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## Shifting Gears: The Federal Government's Reversal on California's Clean Air Act Waiver

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California has led the country for more than fifty years in regulating the pollutants that come out of the tailpipes of cars, trucks, and other vehicles. The Clean Air Act grants California, and California alone, the power to issue its own pollution standards for vehicles as long as the state regulations are tougher than federal standards. Other states can choose to follow either the California or federal requirements but cannot issue their own. This special power is now under siege as the Trump Administration threatens to limit the state's most effective pollution-fighting programs.

Since the 1960s, when California issued the country's first standards to cut smog-causing pollutants from cars, the state's regulations have helped lead to the invention of the modern catalytic converter, the banning of lead in gasoline, the development of the hybrid engine, and the deployment of electric vehicles with ranges up to 300 miles per charge. In 2002, California issued the world's first standards to cut carbon pollution from cars. The federal government eventually adopted and extended the California standards nationwide, cutting billions of tons of greenhouse gases from the nation's vehicle fleet. A second set of standards is poised to cut billions more tons. Yet the Trump Administration is now proposing to take away California's power to set standards for greenhouse gas pollution and require the deployment of non-polluting cars with zero emissions.

No Presidential Administration has ever attacked the state's unique role in regulating vehicular pollution so broadly. The Trump Administration's attack is designed to decimate one of the most effective means any state has for fighting traditional air pollution and climate change.

The California waiver and the programs the Trump Administration seeks to eliminate are, as we show below, environmentally powerful and legally strong. The Trump Administration's proposal to revoke the state's power to issue car standards is likely to fail.

In this Issue Brief, we provide background on the history of California's Clean Air Act waiver, describe California's groundbreaking progress on reducing pollution through cutting tailpipe and other vehicle pollutants, and explain why the Trump Administration's current attacks are misguided and unlawful. We do not tackle a separate but related question, which is whether the

Trump Administration's proposal to freeze *national* greenhouse gas emission standards for cars and light trucks at 2020 levels is legally defensible. If adopted, the nationwide freeze will also face a powerful legal challenge, and we believe it will be struck down. But our task is instead to focus on the Trump Administration's proposed assault on California's independent authority to issue greenhouse gas and conventional pollution standards for cars and trucks.

## I. California's Clean Air Act Waiver is a Textbook Success Story

In the early 1940s, Los Angeles began to experience mystifying attacks of "eye-irritating haze, accompanied by a peculiar 'bleaching-solution' odor."<sup>1</sup> The toxic air was initially thought to be caused by traditional industrial sources of pollution like refineries and chemical plants. In response, California authorized the establishment of the nation's first local Air Pollution Control District (APCD) in Los Angeles County to address the problem.<sup>2</sup> The Los Angeles APCD quickly went to work enacting stringent restrictions on smoke emissions from industrial sources.<sup>3</sup>

In the early 1950s, California scientists recognized that the unique combination of enclosed topography, a rapidly growing population, and a warm climate in the Los Angeles air basin was a recipe for trapping dangerous pollution in the basin.<sup>4</sup> Around the same time, CalTech chemist Arie Jan Haagen-Smit published his pioneering findings on the source of Los Angeles smog. For the first time, his research showed that industrial pollution was not the only culprit behind worsening Los Angeles smog episodes. Instead, photochemical reactions between California's sunshine and nitrogen oxides and unburned hydrocarbons in the exhaust from cars and trucks were the primary causes of Southern California's terrible air pollution.<sup>5</sup>

California then formed the Motor Vehicle Pollution Control Board in 1960, and began a decades-long program to spur the technological innovation necessary to reduce vehicle pollution.<sup>6</sup> In 1966, the Board issued the nation's first tailpipe emission standards, mandating that emissions from new vehicles could not exceed numerical targets for carbon monoxide and hydrocarbon pollution.<sup>7</sup>

Congress then stepped in to begin to address vehicle pollution nationally and to prevent other states from following California's lead to avoid a patchwork of state standards. In 1967,

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<sup>1</sup> A.J. Haagen-Smit, *A Lesson from the Smog Capital of the World*, 67 PROCEEDINGS NAT'L ACAD. SCI. 887, 887 (1970), [https://www.arb.ca.gov/research/hsawards/a\\_lesson\\_from\\_the\\_smog\\_capital\\_of\\_world.pdf](https://www.arb.ca.gov/research/hsawards/a_lesson_from_the_smog_capital_of_world.pdf).

<sup>2</sup> *Id.* at 887-88.

<sup>3</sup> *Id.* at 888-89.

<sup>4</sup> See, e.g., Fred E. Littman & P. L. Magill, *Some Unique Aspects of Air Pollution in Los Angeles*, 3 AIR REPAIR 29 (1953), <https://www.tandfonline.com/doi/abs/10.1080/00966665.1953.10467586>.

<sup>5</sup> Haagen-Smit, *supra* note 1, at 889.

<sup>6</sup> *Id.* at 891-92.

<sup>7</sup> Ann Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1111 (2009).

Congress preempted states from issuing “any standard relating to the control of emissions from new motor vehicles”<sup>8</sup> but made an exception for California. Recognizing both California’s policy leadership and its particular problems with smog caused by vehicles, Congress included a carve-out for the state.<sup>9</sup> Still enshrined in the Clean Air Act today, this special exemption allows California to issue its own standards if it seeks a federal preemption “waiver” from the Environmental Protection Agency (EPA).<sup>10</sup> So long as California’s standards protect public health and welfare at least as strictly as federal law, and are necessary “to meet compelling and extraordinary conditions,” the law requires EPA to grant California’s request for a preemption waiver.<sup>11</sup> Each time California adopts new standards, the state applies to EPA for a preemption waiver for those standards.

Beginning with the 1968 adoption of national tailpipe standards identical to those adopted by California two years earlier,<sup>12</sup> California and the federal government together have made significant strides in reducing vehicle pollution.<sup>13</sup> This symbiotic relationship between today’s California Air Resources Board (CARB) and the federal EPA – what one of us has called “iterative federalism”<sup>14</sup> – has achieved greater environmental successes than either agency could have achieved on its own. The federal government prods California to develop ever-more stringent standards to advance the state’s efforts to come into attainment with federal ambient air quality standards.<sup>15</sup> And California, with its status as a Clean Air Act super-regulator, has the freedom to experiment with innovative new regulatory programs that the federal

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<sup>8</sup> *Id.*; see also Clean Air Act, Pub. L. No. 90-148, § 208(a), 81 Stat. 501, 501 (codified as amended at 42 U.S.C. § 7543(a)) (“No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part.”).

<sup>9</sup> Carlson, *supra* note 7, at 1111.

<sup>10</sup> See Clean Air Act Pub. L. No. 90-148, § 208(b), 81 Stat. 501, 501 (codified as amended at 42 U.S.C. § 7543(b)).

<sup>11</sup> *Id.*

<sup>12</sup> Carlson, *supra* note 7, at 1111.

<sup>13</sup> See generally COMM. ON STATE PRACTICES IN SETTING MOBILE SOURCE EMISSION STANDARDS, THE NAT’L ACADS., STATE AND FEDERAL STANDARDS FOR MOBILE-SOURCE EMISSIONS 65-113 (2006), <https://www.nap.edu/read/11586/chapter/1>. In particular, this 2006 report from the National Research Council describes California’s leadership in forcing technological improvements throughout the 1960s and ‘70s thanks to the freedom granted by its federal Clean Air Act waiver. *Id.* at 90-91.

<sup>14</sup> See generally Carlson, *supra* note 7; see also *id.* at 1099-03 (defining “iterative federalism” by identifying “schemes of federalism where federal law consciously designates a particular and distinct state or group of states to regulate and relies on that regulatory arrangement to enhance compliance with federal standards”).

<sup>15</sup> *Id.* at 1128-34.

government can adopt at the national level once tested in California’s laboratory of democracy.<sup>16</sup>

Together, CARB and EPA have not only tightened emission standards even further,<sup>17</sup> but also forced the automotive industry to develop new technologies and refine existing technologies<sup>18</sup>—resulting in cleaner air for all Americans. The best example is the catalytic converter, considered one of the greatest environmental inventions of all time.<sup>19</sup> The catalytic converter—now standard on cars around the world—also led to the elimination of lead in gasoline. New passenger vehicles are 99% percent cleaner than when California and EPA first began regulating tailpipe emissions in the 1960s.<sup>20</sup> Aggregate emissions of criteria pollutants from vehicles decreased by 65% between 1980 and 2015, even as vehicle miles travelled more than doubled.<sup>21</sup> And these reductions in vehicle pollution have remarkable health benefits. Lead exposure has dropped dramatically. Although children’s health studies conducted in the Los Angeles region have shown that long-term exposure to pollution from vehicle exhaust increases the risk for developing asthma<sup>22</sup> and bronchitis,<sup>23</sup> and causes other lung damage,<sup>24</sup> these same studies have shown that successful regulatory programs to reduce vehicle emissions have improved lung health.<sup>25</sup> And these regulatory programs have more than paid for themselves. The federal

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<sup>16</sup> *Id.* at 1134-37.

<sup>17</sup> *Id.* at 1109-19.

<sup>18</sup> See, e.g., Jaegul Lee et al., *Forcing Technological Change: A Case of Automobile Emissions Control Technology Development in the US*, 30 *TECHNOVATION* 249 (2010) (analyzing technology-forcing tailpipe standards from the 1970s and finding that the standards drove automakers to develop innovative technologies that they otherwise would not have adopted, precisely because it was impossible to meet the standards with then-existing technologies).

<sup>19</sup> *History of Reducing Air Pollution from Transportation in the United States*, EPA, <https://www.epa.gov/transportation-air-pollution-and-climate-change/accomplishments-and-success-air-pollution-transportation> (last visited Dec. 12, 2018).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See W. James Gauderman et al., *Childhood Asthma and Exposure to Traffic and Nitrogen Dioxide*, 16 *EPIDEMIOLOGY* 737 (2005), <https://www.ncbi.nlm.nih.gov/pubmed/16222162>.

<sup>23</sup> See Rob McConnell et al., *Prospective Study of Air Pollution and Bronchitic Symptoms in Children with Asthma*, 168 *AM. J. RESPIRATORY CRITICAL CARE MED.* 790 (2003), <https://www.ncbi.nlm.nih.gov/pubmed/12893648>.

<sup>24</sup> See W. James Guaderman et al., *The Effect of Air Pollution on Lung Development from 10 to 18 years of Age*, 351 *NEW ENG. J. MED.* 1057 (2004), <https://www.ncbi.nlm.nih.gov/pubmed/15356303>.

<sup>25</sup> See W. James Gauderman et al., *Association of Improved Air Quality with Lung Development in Children*, 372 *NEW ENG. J. MED.* 905 (2015), <https://www.nejm.org/doi/full/10.1056/NEJMoa1414123>; see also Kiros Berhane et al., *Association of Changes in Air Quality With Bronchitic Symptoms in Children in California, 1993-2012*, 315 *JAMA* 1491 (2016), <https://jamanetwork.com/journals/jama/fullarticle/2512784>. The studies cited here and in the previous three footnotes are part of the landmark USC Children’s Health Study, “one of the largest and most detailed studies of the long-term effects of air pollution on the respiratory health of children,” following cohorts of more than 12,000 Los Angeles children from elementary school through

government estimates that every dollar spent to reduce emissions from vehicles results in nine dollars in benefits to public health, the environment, productivity, and consumer savings.<sup>26</sup>

Beginning in the early 2000s, California and the federal government have also used this back and forth iterative federalism process to cut vehicular greenhouse gas emissions.<sup>27</sup> In 2002, the California legislature directed the state's Air Resources Board to develop the world's first standards to reduce greenhouse gases from cars and light trucks. But the state needed a waiver from EPA to implement the standards. EPA under the Bush Administration denied California's waiver in 2008<sup>28</sup>—out of 126 waiver applications over fifty years, the first (and only) time a waiver request has ever been wholly denied.<sup>29</sup> When President Obama took office, EPA subsequently withdrew its denial of the waiver and approved the greenhouse gas standards in 2009.<sup>30</sup>

The federal government then took the California standards, tweaked them, and extended them nationwide for model year cars sold from 2012-2016. These federal standards came about not just because California had them ready-made once the Obama Administration took office, but also in response to the U.S. Supreme Court decision in *Massachusetts v. EPA*. In 1999, environmental groups had petitioned EPA to regulate motor vehicle greenhouse gas emissions under the Clean Air Act § 202(a)(1), which requires EPA to regulate emissions of “any air pollutant” from new motor vehicles “anticipated to endanger public health or welfare.”<sup>31</sup> EPA denied the petition in 2003, reasoning that the Clean Air Act neither authorized nor required

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high school. See generally *USC Children's Health Study* U. S. CAL., <https://healthstudy.usc.edu/> (last visited Jan. 9, 2019).

<sup>26</sup> *History of Reducing Air Pollution from Transportation in the United States*, EPA, <https://www.epa.gov/transportation-air-pollution-and-climate-change/accomplishments-and-success-air-pollution-transportation> (last visited Dec. 12, 2018).

<sup>27</sup> Carlson, *supra* note 7, at 1125-28.

<sup>28</sup> California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156 (Mar. 6, 2008).

<sup>29</sup> See Barry Rabe, *Leveraged Federalism and the Clean Air Act*, in *LESSONS FROM THE CLEAN AIR ACT: BUILDING DURABILITY AND ADAPTABILITY INTO U.S. CLIMATE AND ENERGY POLICY* (Ann Carlson & Dallas Burtraw eds.) (forthcoming 2019).

<sup>30</sup> California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32,744 (July 8, 2009) [hereinafter 2009 GHG Waiver Grant]. While California challenged the Bush Administration's 2008 waiver denial, the Obama Administration's reversal mooted the litigation before a court could rule on the issue. Felicity Barringer, *California Sues E.P.A. Over Denial of Waiver*, N.Y. TIMES (Jan. 3, 2008), <https://www.nytimes.com/2008/01/03/us/03suit.html>; Jim Tankersley, *EPA Gives California Emissions Waiver*, L.A. TIMES (June 30, 2009), <http://articles.latimes.com/2009/jun/30/nation/na-california-waiver30>.

<sup>31</sup> *Massachusetts v. EPA*, 549 U.S. 497, 501-02 (2007).

regulations to address climate change.<sup>32</sup> But the U.S. Supreme Court disagreed, and in 2007, held that greenhouse gases are a “pollutant” as defined by the Clean Air Act<sup>33</sup> and directed EPA to determine whether these emissions endangered public health and welfare such that regulation would be required.<sup>34</sup> The Obama EPA did so in 2009, issuing an “endangerment finding” that emissions from vehicles contributed to greenhouse gas pollution that threatened public health and welfare.<sup>35</sup> This triggered mandatory regulation under the Clean Air Act, and in 2010, EPA issued the first national carbon dioxide tailpipe emission standards. These tailpipe standards—harmonized with California’s standards—were also designed in coordination with the Department of Transportation’s national fuel economy standards (the Corporate Average Fuel Economy, or CAFE standards).<sup>36</sup>

The 2012-2016 standards have been a great success. They have led to the most fuel-efficient vehicle fleet in U.S. history and, in combination with the vehicle standards for trucks, are projected to eliminate billions of tons of carbon pollution.<sup>37</sup>

But California and the federal government did not stop with the 2012-2016 standards. Instead, they adopted standards for 2017-2025 that require fleets of cars and light trucks to average 54.5 miles per gallon by 2025. California agreed to harmonize these standards with the federal government and received a waiver for its standards.<sup>38</sup> This waiver, granted in 2013, covered a full suite of California vehicle regulations known as the “Advanced Clean Cars” or ACC program.

In the same waiver, California also received permission to continue what is known as its Zero Emission Vehicle (ZEV) program. California first adopted a program to mandate that car

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<sup>32</sup> *Id.* at 511.

<sup>33</sup> *Id.* at 528-29 (“The Clean Air Act’s sweeping definition of ‘air pollutant’ . . . embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word ‘any.’ Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt ‘physical [and] chemical . . . substance [s] which [are] emitted into . . . the ambient air.’ The statute is unambiguous.”).

<sup>34</sup> *Id.* at 534-35.

<sup>35</sup> See generally *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under the Section 202(a) of the Clean Air Act*, EPA, <https://www.epa.gov/ghgemissions/endangerment-and-cause-or-contribute-findings-greenhouse-gases-under-section-202a-clean> (last visited Dec. 12, 2018).

<sup>36</sup> See OFFICE OF TRANSP. & AIR QUALITY, EPA, EPA AND NHTSA FINALIZE HISTORIC NATIONAL PROGRAM TO REDUCE GREENHOUSE GASES AND IMPROVE FUEL ECONOMY FOR CARS AND TRUCKS (2010), <https://nepis.epa.gov/Exe/ZyPDF.cgi/P100AKHW.PDF?Dockey=P100AKHW.PDF>.

<sup>37</sup> *Fact Sheet – Vehicle Efficiency and Emissions Standards*, ENVTL. ENERGY STUDY INST. (Aug. 26, 2015), <https://www.eesi.org/papers/view/fact-sheet-vehicle-efficiency-and-emissions-standards>.

<sup>38</sup> California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California’s Advanced Clean Car Program and a Within the Scope Confirmation for California’s Zero Emission Vehicle Amendments for 2017 and Earlier Model Years, 78 Fed. Reg. 2,112 (Jan. 9, 2013).

companies sell a certain percentage of Zero Emission Vehicles in 1990. Combined with its Low Emission Vehicle (LEV) program, the ZEV program was designed to eliminate the pollutants that cause smog from the tailpipes of cars.<sup>39</sup> California's primary objective, in including the technology-forcing ZEV mandate, was to meet state and federal ambient air quality standards for conventional pollutants.<sup>40</sup> The state received its first EPA waiver for its ZEV (and LEV) programs in January 1993.<sup>41</sup> The ZEV mandate continues to be a crucial part of California's efforts to meet the ambient air quality standards. The program has the added benefit of eliminating greenhouse gases from cars.

Now, the Trump EPA is attempting to freeze the 2017-2025 standards at 2020 levels.<sup>42</sup> It is also proposing to revoke California's waiver that would allow the state to keep the 2021-2025 standards in place and to maintain its ZEV program.<sup>43</sup> Resurrecting arguments from the Bush EPA, the Trump EPA argues that California's waiver should not cover greenhouse gas regulations because climate change is a global problem not specific to California.<sup>44</sup>

## II. Revoking California's Waiver Flies in the Face of Federalism Principles and Would Have Catastrophic Environmental Impacts

The Clean Air Act's waiver provision is one of the most successful examples of federalism ever enacted: a state experiments with groundbreaking regulation, and the federal government adopts only those outcomes that are successful for implementation across the country.

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<sup>39</sup>2% in 1998, 5% in 2001, and 10% in 2003. *Zero-Emission Vehicle Legal and Regulatory Activities - Background*, CAL. AIR RESOURCES BOARD, <https://www.arb.ca.gov/msprog/zevprog/background.htm>, (last visited Dec. 12, 2018).

<sup>40</sup> See, e.g., STATE OF CAL. AIR RES. BD., PROPOSED REGULATIONS FOR LOW-EMISSION VEHICLES AND CLEAN FUELS: STAFF REPORT 3-4 (1990), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2004-0364-0112>; see also STATE OF CAL. AIR RES. BD., PROPOSED REGULATIONS FOR LOW-EMISSION VEHICLES AND CLEAN FUELS: FINAL STATEMENT OF REASON 47-48 (1991) [hereinafter 1991 CARB REPORT], <https://www.regulations.gov/document?D=EPA-HQ-OAR-2004-0364-0115> ("The primary objective of the adopted regulations is to achieve substantial emission reductions in an attempt to attain the state and federal ambient air quality standards. . . . [W]e believe that the significant penetration of ZEVs is crucial to long-term attainment of the ambient standards in the South Coast, and there is no assurance that ZEVs will be developed without the limited, measured ZEV sales requirements in the regulations.").

<sup>41</sup> California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption; Decision, 58 Fed. Reg. 4,166 (Jan. 13, 1993). Like CARB's Final Statement of Reasons for the LEV program, 1991 CARB REPORT, *supra* note 40, the EPA's accompanying decision document makes no reference to greenhouse gases in its approval of the LEV program waiver. EPA, WAIVER OF FEDERAL PREEMPTION: CALIFORNIA LOW-EMISSION VEHICLE STANDARDS (1992), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2004-0364-0117>.

<sup>42</sup> The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986, 42,988 (Aug. 24, 2018) [hereinafter Proposed SAFE Rule].

<sup>43</sup> *Id.* at 42,999.

<sup>44</sup> *Id.*

Revoking California’s waiver not only attacks this success story but directly contradicts traditional conservative orthodoxy.<sup>45</sup> Although the Trump Administration’s first EPA head Scott Pruitt<sup>46</sup> argued that “[c]ooperative federalism doesn’t mean that one state can dictate standards for the rest of the country,”<sup>47</sup> this statement both mischaracterizes federalism principles and how the California waiver actually works.

Congress designed the Clean Air Act to be a collaborative effort between states and the federal government to protect public health. In the original Findings and Declarations of Purpose, Congress explicitly found that federal leadership was “essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.”<sup>48</sup> The heart of the Clean Air Act revolves around the federal government setting health-based ambient air quality standards at the national level and states having the flexibility to develop their own plans to meet these standards.<sup>49</sup> This relationship works because EPA always has the hammer of federal enforcement behind it.<sup>50</sup> Since EPA is required to continually update its ambient standards to better protect public health (thus triggering further emission reductions and submittal of new state plans),<sup>51</sup> this federalism relationship has successfully endured since the Clean Air Act was enacted.

This federalism relationship is even more important in the motor vehicle context. The federal government has repeatedly chosen to adopt the innovations California has tested. This is far from a perversion of federalism—rather, it is the *entire goal*. Contrary to Pruitt’s assertions,

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<sup>45</sup> See, e.g., David Roberts, *Trump’s Plan to Revoke California’s Car Pollution Waiver Makes a Mockery of Conservative Principles*, VOX (July 24, 2018), <https://www.vox.com/energy-and-environment/2018/7/24/17606030/trump-california-fuel-economy-waiver-standards-conservative>; see also Evan Halper, *Trump Administration Pushes States’ Rights — as Long as They are Coal States*, L.A. TIMES (Aug. 21, 2018), <https://www.latimes.com/politics/la-na-pol-clean-power-states-20180821-story.html>.

<sup>46</sup> Coral Davenport, Lisa Friedman & Maggie Haberman, *E.P.A. Chief Scott Pruitt Resigns Under a Cloud of Ethics Scandals*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/climate/scott-pruitt-epa-trump.html>.

<sup>47</sup> Press Release, EPA, EPA Administrator Pruitt: GHG Emissions Standards for Cars and Light Trucks Should Be Revised (Apr. 2, 2018), <https://www.epa.gov/newsreleases/epa-administrator-pruitt-ghg-emissions-standards-cars-and-light-trucks-should-be>.

<sup>48</sup> Clean Air Act, Pub. L. No. 88-206, § 101, 77 Stat. 392, 393 (codified as amended at 42 U.S.C. § 7401).

<sup>49</sup> Clean Air Act, Pub. L. No. 91-604, § 109, 84 Stat. 1679 (codified as amended at 42 U.S.C. § 7409) (providing for the creation of the National Ambient Air Quality Standards or NAAQS); Clean Air Act, Pub. L. No. 91-604, § 110, 84 Stat. 1680 (codified as amended at 42 U.S.C. § 7410) (requiring submittal of State Implementation Plans demonstrating how states intend to achieve and maintain compliance with the NAAQS).

<sup>50</sup> Clean Air Act, Pub. L. No. 91-604, § 113, 84 Stat. 1686 (codified as amended at 42 U.S.C. § 7413) (providing for federal enforcement of the NAAQS and the creation of Federal Implementation Plans in the event of state recalcitrance).

<sup>51</sup> Clean Air Act, Pub. L. No. 95-95, § 106, 91 Stat. 691 (codified as amended at 42 U.S.C. § 7409(d)).



California is not “dictating” standards for the rest of the country; rather, the Obama Administration learned from California’s example and adapted parts of the state’s successful regulatory programs into national standards to further reduce vehicle pollution. Moreover, if the national government now weakens the standards, California can follow its own standards and other states can make a choice between the two.

More than a dozen states have adopted California’s ZEV standards and have indicated they will continue to follow California if the Trump Administration freezes the national standards. These states, known as the “177 states” based on the Clean Air Act section that allows them to follow California’s lead,<sup>52</sup> represent about one-third of the U.S. auto market.<sup>53</sup> Again, California is not dictating standards for the rest of the country; instead, states can choose to follow California standards or federal standards.

Beyond demonstrating popular support for California’s waiver and stringent standards, the 177 states rely heavily on California’s vehicle standards to meet federal ambient air quality standards, as EPA acknowledges in its Proposed Rule to revoke the California waiver.<sup>54</sup> The attorneys general of those states and the mayors of over fifty cities within them have stressed that “these standards are both necessary and feasible” and are “particularly appropriate given the serious public health impacts of air pollution in our cities and states[.]”<sup>55</sup>

California, of course, also relies on its waiver to meet state and federal air quality standards and the state’s ambitious climate goals. California, particularly in the Central Valley and the Los Angeles region, continues to struggle with ozone pollution generated by the emission of oxides of nitrogen (NO<sub>x</sub>) from fossil fuel combustion in gasoline-powered vehicles. For example, in order to meet new federal ozone standards on time, the Los Angeles region must reduce its

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<sup>52</sup> Clean Air Act, Pub. L. No. 95-95, § 177, 91 Stat. 750 (codified as amended at 42 U.S.C. § 7507).

<sup>53</sup> Currently, more than a dozen states have opted in to at least some part of California’s standards (with some new additions pending after recent state legislative and gubernatorial flips in the 2018 midterm elections). Stephen Edelstein, *Which States Follow California’s Emission and Zero-Emission Vehicle Rules?*, GREEN CAR REP. (Mar. 7, 2017), [https://www.greencarreports.com/news/1109217\\_which-states-follow-californias-emission-and-zero-emission-vehicle-rules](https://www.greencarreports.com/news/1109217_which-states-follow-californias-emission-and-zero-emission-vehicle-rules); see also Anna Staver, *Colorado Likely to Adopt California’s Low-Emission Vehicle Standards*, DENV. POST (Nov. 15, 2018), <https://www.denverpost.com/2018/11/15/colorado-california-low-emission-vehicle-standards/>.

<sup>54</sup> Proposed SAFE Rule, *supra* note 42, at 43,244 (“EPA may subsequently consider whether to employ the appropriate provisions of the CAA to identify provisions in Section 177 states’ SIPs that may require amendment and to require submission of such amendments.”). With this statement, EPA acknowledges that revocation of California’s waiver threatens the ability of states who follow California’s standards to meet federal air quality standards.

<sup>55</sup> Press Release, Attorney General George Jepsen et al., Local Leaders’ Clean Car Declaration (Apr. 3, 2018), <https://www.bbhub.io/dotorg/sites/28/2018/04/Clean-Car-Declaration.pdf>.

NOx emissions “by an additional two thirds beyond reductions from all of the control measures in place today.”<sup>56</sup>

The zero emission vehicle program is critical to achieving these reductions.<sup>57</sup> Indeed, the main purpose of the 1990s original ZEV program was to meet state and federal ambient air quality standards for conventional pollutants. The program was not originally aimed at cutting greenhouse gases. This history and purpose makes the Trump EPA’s waiver revocation for the ZEV program especially indefensible.<sup>58</sup> Without the state’s clean car program, multiple air basins in California will be unable to meet *federal* air quality standards for *conventional* pollutants. EPA has acknowledged this problem in the context of the Section 177 states; it is just as real for California itself. Moreover, waiver revocation for California’s greenhouse gas standards will also exacerbate the conventional pollutant problem in California, as climate change worsens the health impacts from ozone and PM pollution.

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<sup>56</sup> CAL. AIR RES. BD., CAL. ENV’T PROTECTION AGENCY, CALIFORNIA’S ADVANCED CLEAN CARS MIDTERM REVIEW: SUMMARY REPORT FOR THE TECHNICAL ANALYSIS OF THE LIGHT DUTY VEHICLE STANDARDS ES-11 (2017) [hereinafter ACC MIDTERM REPORT],

[https://www.arb.ca.gov/msprog/acc/mtr/acc\\_mtr\\_finalreport\\_full.pdf](https://www.arb.ca.gov/msprog/acc/mtr/acc_mtr_finalreport_full.pdf).

<sup>57</sup> *Id.*; see also S. COAST AIR QUALITY MGMT. DIST., FINAL 2016 AIR QUALITY MANAGEMENT PLAN ES-5 (2017), <http://www.aqmd.gov/docs/default-source/clean-air-plans/air-quality-management-plans/2016-air-quality-management-plan/final-2016-aqmp/final2016aqmp.pdf?sfvrsn=15> (noting the Los Angeles region “strongly relies on a transition to zero and near-zero technologies in the mobile source sector” to achieve federal ambient air quality standards); SAN JOAQUIN VALLEY AIR POLLUTION CONTROL DIST., 2016 PLAN FOR THE 2008 8-HOUR OZONE STANDARD ES-5 (2016), [http://valleyair.org/Air\\_Quality\\_Plans/Ozone-Plan-2016/Adopted-Plan.pdf](http://valleyair.org/Air_Quality_Plans/Ozone-Plan-2016/Adopted-Plan.pdf) (noting “[a]ttainment of the latest [federal] standards will require transformative changes and development of innovative control strategies to reduce emissions from mobile sources, which now make up over 85% of the Valley’s NOx emissions...mobile sources, particularly in the goods movement sector, must transition to near zero emission levels...”); SAN JOAQUIN VALLEY AIR POLLUTION CONTROL DIST., CAL. AIR RES. BD., DRAFT SAN JOAQUIN VALLEY SUPPLEMENT TO THE REVISED 2016 STATE STRATEGY FOR THE STATE IMPLEMENTATION PLAN 2 (2018), [https://www.arb.ca.gov/planning/sip/sjvpm25/2018plan/20180828\\_sjv\\_supplement\\_sip\\_strategy.pdf](https://www.arb.ca.gov/planning/sip/sjvpm25/2018plan/20180828_sjv_supplement_sip_strategy.pdf) (“[S]ubstantial reductions from both mobile and stationary sources are necessary to reach attainment...Such actions to control mobile sources are possible because of California’s unique authority to regulate emissions from certain source categories more stringently than the federal government under the Act’s §209(b) waiver provision.”).

<sup>58</sup> See STATE OF CAL. AIR RES. BD., PROPOSED REGULATIONS FOR LOW-EMISSION VEHICLES AND CLEAN FUELS: STAFF REPORT 3-4 (1990), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2004-0364-0112>; see also STATE OF CAL. AIR RES. BD., PROPOSED REGULATIONS FOR LOW-EMISSION VEHICLES AND CLEAN FUELS: FINAL STATEMENT OF REASON 47-48 (1991), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2004-0364-0115> (“The primary objective of the adopted regulations is to achieve substantial emission reductions in an attempt to attain the state and federal ambient air quality standards. . . . [W]e believe that the significant penetration of ZEVs is crucial to long-term attainment of the ambient standards in the South Coast, and there is no assurance that ZEVs will be developed without the limited, measured ZEV sales requirements in the regulations.”).

California's ACC program is also crucial to meet California's climate change targets, which require the state to reduce greenhouse gas emissions forty percent below 1990 levels by 2030. As the state's Air Resources Board has explained, California will need to add about three million ZEV and extremely low emission vehicles to meet its 2030 climate targets.<sup>59</sup> As California continues to adopt more stringent climate change targets, its ability to regulate greenhouse gas emissions from vehicles will be even more crucial.<sup>60</sup>

California's climate change targets do not exist in a vacuum. The transportation sector is now the single-largest contributor to greenhouse gas emissions in the country.<sup>61</sup> In recent months, both the United Nations and our own federal government have issued serious warnings about the dangers of failing to reduce greenhouse gas emissions.<sup>62</sup> Since the 1960s California has set innovative technology-forcing standards that have pushed automakers to develop tools to significantly reduce criteria pollution from vehicles. Now, the Trump Administration's proposed revocation of California's waiver would jettison California's climate leadership when we need it the most.

### III. EPA Has No Legal Basis to Revoke California's Waiver

Not only is the revocation of California's waiver bad for the environment, it is also illegal on a number of grounds. First, the Clean Air Act does not provide EPA with the authority to revoke a waiver; it allows EPA to grant or deny a waiver but not to revoke one. Second, California's waiver continues to satisfy all requirements of Clean Air Act section 209. Revocation of California's waiver would ignore the "compelling and extraordinary" conditions that have supported California's waiver in the past, conditions which, if anything, have become even more compelling. Finally, though the Trump Administration argues that California's greenhouse gas tailpipe standards are preempted by the federal Department of Transportation's authority to issue fuel economy standards, there is virtually no support for this position. Multiple federal courts have already rejected this argument in earlier challenges to California's first tailpipe standards, and these arguments are no more convincing now than when they were rebuffed in 2008. We address each of these arguments in more detail below.

#### A. EPA Lacks Authority To Revoke The Waiver

During the long history of California's special authority to regulate motor vehicle emissions, EPA has never revoked a previously-granted waiver. Beyond the continuing necessity of

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<sup>59</sup> ACC MIDTERM REPORT, *supra* note 56, at ES-6.

<sup>60</sup> See, e.g., Cal. Exec. Order B-55-18 (2018), <https://www.gov.ca.gov/wp-content/uploads/2018/09/9.10.18-Executive-Order.pdf> (targeting statewide carbon neutrality by 2045).

<sup>61</sup> *Power Sector Carbon Dioxide Emissions Fall Below Transportation Sector Emissions*, U.S. ENERGY INFO. ADMIN. (Jan. 19, 2017), <https://www.eia.gov/todayinenergy/detail.php?id=29612>.

<sup>62</sup> See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SPECIAL REPORT: GLOBAL WARMING OF 1.5°C (2018), <https://www.ipcc.ch/sr15/>; see also U.S. GLOBAL CHANGE RESEARCH PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT (2018), <https://www.globalchange.gov/nca4>.

California's waiver, the statute itself provides guidance: the Clean Air Act does not grant EPA the authority to withdraw a waiver that has already been approved. Instead, it only authorizes EPA to grant or deny an initial request for a waiver.

The standards for grant or denial of California's waiver are codified in section 209 of the Clean Air Act. Section 209 provides that, as long as the California Air Resource Board finds its standards "will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards," EPA must grant the requested waiver unless it makes one of three determinations: (1) California's finding was arbitrary and capricious, (2) California does not need the standards to meet compelling and extraordinary conditions; or (3) the standards and accompanying enforcement procedures are not consistent with Clean Air Act section 202.<sup>63</sup> Standards are only inconsistent with section 202 if they are technologically infeasible, taking cost considerations into account, or if California's test procedures impose requirements that are at odds with federal test procedures.<sup>64</sup>

But section 209 contains no suggestion that a waiver, once granted, can be revoked. The standards clearly apply when a waiver has been requested and is under consideration by EPA. They do not apply retroactively once the waiver has already been determined to satisfy section 209's criteria.

In interpreting section 209, which expressly preempts states other than California from setting their own motor vehicle emissions standards, "the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent," should be the primary consideration.<sup>65</sup> Here, the plain language is clear: EPA may consider the factors enumerated in section 209 when determining whether or not to grant a waiver *in the first instance*, but not after the waiver is granted. Indeed, Congress has not been reticent to expressly grant revocation authority in other sections of the Clean Air Act or in other federal environmental statutes.<sup>66</sup> Given that Congress has been explicit in other Clean Air Act provisions in granting EPA the

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<sup>63</sup> Clean Air Act, Pub. L. No. 95-95, § 207, 91 Stat. 755, 755 (codified as amended at 42 U.S.C. § 7543(b)).

<sup>64</sup> *Motor & Equipment Mfrs. Ass'n, Inc. v. EPA (MEMA I)*, 627 F.2d 1095, 1126 (D.C. Cir. 1979).

<sup>65</sup> *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *see also Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (where a statute's plain language is not absurd, it should be enforced according to its terms).

<sup>66</sup> *See* 42 U.S.C. § 7661a (granting EPA authority, under specific circumstances, to withdraw a state's delegated authority under Title V of the Clean Air Act to administer its own permitting program); 42 U.S.C. § 300h-1(b)(3) (explaining the circumstances under which EPA can withdraw a state's delegated primary enforcement authority for underground water sources under the Safe Drinking Water Act); 33 U.S.C. § 1342(b) (specifying the conditions under which EPA may withdraw a state's delegated authority to enforce NPDES requirements under the Clean Water Act).

authority to revoke, EPA and courts cannot read such authority into a statutory provision from which Congress omitted it.<sup>67</sup>

In sum, EPA lacks the authority under CAA section 209 to revoke an already-granted waiver. California received its waiver for the greenhouse gas and ZEV programs in 2013 after an extensive administration process. While EPA is entitled to consider the necessity of California's separate motor vehicle emission program at the time the state applies for its waiver (though the agency is still limited to the criteria for approval contained in Section 209), EPA's ability to do so is temporally limited by the terms of section 209: it does not get to second-guess the waiver determination after it has already been made. Neither the plain language of the statute nor the legislative history offers any support for EPA's assertion of revocation authority here.

### B. The Waiver Remains Necessary and Appropriate

Even if EPA were able to claim some inherent authority to revoke a previously granted waiver, such authority would still necessarily be limited to consideration of the section 209 factors. California's ACC program continues to comply with all standards for a federal waiver. Moreover, the state is entitled to considerable deference in its application for a waiver: it is well-settled that California's findings with respect to its motor vehicle emission program are entitled to significant deference.<sup>68</sup> Furthermore, "EPA has consistently interpreted the waiver provision

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<sup>67</sup> EPA points to legislative history from the original 1963 Air Quality Act to support its alleged revocation authority, Proposed SAFE Rule, *supra* note 42, at 43,242, but this argument is flawed for two primary reasons. First, this legislative history predates both the waiver's original adoption in 1967 and further congressional action strengthening the waiver as part of the 1977 Clean Air Act amendments. H.R. Rep. No. 294 at 23. In 1977, Congress changed the decision-making structure, placing the necessity determination in the hands of California officials at the outset, and curtailing EPA's authority to deny a waiver to the three limited circumstances enumerated in section 209. Given the constraints imposed by the amended statutory text, if any revocation authority existed under the original language of the Air Quality Act (and the lack of explicit authority makes this argument doubtful, as explained below), it has since been eliminated by the broader California authority granted in 1977. Second, the presence of one line in the legislative history for a provision that is no longer intact cannot be the basis for reading revocation authority into Section 209—EPA cannot read "a standardless and open-ended revocation authority" into "a silent statute." *Am. Methyl Corp. v. EPA*, 749 F.2d 826, 836-37 (D.C. Cir. 1984). Where, as here, the plain language of the statute and a comparison with similar federal laws shows that Congress did not intend to include revocation authority as part of section 209, EPA cannot read that authority into the statute based on "a sentence in a legislative committee report untethered to any statutory language." *Abrego v. Dow Chem. Co.*, 443 F.3d 676, 686 (9th Cir. 2006); *see also Int'l Bhd. of Elec. Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697, 699-00 (D.C. Cir. 1987) ("...courts have no authority to enforce alleged principles gleaned solely from legislative history that has no statutory reference point.").

<sup>68</sup> *See, e.g.*, 2009 GHG Waiver Grant, *supra* note 30, at 32,749; *see also MEMA I*, 627 F.2d at 1121 ("The language of the statute and its legislative history indicate that California's regulations, and California's determinations that they must comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them.").

as placing the burden on the opponents of a waiver to demonstrate that one of the criteria for a denial has been met.”<sup>69</sup> California has repeatedly determined, based upon substantial evidence, that the ACC program is at least as protective as any federal program, is necessary to meet “compelling and extraordinary conditions,” and is consistent with Clean Air Act section 202. Even if the section 209 factors were to apply to a revocation determination—which we believe they do not—EPA has not met its burden to show that the waiver should be withdrawn.

### 1. The Waiver is at Least as Protective as Federal Standards

It is indisputable that the ACC program is at least as protective as any applicable federal standards—EPA determined over a decade ago that California’s pre-existing standards for light-duty vehicles and trucks are at least as protective as the relevant federal standards.<sup>70</sup> Indeed, EPA does not dispute this determination.<sup>71</sup> California’s protectiveness finding stands, and the absence of federal standards with which to compare the ZEV mandate underscores the importance of the waiver and its consistency with section 209’s longstanding recognition of California as “a pioneer and a laboratory for the nation in setting new motor vehicle standards.”<sup>72</sup>

### 2. The Waiver is Necessary to Meet “Compelling and Extraordinary Conditions”

EPA asserts that California no longer needs the ACC/ZEV waiver to meet “compelling and extraordinary conditions.” This assessment is based upon two arguments: (1) that the effects of global climate change are not unique to California, and standards which address climate change are therefore not needed to meet “compelling and extraordinary conditions”; and (2) that even if California does have “compelling and extraordinary conditions” in the climate change context, the waiver is not necessary because it will not solve the problem of global climate change.

These arguments are both specious. First, they ignore the well-established practice of EPA in assessing “compelling and extraordinary conditions,” which is to review California’s motor vehicle emission program as a whole, not as separate component parts. EPA’s attempt to pick off the GHG standards and ZEV requirements as though they do not fit within a larger regulatory program is inconsistent with the law and with the agency’s prior practice. Second, they disregard California’s substantial evidence—entitled to significant deference—that it will uniquely suffer from the effects of climate change and that implementation of the ACC program will mitigate those ill effects. EPA has not presented “clear and compelling evidence” to suggest the waiver is no longer needed.<sup>73</sup>

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<sup>69</sup> 2009 GHG Waiver Grant, *supra* note 30, at 32,745.

<sup>70</sup> *Id.* at 32,754.

<sup>71</sup> See Proposed SAFE Rule, *supra* note 42, at 43,240.

<sup>72</sup> 2009 GHG Waiver Grant, *supra* note 30, at 32,745.

<sup>73</sup> *MEMA I*, 627 F.2d at 1122.

When assessing whether a waiver request should be granted, EPA has traditionally “consider[ed] whether California needs a separate motor vehicle program to meet compelling and extraordinary conditions.”<sup>74</sup> EPA—even during the Bush Administration—has agreed that it should “look at the program as a whole in determining compliance with section 209(b)(1)(B)” because “in the legislative history of section 209, the phrase ‘compelling and extraordinary circumstances’ refers to ‘certain general circumstances, unique to California, primarily responsible for causing its air pollution problem’” rather than “‘the levels of pollution directly.’”<sup>75</sup> Section 209’s legislative history supports this interpretation as well.<sup>76</sup> Thus, the only question should be whether general conditions persist in California that necessitate a separate motor vehicle emission program. The answer to that question is an unequivocal “yes”: all of the distinguishing characteristics that led Congress to recognize California’s need for a waiver in the first place remain in spades.<sup>77</sup> California’s need for its own motor vehicle emission program is as strong as ever.

Even if the greenhouse gas tailpipe standards and ZEV requirements of the ACC program are broken out and considered separately, they are still necessary to meet “compelling and extraordinary conditions” unique to California. First, California has demonstrated that “its greenhouse gas standards are linked to amelioration of California’s smog problems.”<sup>78</sup> Second,

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<sup>74</sup> 2009 GHG Waiver Grant, *supra* note 30, at 32,759.

<sup>75</sup> California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156, 12159-60 (Mar. 6, 2008).

<sup>76</sup> The 1977 amendments to section 209 clarified that the protectiveness of California’s program should be considered “in the aggregate”; the protectiveness of individual component parts of a motor vehicle emission program do not each need to be as stringent as federal standards if the program, as a whole, is at least as protective. 42 U.S.C. § 7543(b)(1). In so amending section 209, “Congress quite intentionally restricted and limited EPA’s review of California’s standards, and its express legislative intent was to ‘provide the broadest possible discretion [to California] in selecting the best means to protect the health of its citizens and the public welfare.’” 2009 GHG Waiver Grant, *supra* note 30, at 32,761 (quoting H.R. Rep. No. 294, at 301-302 (1977)).

<sup>77</sup> See, e.g., Tony Barboza, *87 Days of Smog: Southern California Just Saw its Longest Streak of Bad Air in Decades*, L.A. TIMES (Sept. 21, 2018), <https://www.latimes.com/local/lanow/la-me-smog-streak-20180921-story.html>. Indeed, California currently has the only two areas in the country that are designated extreme nonattainment; it also has the only two severe nonattainment areas, the only two serious nonattainment areas, and four out of the five areas designated moderate nonattainment in the entire country for the federal ambient air quality standard for ozone. *8-Hour Ozone (2015) Designated Area/State Information*, EPA, <https://www3.epa.gov/airquality/greenbook/jbtc.html> (data current as of Nov. 30, 2018).

<sup>78</sup> Studies have shown that climate change, and the warmer temperatures California will experience because of it, will increase the air stagnation that leads to elevated PM<sub>2.5</sub> and ground-level ozone concentrations, further worsening this already “compelling and extraordinary” problem. Daniel E. Horton et al., *Occurrence and Persistence of Future Atmospheric Stagnation Events*, 4 NATURE CLIMATE CHANGE 698, 700 (2014), <https://www.nature.com/articles/nclimate2272>; D.J. Jacob & D.A. Winner, *Effect of Climate Change on Air Quality*, 43 ATMOSPHERIC ENV’T 51, 52-53 (2009),

California's unique geography and weather patterns—qualities EPA has acknowledged, in this rulemaking, are among those constituting “compelling and extraordinary conditions” —mean that California will suffer more extreme impacts as a result of climate change.<sup>79</sup> Finally, California has shown that its ACC program is mitigating the negative effects of climate change on the state by successfully reducing greenhouse gas emissions.<sup>80</sup> EPA's argument that the waiver is not necessary because the ACC program will not solve the issue of global climate change is inapposite.<sup>81</sup> In sum, even when assessed independently of the ACC program as a whole, the GHG standards and ZEV requirements are necessitated by “compelling and extraordinary conditions” in California.

### 3. The Waiver is Consistent with Clean Air Act Section 202

Under section 209, EPA's review of a waiver's consistency with Clean Air Act section 202(a) is constrained: those opposed to the waiver must meet their burden of showing either that California's standards are technologically infeasible or that California's test procedures impose requirements that are at odds with the federal test procedure.<sup>82</sup> Here, the Proposed Rule suggests that the ACC/ZEV waiver is inconsistent with section 202(a) because California has not provided “adequate lead time for the development and application of necessary technology

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<https://www.sciencedirect.com/science/article/pii/S1352231008008571>. Scientists have also found that reductions in GHG emissions can bring with them co-benefits of improved air quality with respect to conventional pollutants like ozone and PM<sub>2.5</sub>. Yuqiang Zhang et al., *Co-Benefits of Global, Domestic, and Sectoral Greenhouse Gas Mitigation for U.S. Air Quality and Human Health in 2050*, 12 ENVTL. RES. LETTERS 114033 (2017), <http://iopscience.iop.org/article/10.1088/1748-9326/aa8f76>. California is projected to experience the worst health impacts of any state as a result of increased ozone pollution, with costs of over \$700 million projected in 2020 alone. UNION OF CONCERNED SCIENTISTS, RISING TEMPERATURES, WORSENING OZONE POLLUTION 19 (2011), [https://www.ucsusa.org/sites/default/files/legacy/assets/documents/global\\_warming/climate-change-and-ozone-pollution.pdf](https://www.ucsusa.org/sites/default/files/legacy/assets/documents/global_warming/climate-change-and-ozone-pollution.pdf). Increased GHG emissions, which EPA admits will occur if the waiver is denied, will worsen these impacts, and reductions in GHG emissions, which the ACC program is designed to promote, could mitigate them.

<sup>79</sup> CARB has already “identified a wide variety of impacts and potential impacts within California, which include exacerbation of tropospheric ozone, heat waves, sea level rise and salt water intrusion, an intensification of wildfires, disruption of water resources by, among other things, decreased snowpack levels, harm to high value agricultural production, and additional stresses to sensitive and endangered species and ecosystems.” 2009 GHG Waiver Grant, *supra* note 30, at 32,765.

<sup>80</sup> See generally ACC MIDTERM REPORT, *supra* note 56.

<sup>81</sup> As EPA recognized over four decades ago, “[t]he issue of whether a proposed California requirement is likely to result in only marginal improvement in air quality not commensurate with its cost or is otherwise an arguably unwise exercise of regulatory power is not legally pertinent to [EPA's] decision under section 209, so long as the California requirement is consistent with section 202(a) and is more stringent than applicable Federal requirements in the sense that it may result in some further reduction in air pollution in California.” Waiver of Application of Clean Air Act to California State Standards, 36 Fed. Reg. 17,458 (Aug. 31, 1971).

<sup>82</sup> Motor & Equipment Mfrs. Ass'n, Inc. v. EPA (*MEMA I*), 627 F.2d 1095, 1126 (D.C. Cir. 1979).



prior to the effective date of applicable standards.”<sup>83</sup> But California has provided ample support for the feasibility of its standards, which have already been in place for five years, and EPA has not presented clear, compelling evidence that the standards are technologically infeasible.

At the time it adopted the ACC program, CARB assessed vehicle technology and the feasibility of the program’s standards.<sup>84</sup> As part of a midterm review in 2017, CARB assessed manufacturer compliance with the ACC program and found that automobile manufacturers had “successfully employed a variety of technologies that reduce GHG emissions and increase fuel efficiency, many at a faster rate of deployment than was originally projected” and manufacturers were “over complying with the GHG requirements and [were] offering various vehicles on the road today that are already able to comply with the GHG standards for later model years.”<sup>85</sup> In other words, not only was the technology in existence and feasible, it was being—and continues to be—successfully employed.

EPA says that its own predictions “for future and timely availability of emerging technologies” cast doubt on CARB’s assessment of technological feasibility.<sup>86</sup> But even if EPA’s predictions were to be correct, which market data suggests they are not, there must be more than mere “doubt” to overturn California’s finding of technological feasibility: there must be clear and compelling evidence.<sup>87</sup> EPA has not offered any. In the absence of such evidence, California’s finding, and the waiver, must stand.

### C. California’s Waiver Authority is Not Preempted by EPCA

As a last-ditch argument against California’s waiver authority, EPA also points to the National Highway Traffic Safety Administration (NHTSA)’s proposed determination that its authority to set fuel economy standards under the Energy Policy and Conservation Act (EPCA) preempts California’s authority to regulate greenhouse gases.<sup>88</sup> But the U.S. Supreme Court has already held that fuel economy standards and greenhouse gas emission regulations are distinct, and

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<sup>83</sup> Proposed SAFE Rule, *supra* note 42, at 43,251.

<sup>84</sup> 2009 GHG Waiver Grant, *supra* note 30, at 32,769.

<sup>85</sup> ACC MIDTERM REPORT, *supra* note 56, at ES-2.

<sup>86</sup> Proposed SAFE Rule, *supra* note 42, at 43,251.

<sup>87</sup> *MEMA I*, 627 F.2d at 1122 n. 54 (“The Administrator . . . is not to overturn California’s judgment lightly. Nor is he to substitute his judgment for that of the State. There must be **clear and compelling evidence** that the State acted unreasonably in evaluating the relative risks of various pollutants in light of the air quality, topography, photochemistry, and climate in that State, before the EPA may deny a waiver.”) (quoting H.R. Rep. No. 294, 95th Cong., 1st Sess. 302 (1977), U.S. Code Cong. & Admin. News 1977, p. 1381) (emphasis added).

<sup>88</sup> Proposed SAFE Rule, *supra* note 42, at 43,240 (“EPA notes that elsewhere in this notice NHTSA has proposed to find that California’s GHG and ZEV standards are preempted under EPCA. . . . EPA is proposing to conclude that if NHTSA finalizes a determination that California’s GHG and ZEV standards are preempted, then it would be necessary to withdraw the waiver[.]”).

explicit EPCA preemption challenges to California’s tailpipe standards have been raised — and rejected — twice already.

EPCA expressly preempts states from setting their own fuel economy standards.<sup>89</sup> But in *Massachusetts v. EPA*, the U.S. Supreme Court rejected EPA’s argument that its Clean Air Act authority to regulate greenhouse gases was displaced by EPCA’s grant of authority to set fuel economy standards, finding that such statutory obligations were “wholly independent”:

[T]hat DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public health and welfare . . . a statutory obligation wholly independent of DOT’s mandate to promote energy efficiency. The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.<sup>90</sup>

And EPCA preemption challenges to California’s greenhouse standards have been rejected by every federal court that has heard them.<sup>91</sup> Based on the Supreme Court’s finding in *Massachusetts* that EPCA did not displace the Clean Air Act, the District Court of Vermont held in 2007 that EPCA did not preempt state greenhouse gas standards, upholding Vermont’s adoption of California’s tailpipe standards.<sup>92</sup> A year later, the Eastern District of California likewise upheld California’s standards from an EPCA preemption challenge.<sup>93</sup>

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<sup>89</sup> 49 U.S.C. § 32919(a).

<sup>90</sup> *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).

<sup>91</sup> See *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007); *Cent. Valley Chrysler-Jeep v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007).

<sup>92</sup> *Green Mountain Chrysler*, 508 F. Supp. 2d at 355 (“The Supreme Court recently made clear that the regulation of carbon dioxide emissions from motor vehicles is not the exclusive province of the federal Department of Transportation. See *Massachusetts v. EPA*, 127 S. Ct. at 1462. EPA has the obligation under the CAA to protect public health and welfare by regulating the emission of air pollutants, which may include carbon dioxide. *Id.* Under the CAA, California may set its emissions standards, subject to EPA waiver review, and Vermont, among other states, may adopt those EPA-approved standards. When Congress enacted EPCA, it was well aware of this long-standing practice of permitting California to apply for waivers from EPA for its emissions standards pursuant to the CAA.”)

<sup>93</sup> *Cent. Valley Chrysler-Jeep*, 529 F. Supp. 2d at 1176 (“State laws that are granted waiver of preemption under the Clean Air Act that have the effect of requiring even substantial increases in average fuel economy performance are not preempted where the required increase in fuel economy is incidental to the state law’s purpose of assuring protection of public health and welfare under the Clean Air Act. The court also finds that a law that requires substantial improvement in average fleet mileage standards incidentally to its purpose of protecting public health and welfare does not constitute a de facto regulation of fuel economy standards unless there is a narrow one-to-one correlation between the pollution reduction regulation and the fuel efficiency standard. Where, as here, various considerations including fuel type and source and other sources of emission may have the effect of mitigating fuel

The intervening decade has not strengthened arguments that EPCA preempts California's authority to set greenhouse gas standards. These arguments fail now for the same reason the original challenges failed ten years ago: EPA and California's Clean Air Act authority to regulate greenhouse gas emissions to protect public health is distinct from, and neither preempted nor displaced by, NHTSA's EPCA authority to regulate fuel economy to promote energy efficiency.

#### IV. Conclusion

California's leadership in developing innovative regulatory programs to address pervasive pollution problems benefits more than just California. Other states—and the federal government—have learned from California's example and adopted similar or identical programs to reduce vehicle emissions. The demonstrated success of California's Clean Air Act waiver in driving significant pollution reductions and public health benefits, both in California and nationally, stands as a shining example of federalism at work. As recent international<sup>94</sup> and national<sup>95</sup> reports detail the drastic reductions in greenhouse gas emissions necessary to avert the most catastrophic impacts of climate change, California's leadership is needed now more than ever before.

The Trump Administration's unprecedented attack on California's authority to regulate greenhouse gas emissions from motor vehicles is unlawful and will have serious environmental consequences. If enacted, this proposal would be a huge setback to environmental progress and endanger public health throughout the country.

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efficiency improvement requirements, the pollution control standard does not constitute a de facto regulation of fuel efficiency.”).

<sup>94</sup> See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 62; Coral Davenport, *Major Climate Report Describes a Strong Risk of Crisis as Early as 2040*, N.Y. TIMES (Oct. 7, 2018), <https://www.nytimes.com/2018/10/07/climate/ipcc-climate-report-2040.html>.

<sup>95</sup> See U.S. GLOBAL CHANGE RESEARCH PROGRAM, *supra* note 62; Coral Davenport & Kendra Pierre-Louis, *U.S. Climate Report Warns of Damaged Environment and Shrinking Economy*, N.Y. TIMES (Nov. 23, 2018), <https://www.nytimes.com/2018/11/23/climate/us-climate-report.html>.

## About the Authors

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