. EPA's technological feasibility reasoning is flawed.

EPA interprets the Section 209(e)(2)(A)(iii) consistency requirement to mean that California's standards must be consistent with Section 209(b)(1)(C) and therefore consistent with Section 202(a). 1-ER-33. As EPA explained, it interprets consistency with Section 202(a) using a two-pronged test: (1) whether there is sufficient lead time to permit the development of technology necessary to meet the

standards and other requirements, giving appropriate consideration to the cost of compliance in the time frame provided, and (2) whether the California and Federal test procedures are sufficiently compatible to permit manufacturers to meet both the State and Federal test requirements with one test vehicle or engine. *Id.* The first element is referred to as technological feasibility, and it considers whether, considering costs, it is feasible to develop and adopt the necessary technology on the timeline provided. 1-ER-34. Here, EPA overlooked that for scores of SORE equipment, the regulations fail to provide an adequate lead time for the transition from SSI products to zero-emission battery power, and the transition required is infeasible for many types of SORE.

A. Transitioning an SSI engine-powered piece of equipment to ZEE is a complicated process.

The components of a gas-powered powertrain differ markedly from an electrified one. 2-ER-244-45. A powertrain comprises more than just the power source—SSI engine or battery. 2-ER-245. It also includes the components that ultimately turn the chemical energy released from the fuel source into mechanical energy in the form of a turning wheel, spinning blade, or blowing fan—*i.e.*, the components that deliver the generated power to a functional use. *Id.* A gas-powered powertrain uses mechanical systems like belts and pulleys for that process. *Id.* But an electrified one requires electric motor controllers and different drive devices to deliver the generated power. *Id.* In short, the differences between a gas-powered

and electrified powertrain go far beyond whether they contain an SSI engine or battery.

Accordingly, to transition from a gas-powered device to a battery-powered one, all elements of the product's powertrain must be replaced and reconfigured. 2-ER-244-45. The complexity of this task cannot be understated. 2-ER-245. Components must be designed and manufactured, and then a prototype must be built, tuned, and subsequently tested. *Id.* All components must then be manufactured before any equipment manufacturing can begin. *Id.* This process is complicated by the fact that the SORE industry is non-integrated. 2-ER-244. SORE manufacturers must work with numerous separate engine component manufacturers to develop, test, and produce their products. 2-ER-239, 244, 250. This means that the timeline for transition is more than two years per product line, and transition of all of a manufacturers' product lines would take 6-8 years—far more than the one full model year CARB has provided. 2-ER-245.

CARB's 2021 SORE Amendments fail to provide a sufficient lead time, and EPA's conclusion otherwise is "arbitrary[and] capricious." 5 U.S.C. § 706(2)(A); *All. for the Wild Rockies v. Petrick*, 68 F.4th 475, 493 (9th Cir. 2023) ("The touchstone of arbitrary and capricious review under the APA is reasoned decisionmaking.") (cleaned up). EPA reasoned that because ZEE technology has been available for many years and ZEE product development has increased over the

last several years, no additional lead time was necessary. 1-ER-52-53, 57-58. It faulted companies that have focused on gas-fueled products while ZEE technology is available for being "technological laggards." 1-ER-58.

This sort of reasoning eviscerates the concept of lead time, essentially measuring it not from when California received authorization for its regulations but from when other businesses adopted the technology. And it further undercuts the protection for industry offered by Section 209(e). Instead of industry knowing California cannot move forward with regulations until authorization, a business must examine what technologies companies are adopting, guess whether California may one day require adoption of them, and decide whether to implement them now without knowing if EPA will ever authorize them. EPA failed to offer "a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *All. for the Wild Rockies*, 68 F.4th at 493 (citation and internal quotation marks omitted).

In sum, the lead time inquiry is not merely about whether technology exists somewhere in the market; it is about whether regulated manufacturers have been given adequate time to develop, test, certify, and produce compliant products before compliance is required. Regulated manufacturers have not been afforded the protection they are due under Section 209(e).

B. ZEE technology is not currently available for commercial SORE.

The amount of battery power a product needs depends on a number of variables—type of use, operational requirements, frequency and length of use, and so forth. 2-ER-246-47. Commercial SORE is operated on a more frequent basis and for longer times than residential SORE, meaning less available time to charge a battery and shorter replacement cycles for the battery. 2-ER-247. As a result, commercial SORE requires significantly more battery power than residential SORE. 2-ER-246.

This creates significant technological barriers to transitioning commercial SORE from gas-powered to electrified—a fact EPA has previously recognized. In December 2024, EPA and DOE issued a joint report assessing energy and emissions innovation in off-road vehicle and equipment. Environmental Protection Agency & Department of Energy, *A Market and Technology Assessment for Off-Road Vehicle & Equipment Energy and Emissions Innovation* at 1 (Dec. 2024), https://www.epa.gov/system/files/documents/2025-01/off-road-action-plan.pdf. It specifically analyzed lawn and garden equipment, which "account for over 80% of all off-road vehicles by population." *Id*. at 35. While it recognized that "[t]here is significant electrification in the current equipment," commercial-use equipment is "the notable exception." *Id*. Commercial equipment would "follow trends for other

lower-power, high-use equipment and may be reliant on SLFs [sustainable liquid fuels]." *Id.*

The report explained that this was because "BEE [battery electric equipment] technology is currently limited to smaller machines, which operate for up to 8 hours (depending on duty cycle) per workday and have opportunity for recharging during or after the work shift." *Id.* at 38. Accordingly, "[m]any handheld lawn and garden pieces of equipment have already begun to transition to BEE, as well as indoor forklifts and smaller agricultural machines where infrastructure supports it." *Id.*

But the "[c]urrent barriers to electrification are related to cost, weight, charging downtime, and charging infrastructure." *Id.* The report further stated that "battery weight is also a concern." *Id.* "In the case of smaller equipment, multiple batteries may be required to complete a task or for large equipment battery weight may lead to soil compaction or issues with transportation." *Id.* And the fact that "off-road equipment may be operated in remote environments where charging infrastructure does not exist" poses a barrier—"[i]n many applications, the energy must be delivered to, or generated, where the equipment operates." *Id.*

The report thus found that "[s]ome off-road equipment, either due to daily energy consumption requirements or because of the remoteness of their operation, will continue to require SLFs in the long term." *Id.* at 39. Although "it has made significant inroads from smaller handheld to medium-sized mobile equipment,"

"[c]urrent battery technology is not sufficient for long-duration equipment operation," and so "[m]ost lawn and garden and some construction and industrial equipment have been identified as good candidates because of their predictable workday routines." *Id*. at 41. For off-road equipment that cannot rely on batteries, the report proposed focusing on minimizing liquid fuel consumption through maximizing efficiency and developing technologies and supply chains for low-carbon liquid fuel. *Id*. at 39.

EPA's authorization decision cannot be squared with its previous findings that battery usage is simply not feasible for all forms of SORE. Likewise, CARB largely ignored these technological barriers for commercial SORE. Its feasibility assessment relied on a market review of just nine SORE equipment categories—four of which were non-handheld products—and a CARB-sponsored "ZEE Roadshow," which again largely focused on handheld equipment. 2-ER-247-48. CARB's analysis fails to appreciate that there is a wide variety of equipment currently using SSI engines that lack a ZEE alternative that can deliver the performance required over the time and under the conditions in which the equipment is typically used. 2-ER-248.

* * *

In sum, CARB's and EPA's assumption that all manufacturers can seamlessly convert from gas-powered to battery-powered equipment simply because battery

technology exists for some products is wrong. That transition is not feasible for many types of SORE; for the products where that transition may be feasible, the process will take longer than the afforded lead time.

CONCLUSION

For the foregoing reasons, this Court should grant the petitions for review and vacate EPA's authorization decision.

Dated: February 9, 2026

Respectfully submitted,

/s/ Jeffrey H. Wood

Jeffrey H. Wood
BAKER BOTTS L.L.P.
700 K Street N.W.
Washington, D.C. 20001
(202) 639-7732
jeff.wood@bakerbotts.com

Christopher E. Tutunjian
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, TX 77002

Erica Klenicki
Caroline McAuliffe
NAM LEGAL CENTER
733 Tenth Street N.W.,
Suite 700
Washington, D.C. 20001

Counsel for Amicus Curiae The National Association of Manufacturers

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS

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9th Cir. Case Number(s) 25-881, 25-1481

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2026, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate Electronic Filing system, which will send notice of such filing to all registered users.

Dated: February 9, 2026

/s/ Jeffrey H. Wood
Jeffrey H. Wood
Baker Botts L.L.P.
700 K Street N.W.
Washington, D.C. 20001
(202) 639-7732
jeff.wood@bakerbotts.com

Counsel for Amicus Curiae The National Association of Manufacturers