CENTER FOR ENVIRONMENTAL ACCOUNTABILITY

COMMENTS OF THE CENTER FOR ENVIRONMENTAL ACCOUNTABILITY

Comments on

California State Motor Vehicle Pollution Control Standards; Advanced Clean Cars II Regulations; Request for Waiver of Preemption; Opportunity for Public Hearing and Public Comment

88 Fed. Reg. 88,908 (Dec. 26, 2023)
Docket No. EPA–HQ–OAR–2023–0292

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The Center for Environmental Accountability (CEA) submits these comments on the United States Environmental Protection Agency's (EPA) notice *California State Motor Vehicle Pollution Control Standards; Advanced Clean Cars II Regulations; Request for Waiver of Preemption; Opportunity for Public Hearing and Public Comment*, 88 Fed. Reg. 88,908 (December 26, 2023) (the Notice).

CEA is a 501(c)(3) organization devoted to educating the public and government on the importance of transparency and accountability in the areas of environmental and energy policy. CEA's work is driven by its core principles, including a commitment to the rule of law, to a clean environment, and to a healthy human environment founded on a strong economy and vibrant communities animated by people gainfully employed in the occupations of human flourishing. CEA understands that adherence to law requires respect for the proper roles of each branch of government and for the respective roles of the federal government and of state governments. CEA recognizes that the public interest requires a balance of environmental stewardship, resource development, and energy access and security, and that environmental remediation functions best when targeted at those communities injured by unlawful pollution.

I. Introduction.

The internal combustion engine has been central to the American way of life for generations. Personal transportation is one of the most important applications of energy to enhance life, promote individual liberty, and facilitate mobility in all senses of the word. Accountability and transparency in the regulation of vehicles are key. If regulations are making the type of car you wish to buy too expensive or scarce—let alone subjecting it to an outright *ban*—it's important that you know just who is imposing such a policy on you so that you can raise your concerns through appropriate channels and seek redress. Constraining consumer choice in an area so integral to uniquely American conceptions of freedom and the good life must be done only after open debate, and certainly should never be attempted through the mousehole-cover of a single state's regulations.

The Clean Air Act (CAA) appears to solve this accountability problem by preempting state and local governments from regulating vehicle emissions. Simple: the federal government is the one regulating your car in this regard, so you know whom to contact if you're unhappy about it, right? Well, not so fast.

Congress created a special mechanism known to all as the "California waiver," under which California—and *only* California—can ask the Environmental Protection Agency (EPA) to lift the preemption so that California can adopt and enforce alternative standards. This is a unique provision, and its origins are equally bespoke. Congress created it in 1967 because it recognized that California had uniquely vexing air-quality problems, caused by so-called "criteria" pollutants whose elevated local concentration impaired health and visibility. And, for decades, consistent with this

original Congressional intent, California sought and received waivers for its regulations designed to address those pollutants and the localized pollution problems for which local pollution is a but-for cause.

But in recent years, California and EPA have increasingly abused the waiver provision. California, through the California Air Resources Board (CARB), has begun to regulate vehicle *greenhouse gas* (GHG) emissions. This despite the fact that CARB's stated concern, impacts from climate change, is no more caused by California vehicles' emissions than by emissions from vehicles in New York, New Zealand, or New Delhi. GHG concentrations in the upper atmosphere, collected and circulating in a uniform global manner, are the pollution to which those impacts are attributed. It therefore makes no sense for the waiver, given its narrow purpose, to be applied to this type of regulation—yet under recent Democratic Administrations, that is precisely what EPA has allowed. Textual considerations discussed below independently weigh against this approach.

The Blue EPA appears to have one overriding principle when it comes to the waiver: California gets what it wants, when it wants it—text, purpose, and efficacy be damned. Constitutional considerations aside, Congress could have said that in the CAA. But it didn't. It wrote many words, virtually all of which EPA reads out of existence, abdicating its responsibility in favor of serving as a rubber stamp for California's wishes.

There are other flaws with applying the waiver to GHG regulation. Another statute, the Energy Policy and Conservation Act, preempts (with no waiver opportunity) states from regulating anything even "related to" fuel economy or average fuel economy, and that's all that vehicle carbon dioxide (CO_2) regulation is in essence. And to allow California to be the only state to decide in the first instance whether it should address through motor vehicle regulations a *global* pollution problem would be to give it a prerogative so unique and unequal to the other states as to raise serious constitutional concerns.

Defenders of the "when California says 'jump,' EPA says 'how high?" approach claim it's really "federalism" in action, because another CAA provision allows other states to adopt California's standards once EPA waives preemption for them. But this is false federalism—a follow-the-leader approach where other states are consigned to follow either California's lead or the federal government's. No other state may seek the waiver. No other state may design its own regulations. While Congress made that initial decision in light of California-specific problems, it is pernicious (and illegal) to allow this to extend to problems that are *not* unique to California. (And that's assuming Congress even had authority to give California special sovereign powers in the first place.) This abuse of the waiver creates a classic example of the familiar "elephants in mouseholes" scenario in administrative law, which undermines true federalism by subjecting 49 states to a regulatory duopoly of Washington and Sacramento.

In the Notice on which this comment is submitted, EPA declined to note that CARB's waiver request for the "Advanced Clean Cars II" (ACC II) program (the Request) is a request to allow California to ban *all* sales of new internal-combustion-engine-driven vehicles by 2035. That's quite a tell. And while EPA delayed more than half a year before giving the public notice of the Request, other states have begun purporting to adopt ACC II in whole or in part, despite the fact that the CAA explicitly forbids them from doing so unless and until EPA grants a preemption waiver.

EPA, in conjunction with California, is therefore engaged in an egregious end-run around accountability in environmental regulation. Unless it denies California's Request, the Agency will have acceded to a backdoor ban of traditional vehicles in the nation's largest state, without ever having to do that dirty work itself. EPA must adhere to the statute and common sense by denying the Request.

II. Summary of Argument.

1. The history of the waiver provision reveals that Congress created it for a precise purpose: to allow California to design its own standards to address its unique, local, criteria-pollutant-driven pollution problems as they then obtained. EPA has over the decades interpreted and applied the provision in a hyper-deferential manner that abdicates its statutory role. This trend has now culminated in EPA's providing Notice of California's Request without informing the public that California is requesting authority to ban the sale of new cars powered by internal combustion engines, completing the journey away from the statute's origin and purpose.

2. Congress created three waiver-denial prongs in the statute, and if any one of them is met, EPA must deny California's request for a waiver. Properly construed, the waiver prongs as applied here must result in denial. The first prong requires EPA to consider whether California's required determination that its standards are, in the aggregate, at least as protective as federal standards is arbitrary and capricious. EPA's interpretation of that prong is too deferential to California and does not constitute true arbitrary and capricious review. The second prong requires EPA to consider whether California needs the standards for which it requests a waiver to meet compelling and extraordinary conditions. A proper understanding of this provision reveals that, although this standard may have been satisfied with respect to criteria pollution when Congress created the waiver, it cannot be met with respect to GHG emissions. The third prong requires EPA to consider whether the California standards at issue are compatible with EPA's own vehicle-standard-setting authority; a ban on internal combustion engines is not so compatible.

3. Separate and apart from this, two other considerations require denial of California's Request: State CO_2 standards are preempted by another federal statute, and the constitutional principle of equal sovereignty requires that the waiver provision

be read more narrowly than would be required for California's Request to be granted.

III. History of the Waiver Statute and Its Application and Abuse.

EPA's Notice provides no substantive hint of what it may think about California's Request. So we are constrained largely to shadowboxing with positions set out in the Agency's 2022 action restoring the portions of the January 2013 waiver that it had previously revoked in 2019. In order to engage in that analysis, however, we must first set forth the waiver provision, its origins and evolution, and the story of how it has been distorted beyond recognition by California's and EPA's actions in the half-century since Congress created it.

A. The Waiver Provision in Its Current Form.

> *It is a "cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context. 'Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used.'"*[1]

First, we reproduce below the current text of CAA Section 209(a) and (b) in their entirety. Section 209(a) preempts state and local governments from adopting or attempting to enforce vehicle emissions standards; Section 209(b) is the "California waiver" provision allowing California to seek and obtain a waiver from Section 209(a)'s preemption under certain circumstances (although, as we'll see, it doesn't actually mention California by name).

We reproduce the provisions in full at the beginning of our discussion both for the reader's convenient reference, and to plant firmly in the reader's mind just what these provisions say as a holistic matter, so that the following history of the waiver mechanism's evolution and abuse—and explanation of its proper construction—will be more readily comprehensible.

In their current form, the two subsections read in full as follows:

42 U.S.C. § 7543 – State standards

(a) Prohibition

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. No State shall require certification,

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[1] *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.)) (cleaned up).

inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

(b) Waiver

(1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that—

(A) the determination of the State is arbitrary and capricious,

(B) such State does not need such State standards to meet compelling and extraordinary conditions, or

(C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.

(2) If each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for purposes of paragraph (1).

(3) In the case of any new motor vehicle or new motor vehicle engine to which State standards apply pursuant to a waiver granted under paragraph (1), compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this subchapter. . . .

B. Evolution of the Statutory Text and the Reasons for That Evolution.

1. Origin: Air Quality Act of 1967.

What is now CAA Section 209 was first created as Section 208, three years prior to the enactment of the 1970 Clean Air Act Amendments, and the contemporaneous creation of the EPA itself. The Air Quality Act of 1967, Pub. L. No. 90-148, had the following purposes:

> To amend the Clean Air Act to authorize planning grants to air pollution control agencies; expand research provisions relating to fuels and vehicles; provide

> for interstate air pollution control agencies or commissions; *authorize the establishment of air quality standards*, and for other purposes.[2]

This 1967 Act, therefore, was a halfway station between the CAA's origins as a research and funding program and its 1970 emergence as an authorizing statute for federal regulatory standard-setting.[3] The ambient air quality standards portion of the 1967 Act bore little resemblance to the National Ambient Air Quality Standards process mediated through State and Federal Implementation Plans we now know—that would have to wait for the 1970 CAA Amendments.

But the 1967 Act *did* give the Secretary of Health, Education and Welfare—the EPA and its Administrator did not yet exist—[4] direct regulatory authority over

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[2] Air Quality Act of 1967, Pub. L. No. 90-148, prefatory statement of purpose, 81 Stat. 485 (Nov. 21, 1967) (emphasis added).

[3] *See* EPA's own description of the evolution of the CAA:

> The legal authority for federal programs regarding air pollution control is based on the 1990 Clean Air Act Amendments (1990 CAAA). These are the latest in a series of amendments made to the Clean Air Act (CAA). This legislation modified and extended federal legal authority provided by the earlier Clean Air Acts of 1963 and 1970.
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> The Air Pollution Control Act of 1955 was the first federal legislation involving air pollution. This Act provided funds for federal research in air pollution. The Clean Air Act of 1963 was the first federal legislation regarding air pollution control. It established a federal program within the U.S. Public Health Service and authorized research into techniques for monitoring and controlling air pollution. *In 1967, the Air Quality Act was enacted in order to expand federal government activities*. In accordance with this law, enforcement proceedings were initiated in areas subject to interstate air pollution transport. As part of these proceedings, the federal government for the first time conducted extensive ambient monitoring studies and stationary source inspections.
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> The Air Quality Act of 1967 also authorized expanded studies of air pollutant emission inventories, ambient monitoring techniques, and control techniques.

Clean Air Act Overview—Evolution of the Clean Air Act—Introduction (EPA, last updated Nov. 21, 2023) (emphasis added), *available at* https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act (last visited Feb. 18, 2024).

[4] *See* Air Pollution Control Act of 1955 (the original nucleus Act which all future Amendments have built upon), Pub. L. No. 84-159 (July 14, 1955), Sec. 1:

> . . . the Secretary of Health, Education, and Welfare and the Surgeon General of the Public Health Service (under the supervision and direction of the Secretary of Health, Education, and Welfare) shall have the authority relating to air pollution control vested in them respectively by this Act.

See also 1970 CAA Amendments, Pub. L. No. 91-605, Sec. 15(c)(2), 84 Stat. 1713 (Dec. 31, 1979) ("The Clean Air Act is amended by striking out "Secretary" wherever it appears (except in reference to the Secretary of a department other than the Department of Health, Education, and Welfare) and inserting in lieu thereof "Administrator" . . . .).

emissions from new motor vehicles and new motor vehicle engines.[5] And in the same breath, Congress created the first version of what is now CAA Section 209—first enacted in 1967 as Section 208. That original version read in relevant part:[6]

> *State Standards.*
>
> Sec. 208.
>
> (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 title. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.
>
> (b) The Secretary shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, unless he finds that such State does not require standards more stringent than applicable Federal standards to meet compelling and extraordinary conditions or that such State standards and accompanying enforcement procedures are not consistent with section 202(a) of this title.
>
> (c) Nothing in this title shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.[7]

The phrase "any State which has adopted . . . prior to March 30, 1966" was a roundabout way of saying "California."[8]

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[5] *See* Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 499 (Nov. 21, 1967) (enacting Section 202(a)), authorizing the Secretary to

> prescribe as soon as practicable standards, applicable to the emission of any kind of substance, from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause or contribute to, or are likely to cause or to contribute to, air pollution which endangers the health or welfare of any persons . . . .

[6] The original version of this section, as with all subsequent versions of the section, contain material other than subsections (a) and (b), but they are not relevant to the matter at hand.

[7] Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 501 (Nov. 21, 1967).

[8] *Motor & Equip. Mfr's Ass'n, Inc. v.* EPA, 627 F.2d 1095, 1101 (D.C. 1979) (*MEMA*) ("California is the only state which had adopted emission control standards (other than crankcase emission standards) before March 30, 1966. It is thus the only state eligible for a waiver."). The third subsection is not relevant to the matter at hand, is included here only to show the original section in its complete form, and neither it nor the other subsections added at later

The D.C. Circuit explained the balance struck by this provision in light of its contemporaneous legislative history in the early case *Motor and Equipment Manufacturers Association, Inc. v. EPA*, 627 F.2d 1095 (1979) (*MEMA*), quoting that legislative history as follows:

> On the question of preemption, representatives of the State of California were clearly opposed to displacing the State's right to set more stringent standards to meet peculiar local conditions. The auto industry conversely was adamant that the nature of their manufacturing mechanism required a single national standard in order to eliminate undue economic strain on the industry.
>
> The committee has taken cognizance of both of these points of view. Senator Murphy convinced the committee that *California's unique problems* and pioneering efforts justified a waiver of the preemption section to the State of California.[9]

From the beginning, Congress clearly intended that California be entitled to a special dispensation under the new, otherwise-preemptive federal vehicle emissions standards regime because it had *unique* problems.[10] This will become highly important later in the discussion.

2. Renumbering in Clean Air Act Amendments of 1970.

The section containing the waiver provision was renumbered from Section 208 to Section 209 in the Clean Air Act Amendments of 1970,[11] but its content was not substantively altered.

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dates will be reproduced below in the discussion tracking the evolution of the text of the relevant subsections.

[9] Sen. Rep. No. 403, 90th Congress, 1st session (1967) (emphasis added), *quoted by MEMA*, 627 F.2d at 1109 n.29.

[10] True, the legislative history also speaks of California's "pioneering efforts" in vehicle emissions control. EPA in its 2022 Restoration and elsewhere has placed great weight on what it styles as Congressional intent to recognize and foster California's role as a "laboratory" of innovation in this regard. But nowhere has EPA ever explained how that role can outweigh the statute's clear intent that the waiver be tethered in some fashion to problems of a magnitude and duration unique to California. Just because solutions California adopts to address those problems may serve as an inspiration to the federal government does not remove the need for California's waiver-worthy regulations to, in fact, be tailored to those problems. And constitutional avoidance cautions against placing excessive emphasis on the "pioneering efforts" aspect of the legislative history—no matter how pioneering one state's efforts at a particular juncture in time now almost sixty years in the past, that cannot justify allowing that state a unique privilege in perpetuity without carefully and narrowly construing the bounds of that privilege as tailored to that state's unique problems, to the extent that such unique problems still obtain.

[11] Pub. L. No. 91-604, Sec. 8(a), 84 Stat. 1694 (Dec. 31, 1970) (*inter alia*, redesignating Section 208 as Section 209).

3. Amendment in Clean Air Act Amendments of 1977.

In the 1977 Clean Air Act Amendments, Congress amended the waiver provision,[12] which thereafter read and to this day reads as follows (emphases added):

> (b) Waiver
>
> > (1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, *if the State determines that the State standards will be, in the aggregate, at least as protective* of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that—
> >
> > > (A) *the determination of the State is arbitrary and capricious*,
> > >
> > > (B) such State does not need such State standards to meet compelling and extraordinary conditions, or
> > >
> > > (C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.
> >
> > (2) If each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for purposes of paragraph (1).
> >
> > (3) In the case of any new motor vehicle or new motor vehicle engine to which State standards apply pursuant to a waiver granted under paragraph (1), compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this title.

To recap: the original 1967 version of what became Section 209(b) did not contemplate any determination by California regarding the stringency of its standards. Instead of parsing out specific waiver-denial prongs, it provided merely that the waiver should be denied absent a finding "that such State does not require standards more stringent than applicable Federal standards to meet compelling and extraordinary conditions or that such State standards and accompanying enforcement procedures are not consistent with section 202(a) of this title." By contrast, the 1977 version:

- tasked California with determining that its "standards will be, in the aggregate, at least as protective" as federal standards, and

[12] *See* Pub. L. No. 95-95, Sec. 207, 91 Stat. 755 (Aug. 7, 1977) (amending Section 209(b)).

- broke out the denial grounds (to some extent already implicit in the 1967 text) into three distinct denial prongs, one of which was entirely new, with the prongs collectively requiring EPA to deny the waiver if it found:
    - (1) the state's determination is arbitrary and capricious (the entirely new prong);
    - (2) "such State does not need such State standards to meet compelling and extraordinary conditions" (compare with the original "such State does not require standards more stringent than applicable Federal standards to meet compelling and extraordinary conditions"; the 1977 Amendments broke this language into two portions, changing the "more stringent" to "in the aggregate, as least as protective" and placing it in the root text of 209(b)(1), and reshaping what remained into the second denial prong); *or*
    - (3) California's standards and accompanying enforcement procedures are not consistent with Section 202(a) (no substantive change here from the original version).

The "in the aggregate" language was added for a very specific purpose: to allow California more latitude in relative stringency with respect to controlling various types of criteria pollutants due to California's particular, local criteria-pollution problems. Again, the early case *MEMA* fully recognized the reason for this language:

> Under the 1977 amendments, California need only determine that its standards will be "in the aggregate, at least as protective of public health and welfare than applicable Federal standards," rather than the "more stringent" standard contained in the 1967 Act. . . . The intent of the 1977 amendment was to accommodate *California's particular concern with oxides of nitrogen*, which the State regards as a more serious threat to public health and welfare than carbon monoxide. California was eager to establish oxides of nitrogen standards considerably higher than applicable federal standards, *but technological developments posed the possibility that emission control devices could not be constructed to meet both the high California oxides of nitrogen standard and the high federal carbon monoxide standard*. Under the 1967 waiver provision, each California standard had to be "more stringent" than the corresponding federal standard. Hence Congress amended the waiver provision to require only that the California standards in the aggregate were at least as protective of public health and welfare as applicable federal standards. *This permits the State to maintain a high standard for oxides of nitrogen but a standard for carbon monoxide somewhat lower than the federal standard*.[13]

This point is crucial: The "in the aggregate" language was added to accommodate the inherent tradeoff between regulating *different types of criteria pollutants*. It was about allowing California flexibility to set priorities among the set of criteria

[13] *MEMA*, 627 F.2d at 1110 & n.32 (emphases added).

pollutants that were then causing its own, unique ("compelling and extraordinary") criteria-pollution problems. It was *not* intended to unmoor the waiver mechanism from any nexus to California's unique problems and their sources within the state.

MEMA went on to quote from legislative history surrounding this amendment, inadvertently sowing the seeds of more recent mischief:

> "The Committee amendment is intended to ratify and strengthen the California waiver provision and to *affirm the underlying intent* of that provision, *i.e.*, to afford California the *broadest possible discretion* in selecting the best means to protect the health of its citizens and the public welfare." [14]

In 2022, when EPA restored aspects of the 2013 waiver that it had revoked in 2019, the document effecting that restoration (hereinafter the Restoration or the 2022 Restoration) uttered the phrase "broadest possible discretion" no fewer than *eleven times*. But look at the *context* in which *MEMA* quoted this language, which the court immediately followed by observing:

> This language appears in the same House Report that elaborately describes section 207's regulatory format. The Report is barren of an indication that Congress intended to confine California's discretion to the adoption of emission standards, certification processes, and test procedures.[15]

Why is the court talking here about Section 207? Simple: the argument which it then faced was that certain California regulations regarding in-use vehicle maintenance were not proper subjects for a Section 209(b) waiver, insofar as petitioners were then arguing that those regulations were separately preempted by Section 207, 42 U.S.C. § 7541, which addresses "Compliance by vehicles and engines in actual use."[16]

In other words, this case has nothing to do with the *type* of pollutant whose control, or pollution problem whose attempted regulatory solution, for which California can seek an EPA preemption waiver. Nor did the 1977 legislative history that it quoted have anything to do with that issue. Instead, this case, the 1977 amendment, and the initial creation of the waiver provision in 1967 all are directed towards the same thing: ensuring California can, under appropriate circumstances, have its own

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[14] *Id.* at 1110 (emphases added) (quoting H.R. Rep. No. 294, 95th Cong., 1st Sess. 301-032 (1977)).

[15] *Id.*

[16] *See id.* at 1103 ("Under these 'in-use maintenance regulations,' a manufacturer cannot require a purchaser to perform maintenance beyond that which a manufacturer can perform during the certification process."), 1106 ("Petitioners argue that the in-use maintenance regulations are not aimed at emissions control performance of new motor vehicles but instead purport to regulate in-use performance and post-sale obligations of manufacturers. As such, they contend, the regulations intrude on the pervasive federal regulatory scheme embodied in section 207, and are not subject to waiver under subsection (b) of section 209.") (internal citation to location of Section 207 in U.S.C. omitted).

program to address *criteria pollution*—which in 1967 Congress understood to be the cause of California's unique smog phenomenon. Indeed, the 1977 legislative history confirms this when it says that the 1977 amendment "affirm[s] the underlying intent of that provision," which, the 1967 legislative history confirms, was motivated by California's "unique problems."[17]

C. EPA Issues an Unbroken Stream of Waiver Grants for Forty-Seven Years.

In between the standing-up of EPA in the final days of 1970 and 2008, no waiver request was denied outright. EPA's Restoration repeatedly notes this fact, as if to suggest there was something inherently improper about the 2008 denial and 2019 revocation that were to come. Of course, it could equally be argued that this almost half-century of acquiescence to California's demands suggests instead that EPA was asleep at the switch. But the damage to Congressional intent was relatively limited so long as California limited its regulations to addressing criteria pollution through tailpipe emission standards.

The real switch was not driven in the first instance by a change in EPA's reading or application of Section 209, but rather by the extra-statutory ends to which California started to put its privileged (but cabined) position to use. The relatively noncontroversial era of California seeking and uniformly obtaining waivers for its traditional, criteria-pollutant-targeting regulations was supplanted by the era of great uncertainty and legal and policy conflict that now pervades waiver requests and litigation.

D. California's Forays Into Climate-Focused Regulation Distort the Waiver Beyond All Reasonable Bounds and Lead To An Ongoing Series of Reversals and Re-Reversals.

All administrative-law hell broke loose once California began to expand its regulations to address issues of climate change. After California submitted its first waiver request for regulations in which it regulated vehicle CO_2 emissions as part of a climate-change strategy, in March 2008, EPA, then under the direction of the Bush Administration, for the first time denied in full a California waiver request. But the incoming Obama Administration reversed that decision in July 2009. In January 2013, EPA granted another waiver for an expanded version of California's regulations, known as the "Advanced Clean Cars" program or "ACC" (and now known as "ACC I" after California's 2022 promulgation of "ACC II").

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[17] The 1977 Amendments also added Section 177 to the CAA, *see* 91 Stat. 750, *codified at* 42 U.S.C. § 7507. That provision is located within the statutory part addressing nonattainment plans for the National Ambient Air Quality Standards (i.e., specific to criteria pollution), is titled "New motor vehicle emission standards in nonattainment areas," and provides that states that have "plan provisions approved under this part" may elect to adopt California's vehicle emissions if EPA has granted a waiver for those emissions and if certain other conditions are met. Each of these features of Section 177 confirms that the waiver mechanism was always and only intended to address criteria pollution.

The Trump Administration proposed to reinterpret the waiver provision and revoke aspects of the 2013 ACC waiver, in an omnibus proposal issued jointly in August 2018 with the Department of Transportation (DOT), [18] which also proposed to revise the two agencies' 2012 joint rule establishing GHG and mileage standards and to issue DOT regulations stating that DOT's statute, EPCA (the Energy Policy and Conservation Act), preempts state and local GHG vehicle regulation. This rulemaking was generally referred to as the Safer, Affordable, Fuel-Efficient Vehicle rule, or the "SAFE" rule.

During the pendency of the SAFE proposal, California ventured to take additional steps of questionable legality. It amended ACC I from the form for which EPA had granted a preemption waiver, changing a provision under which compliance with EPA's GHG emission standards would be "deemed to comply" with California's standards by adding a brand-new limitation that provided that the "deemed to comply" provision would only apply to compliance with EPA's standards as they were adopted in 2012, and would not apply if the stringency of those standards were reduced.[19] And it announced an agreement with major auto manufacturers on an ostensibly "voluntary framework to reduce emissions that can serve as an alternative path forward for clean vehicle standards nationwide"[20] in the event that the SAFE proposal were finalized—with no apparent analysis of how it could do this without obtaining a CAA preemption waiver, and with no apparent intent to seek such a waiver.

In September 2019, the Trump Administration finalized the preemption aspects of the SAFE rule, in an action known as "SAFE Step One" or the "One National Program" rule. (Hereinafter, we will refer to it as the 2019 Revocation or the Revocation.) As relevant here, in this action EPA determined that the waiver provision (chiefly under a reinterpretation of the phrase "compelling and extraordinary conditions") was not appropriate for use in GHG/climate-focused regulations, because climate issues lack the particularized, state-specific nexus that EPA determined was required to meet the statutory standard for granting a waiver. In short: for smog, there was in 1967 when Congress created the waiver mechanism a tight nexus between California tailpipes, California smog, and Californians' lungs; for GHG/climate, there is no tighter connection between California tailpipes and California climate impacts than

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[18] Specifically, the National Highway Traffic Safety Administration (NHTSA).

[19] *See* Statement by CARB Chair on action to preserve California vehicle standards (CARB Sept. 28, 2019), *available at* https://ww2.arb.ca.gov/news/statement-carb-chair-action-preserve-california-vehicle-standards (last visited Feb. 19, 2024). Although CARB did not finalize this action until shortly after SAFE Step One was finalized, CARB first floated the action in 2018, *see* Informal Rulemaking Activity for the Low-Emission Vehicle Program - LEV III (CARB May 7, 2018), *available at* https://ww2.arb.ca.gov/informal-rulemaking-activity-low-emission-vehicle-program-lev-iii (last visited Feb. 19, 2024).

[20] *See* California and Major Automakers Reach Groundbreaking Framework Agreement on Clean Emission Standards (Office of Gov. Gavin Newsom July 25, 2019), *available at* https://www.gov.ca.gov/2019/07/25/california-and-major-automakers-reach-groundbreaking-framework-agreement-on-clean-emission-standards/ (last visited Feb. 19, 2024).

with Tokyo or Buenos Aires tailpipes. California cannot "need" measures to address "compelling and extraordinary conditions" if those conditions are not particular to—or in any material way addressable by—California.

EPA also discussed the equal-sovereignty doctrine, under which Congress must generally treat states equally unless specific facts compel different treatment, to support its determination that waiver eligibility required a unique nexus between California's regulations for which the state sought a waiver and California's unique problems. Separate and apart from these issues of CAA interpretation, EPA further determined that because California's CO_2 regulations were separately preempted under EPCA, it could not waive CAA preemption for those regulations. EPA also determined that, even if California's CO_2 regulations could qualify for a waiver and were not preempted under EPCA, other states could not use CAA Section 177 to adopt them. This other section, EPA determined, authorized only the adoption by other states of criteria-pollutant California regulations for which EPA had waived preemption.

Under this interpretation, the 2019 Revocation revoked the 2013 waiver as it related to zero-emission vehicles (ZEVs) and those aspects of ACC I that constituted part of the state's broader, economy-wide GHG reduction program. But the Revocation left in place the 2013 waiver as applied to ACC I's low-emission vehicle (LEV) program, since that was the traditional type of program, directed towards "building a better mousetrap" resulting in reduced criteria pollutant emissions. As to this latter, EPA and DOT determined the LEV program to be an appropriate subject for CAA preemption waiver and not preempted by DOT's statute, respectively.

The Biden Administration reversed course on substantially all of the positions adopted in the 2019 Revocation before litigation over the waiver revocation, the EPCA preemption regulation, and the agencies' revision to their standards reached judgment. Notably, the Biden Administration also departed from both Trump and Obama Administration precedent by having DOT and EPA act separately, rather than through joint actions, as had been the case in 2010, 2012, 2019, and 2020. The Obama and Trump Administrations have not often been accused of singing from the same hymnal, but in at least one important respect, they agreed: in keeping with the Supreme Court's observation in *Massachusetts v. EPA* that the two agencies could and *should* "avoid inconsistency," [21] the two agencies issued their inextricably interrelated fuel-economy and GHG emissions regulations by joint rule under both prior Administrations.[22]

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[21] 549 U.S. 497, 530 (2007) ("The two [agencies'] obligations [under EPCA and CAA] may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.").

[22] One motive for the Biden Administration's decoupling of the two agencies' rules was an attempt to shield its EPA vehicle emission rules, which compel widespread adoption of electric vehicles, from challenge based on EPCA's prohibition on DOT considering electric vehicles when setting its standards. Another motive may have been retribution against DOT, which was seen as taking a more active role in the Trump Administration's joint rulemaking than the role it had been allowed to play under the Obama Administration's joint rulemakings.

EPA provided notice of reconsideration of the 2019 Revocation and requests for comment in April 2021, and finalized that action in March 2022, "turning heel" on all of the interpretive issues which EPA had relied on in the Revocation—except on EPCA preemption, the equal-sovereignty doctrine, and the scope of CAA Section 177. On these pressing questions, EPA appears to have *no* current position other than that it was inappropriate for the 2019 Revocation to have expressed a position on them. EPA has apparently belatedly become a devotee of Chief Justice Robert's beloved maxim that "when it is not necessary to say more, it is necessary not to say more," although we disagree with it on precisely when it is in fact not necessary.

Later in 2022, California adopted ACC II, a set of regulations for which the pending Request now seeks a Section 209(b) waiver. Among other features, ACC II for the first time escalates its electric-vehicle sales-mandate provisions (already present in ACC I) to the point where, by 2035, the sale of internal-combustion-engine vehicles will be outright banned in California, Ground Zero for American "car culture."[23] At least a dozen other states have purported to adopt ACC II,[24] although CAA Section 177, the provision under which they claim authority to do so, explicitly provides that no other state can adopt California's regulations unless "a waiver has been granted."

This brings us to the instant Notice.

E. It's Come to This: EPA Solicits Comment *sub silentio* on a California Ban on the Internal Combustion Engine.

Seven months after receiving California's Request, the day after Christmas 2023, EPA asked the public for its input on whether it should grant the Request, in a Notice remarkable for what it does *not* say. The Notice describes ACC II's escalating ZEV mandate in anodyne terms: "The ZEV requirements of ACC II include, for example, a requirement for vehicle manufacturers to sell increasing percentages of ZEVs beginning with the 2026 MY."[25] *Nowhere does the Notice acknowledge that these "increasing percentages" mount by 2035 to 100 percent*—i.e., a *ban* on the sale of new internal combustion engine vehicles. EPA solicits *no* comment specifically on this new feature of California's regulations. Indeed, all EPA *does* specifically solicit comment on in the Notice is a bare-bones recitation of the textual waiver denial prongs themselves.[26]

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[23] This is not to concede that ACC I's inclusion of an escalating sales mandate that stopped short of a ban was a provision for which a waiver could have validly been granted. Rather, we note only that, whatever the legality of that earlier approach, ACC II has now gone so far as to feature an outright ban.

[24] *See* Moe Khatib, 12 States Have Formally Adopted Advanced Clean Cars II (EV Hub Dec. 4, 2023), *available at* https://www.atlasevhub.com/weekly-digest/12-states-have-formally-adopted-advanced-clean-cars-ii/ (last visited Feb. 19, 2024).

[25] 88 Fed. Reg. at 88,909/1.

[26] *Id.* at 88,909/3: "In this action, EPA invites comment on the following three criteria: whether (a) California's determination that its motor vehicle emission standards are, in the aggregate, at least as protective of public health and welfare as applicable Federal standards

This refusal to provide specific notice or solicit specific comment on such a novel feature of a waiver request is a stark departure from prior practice.[27] In 2007, in the notice requesting comment on California's waiver request for its first GHG regulatory package, EPA, after reciting the denial prongs,

> also request[ed] comment on the following: (1) Given that the regulations referenced in the December 21, 2005, request letter relate to global climate change, should that have any effect on EPA's evaluation of the criteria, and if so, in what manner; (2) whether the United States Supreme Court's decision [in *Massachusetts*], regarding the regulation of emissions of greenhouse gases from new motor vehicles under Title II of the Clean Air Act, is relevant to EPA's evaluation of the three criteria, and if so, in what manner; and (3) whether the Energy Policy and Conservation Act (EPCA) fuel economy provisions are relevant to EPA's consideration of this petition or to CARB's authority to implement its vehicle GHG regulations.[28]

In a two-page notice, EPA found room to pose these specific questions to the public, in keeping with values of transparency and accountability. The contrast with the instant Notice could not be more glaring.

The Notice's failure to, well, provide *notice* that what it's soliciting comment on is an internal-combustion-engine ban is particularly egregious in light of Administrator Regan's statement of opposition to precisely that policy in Congressional testimony last year. In a May 2023 House hearing,[29] after Administrator Regan stated EPA had not yet received a waiver request for ACC II,[30] this dialogue ensued:

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is arbitrary and capricious, (b) California needs such standards to meet compelling and extraordinary conditions, and (c) California's standards and accompanying enforcement procedures are consistent with section 202(a) of the CAA."

[27] One possible explanation for this deviation from precedent is that this EPA actually *does not view* ACC II, flat internal-combustion-engine ban and all, as even *potentially* being fundamentally different in nature from prior California vehicle regulations. If that's the case, the hour is very late indeed.

[28] 82 Fed. Reg. 21,260, 21,261/2 (Apr. 30, 2007).

[29] Hearing: Fiscal Year 2024: Environmental Protection Agency Budget Request, U.S. House of Representatives, Subcommittee on Environment, Manufacturing, and Critical Materials, Committee on Energy and Commerce (May 10, 2023). The entire colloquy between Administrator Regan and Representative Joyce (R-PA) on the subject of ACC II and California's then-impending Request runs from approximately 46 minutes and 10 seconds to approximately 48 minutes and 25 seconds in the video of the hearing, *available at* https://democrats-energycommerce.house.gov/committee-activity/hearings/hearing-on-fiscal-year-2024-environmental-protection-agency-budget; *also available at* https://www.youtube.com/watch?v=FFVnxEdu4u4&t=2774s (last visited Feb. 16, 2024).

[30] This seems to have been the case, if just barely; CARB's Waiver Request Support Document is dated May 22, 2023, twelve days after the hearing took place.

> Rep. Joyce: Do you feel that your administration and the Biden Administration supports the ban of selling new vehicles with internal combustion engines starting in 2035?
>
> Administrator Regan: No, not at all.
>
> Rep. Joyce: You do not support a ban of internal combustion automobiles or any vehicles by 2035?
>
> Administrator Regan. No, I don't support that and neither do our regulations. By the way, our regulations don't ban anything. They're technology standards that guide the future and especially complement the market—
>
> Mr. Joyce. Do you support that the consumer should have the choice of what type of vehicle they drive? That the trucking industry, that the automobile industry has that right to purchase individual vehicles that have internal combustion engines?
>
> Mr. Regan. I absolutely do.

Given that, less than a year ago, Administrator Regan told Congress and the world that he does not support a ban of internal-combustion-engine cars, it is beyond odd that the Notice makes no mention of the fact that that is precisely what the Request asks him to do. Perhaps Administrator Regan is gearing up to grant the Request, invoking the hand-washing words of Administrator Train from the Ford Administration that first sowed the seeds of EPA's abdication of responsibility and improper hyper-deference to California in the Restoration:

> [I] would feel constrained to approve a California approach to the problem which I might also feel unable to adopt at the Federal level in my own capacity as a regulator. The whole approach of the Clean Air Act is to force the development of new types of emission control technology where that is needed by compelling the industry to "catch up" to some degree with newly promulgated standards. Such an approach to automotive emission control may be attended with costs, in the shape of reduced product offering, or price or fuel economy penalties, and by risks that a wider number of vehicle classes may not be able to complete their development work in time. Since a balancing of these risks and costs against the potential benefits from reduced emissions is a central policy decision for any regulatory agency under the statutory scheme outlined above, I believe I am required to give very substantial deference to California's judgments on this score.[31]

After all, Administrator Regan's 2022 Waiver Restoration evoked these very words, near the beginning of that document's section laying out the theory that

[31] 40 Fed. Reg. 23, 102, 23,104/1-2 (May 28, 1975).

> congressional intent in creating a limited review of California waiver requests based on the section 209(b)(1) criteria was to ensure that the federal government did not second-guess the wisdom of state policy.[32]

When the Restoration quoted this 1975 language from Administrator Train, however, the Restoration curiously elided the words "to automotive emission control," however, so that the 2022 language reads: "Such an approach . . . may be attended with costs."[33] This elision can't have been for reasons of space, because the Restoration quotes the entirety of the remainder of the 1975 block quote above. No, the motive for hiding these four words is obvious: to cover the tracks of their origin and context. The waiver is about *controlling emissions from automobiles*, not about *banning automobiles that emit*. To imagine that Congress has ever intended otherwise beggars belief.

As we'll show below, this is unfortunately far from the only respect in which EPA is invoking foundational statements from its own past pronouncements (and the D.C. Circuit) in a distorted and unmoored manner. For now, the important thing to note is just how reticent, to the point of being affirmatively misleading, the Notice is with respect to the radical nature of ACC II, its tension with the Administrator's public statement that he would not support an internal-combustion-engine ban, and the Notice's departure from prior recent practice of Administrations of both parties.

EPA and DOT are, in the pending lawsuits challenging their most recent (and, for the first time since *Massachusetts*, separate) vehicle emissions and fuel-economy actions, offering the defense that their standards don't *require* any manufacturer to build any EVs at all—it's just an anticipated "compliance strategy"! (The other "compliance strategy" would seem to be to stop selling cars in the United States.) But with the prospect of waiving preemption over ACC II now looming, that routine is well and truly worn out.[34] This is a ban, the wolf now comes dressed as a wolf, and the radical

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[32] 87 Fed. Reg. at 14,342/3-14,343/1.

[33] *Id.* at 14,343/1.

[34] Of course, that routine was unconvincing even before ACC II came on the stage. But don't take our word for it. Instead, listen to the Biden White House: "President Biden Outlines Target of 50% Electric Vehicle Sales Share in 2030. . . . Specifically, the President will sign an Executive Order that sets an ambitious new target to *make* half of all new vehicles sold in 2030 zero-emissions vehicles . . ." The White House—Briefing Room—Statements and Releases, Fact Sheet: President Biden Announces Steps to Drive American Leadership Forward on Clean Cars and Trucks (Aug. 5, 2021) (emphasis added), *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/05/fact-sheet-president-biden-announces-steps-to-drive-american-leadership-forward-on-clean-cars-and-trucks/ (last visited Feb. 18, 2024).

The mainstream media rightly views this as a "radical" policy trajectory. Less than two weeks ago, a *New York Times* reporter used exactly that word to describe EPA's *pending* vehicle GHG regulation proposal from May 2023:

nature of where EPA's and California's policy trajectories are leading the nation through the mousehole of a provision designed to address unique California problems can no longer be denied.

IV. The Proper Construction of the Waiver Denial Prongs Requires EPA To Deny California's Waiver Request.

Congress created the California waiver statute because California had unique air-quality problems. That was true in 1967—*with respect to criteria pollutants*.[35] It is not now and will never be true with respect to GHG and climate issues. This is axiomatic, the result of the distinct nature of that problem, which results from the *global* elevation of GHG concentrations in the upper atmosphere and under which California's vehicle emissions bear no more on the problems California experiences than do the emissions in any other state—or, indeed, in any other nation—from mobile or stationary sources.

Reading the waiver statute through this lens makes sense of Congress's original decision to grant California a special prerogative. If one abandons that lens and pretends that GHG/climate is not a fundamentally different pollution problem, as EPA did in the 2009 and 2013 waiver grants and again in the 2022 Restoration, then one is left with *no* justification for California to receive a special privilege with respect to climate-focused regulation.

> The E.P.A. designed the proposed regulations so that 67 percent of sales of new cars and light-duty trucks would be all-electric by 2032, up from 7.6 percent in 2023, *a radical remaking of the American automobile market*.

Coral Davenport, Biden Administration Is Said to Slow Early Stage of Shift to Electric Cars (New York Times Feb. 17, 2024) (emphasis added), *available at* https://www.nytimes.com/2024/02/17/climate/biden-epa-auto-emissions.html (last visited Feb. 18, 2024). True, this article reports that the Administration may be slowing the *initial* forced EV-adoption ramp a little in the draft final rule, although it also reports that the end target in the out years will be the same. But the point is that *everyone knows* that EPA is attempting to force the nation towards EV adoption, it is using the California waivers as a stalking horse to drive this push towards an outright ban, and whatever tweaks it makes to the trajectory of forced EV adoption in response to political or economic headwinds do not negate its ultimate aim.

[35] This is not to say that it is necessarily true today. California's air quality has markedly improved. *See, e.g.*, South Coast Air Quality Management District, Ozone Exceedances in the South Coast Air Basin (demonstrating improving trends from 1980 through the present), *available at* https://xappp.aqmd.gov/ozone/Basin_O3_exceedences_trend.html (last visited Feb. 26, 2024). And, both in California and nationwide, emissions from mobile sources are a small fraction of total criteria pollution. *See* M. Zawacki, et al., Mobile source contributions to ambient ozone and particulate matter in 2025, 188 Atmospheric Env't 129, 132, tbl. 1 (2018). CARB therefore devotes much of its analysis to its claims of benefits from reduction in *upstream* emissions, further confirming that its waiver requests are drifting ever further from the statute's purpose.

As a threshold matter, EPA has wrongly adopted over the decades a position of hyper-deference to California's policy choices, abdicating its own responsibility under the statute. While this is incorrect across the board, the malign effects of this approach only became fully clear when California ventured into the realm of *climate*-focused vehicle emission regulation. California simply is not uniquely situated with respect to GHG and climate, as EPA in the Restoration tacitly admits by going no further than saying California is "particularly" impacted by climate change (whatever that might mean). For EPA to continue its abdication of responsibility and to pretend there's nothing new and different about *allowing California to ban the internal combustion engine* is for EPA to push its improper interpretation of the waiver statute to the point of collapse. EPA must instead interpret and apply the waiver provision and its denial prongs in a reasonable fashion, in line with Congressional intent.

The first denial prong requires EPA to consider whether California's determination that its standards will be, in the aggregate, at least as protective as federal standards is arbitrary and capricious. In doing so, EPA must actually engage in arbitrary and capricious review and not rubber-stamp any standard California submits that appears on its face to be more stringent than federal standards.

The second denial prong requires EPA to consider whether California needs "such state standards to meet compelling and extraordinary conditions." As an initial matter, EPA's current position, that it should conduct this inquiry on a "whole-program" basis, cannot be correct. Under that reading of the second denial prong will *never* be triggered until California has *no* need for its own vehicle emissions program, even for criteria pollutants. Rather, to determine whether the object of a California standard is a "compelling and extraordinary condition" demands considering whether there is a particularized, state-specific nexus between the emissions, pollution, and health and welfare impacts at issue. Furthermore, California cannot be said to "need" a standard to "meet" a condition if that standard will not have a material effect on that condition, which California's regulations will not. EPA's fallback argument in the Restoration, that, even considering California's "need" for climate regulations as such rather than under the "whole-program" approach, California does "need" them because of their claimed criteria benefits, is absurd. California has touted ACC and ACC II as climate regulations,[36] it being apparently very important to the state to claim that it is "tackling climate," and this kind of backpedaling, with its strong whiff of manipulation,

[36] Notably, whereas CARB in its ACC I waiver request disclaimed any criteria benefits from the EV sales mandate portion of that regulation, it has now changed its tune and presents ACC II as if it were a criteria program with sidecar climate aspirations. This about-face is a blatant attempt to rest a climate program on the historical laurels of prior California approaches that were truly designed as criteria-pollutant programs to improve internal-combustion-engine-driven cars' criteria-pollutant emission performance and that were, whatever the merits of any particular historical waiver grant, at the very least more in keeping with the origins and purpose of the waiver.

should not be tolerated. At bottom, EPA's current position is that California "needs" a given standard if it *wants* that standard. This cannot be the law.

The third denial prong requires EPA to consider whether "such State standards and accompanying enforcement procedures are not consistent with" CAA Section 202(a). EPA has consistently interpreted and applied this prong in a narrow sense, considering *only* whether California's standards provide adequate lead time, taking into account the cost of compliance. Of the three denial prongs, this is the one where EPA's *interpretation* has perhaps, to date, done the least violence to the statute (although that's a low bar).[37] Yet *banning the internal combustion engine* cannot be "consistent with" a statute which is manifestly designed to address emissions from cars driven by that type of engine.

Policies designed to ban internal-combustion-engine cars, whether directly adopted by EPA as federal regulations or whether relieved from Section 209(a) preemption by a Section 209(b) waiver grant of California regulations, raise major questions that cannot be justified by arguments from ambiguity or statutory silence. In this regard, EPA appears now to be a glutton for punishment. *West Virginia* prevented EPA's attempt to use this type of reasoning to turn a source-performance statute into a cap-and-trade, aggregate-utility-fuel-balance-setting one. Any attempt to use the waiver provision to allow an internal-combustion-engine ban should meet a similar fate.

A. Threshold Issue of Deference.

As an initial matter, EPA's 2022 Restoration takes the concept of deference to California's waiver requests beyond all legitimate boundaries. Over and over, it says that EPA cannot second-guess California's policy choices—and, as we'll see below, in a limited sense that position does have some support in the regulatory and judicial precedent. But deference to California's policy choices within the legitimate metes and bounds of the waiver does not permit the complete abdication of independent responsibility to construe and apply the statute that EPA exhibited in the Restoration, and that we fear it will once again repeat when ruling on the pending Request. EPA certainly owes California no deference when it comes to the proper construction of the requirements of the CAA generally or the waiver provision specifically.

First, the text of the waiver provision itself pushes against the approach of abdication. The first denial prong, calling for EPA to exercise arbitrary and capricious

[37] But even here, EPA's approach hardly seems to give due consideration to cost. Its position is that "Section 202's cost of compliance concern" was motivated by desire to "avoid doubling or tripling the cost of motor vehicles to purchasers," and that "the cost of compliance must reach a very high level before the EPA can deny a waiver." 88 Fed. Reg. 20,688, 20,705/3 (Apr. 6, 2023) (heavy-duty waiver grant).

review, does indeed contemplate some degree of deference on EPA's part[38] (although, as explained below, far from the *hyper*-deference to which EPA has reduced it). But the second and third denial prongs do *not* contain any language suggesting EPA's examination of California's standards and waiver request on these points should be deferential. Quite the contrary, they task EPA in plain terms with determining if California "needs" the standards (second denial prong) or if the standards "are not consistent" with Section 202(a). There is no sign that deference is called for when applying these latter two denial prongs.

Second, a close examination of the regulatory and judicial precedent on which EPA and California base their reading of the statute as commanding abdication on EPA's part shows just how untethered this line of reasoning has become from the statute, how modest the initial positions of deference staked out in the 1970s were when compared to the ends to which EPA and California now employ them, and what a return to the proper understanding of the statute looks like.

The case for hyper-deference begins and all but ends with *MEMA*. The Restoration cites this case some 35 times across its 48 *Federal Register* pages. But, as we've demonstrated above in our discussion of this case during our examination of the origins and evolution of the statute, *MEMA*'s gloss on the statute and its legislative history teaches only that EPA must defer to some extent (compatible with the textual assignment of arbitrary-and-capricious review to EPA on the first denial prong) to California's reasonable attempts to balance between regulating different types of criteria pollutant to address the state's unique criteria-pollutant issues, to the extent that those unique issues still obtain.

That is to say, examining the trail of regulatory precedent across which EPA articulated and applied its view of the deference it owes California's waiver requests, we are startled by just how modest the application of that view was in its origins and just how absurd it is for EPA to have later applied that same view to California's waiver requests for climate authority, let alone the looming prospect of EPA applying that same view to allow California to ban the internal combustion engine.

The first sign of EPA's view on this issue, although it does not yet use the word "deference,"[39] is in its August 1971 waiver grant for California regulations concerning

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[38] *See, e.g.*, *FCC v. Prometheus Radio Project*, 592 U.S. 414, 417, 423 (2021) ("On this record, we conclude that the FCC's 2017 order was reasonable and reasonably explained for purposes of the APA's *deferential arbitrary-and-capricious standard*. . . . The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. Judicial review under that standard is *deferential*, and a court may not substitute its own policy judgment for that of the agency. A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.") (emphases added).

[39] By contrast, the 2022 Restoration uses the word "deference" some forty-four times.

assembly-line test procedures. Administrator Ruckleshaus had earlier that year *denied* the waiver for these same procedures (in an action where he granted the waiver for other aspects of California's request), but here he changed course, and in so doing he said:

> It is California's position that the statute does not permit me to take into account the extent of the burden placed on residents of California or on regulated interests, unless the California requirement fails to provide an adequate period of time for compliance. On careful consideration, I agree. The law makes it clear that the waiver request cannot be denied unless the specific findings designated in the statute can properly be made. The issue of whether a proposed California requirement is likely to result in only marginal improvement in California air quality not commensurate with its cost or is otherwise an arguably unwise exercise of regulatory power is not legally pertinent to my decision under section 209, so long as the California requirement is consistent with section 209(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.[40]

Here we see already the outlines of EPA's abdication of responsibility—but note the relatively low stakes over which it was first deployed: the wisdom of California requiring assembly line testing:

> California's contention that the proposed assembly-line test will result in control of automobile emissions more stringent than applicable Federal requirements has not been effectively refuted. The most that can be said on the basis of information and data submitted by opponents of the requirement is that the proposed assembly-line tests appear to correlate poorly with present certification tests, that implementation of the assembly-line test requirement will be costly to California consumers, and that the requirement will be of questionable value in reducing air pollution in California. This, in my judgment, does not constitute adequate support for the findings required to deny California's request for waiver under controlling provisions of the Clean Air Act.[41]

Whatever the merits of taking this approach on the matter at hand in 1971, it's a far cry from this to deferring to California's desire to adopt regulations addressing global climate change, as EPA did in the 2009 and 2013 waiver grants and the 2022 Restoration—let alone to deferring to its desire to ban the internal combustion engine, as is at issue in the pending Request and Notice.

Ruckelshaus' successor, Administrator Train, took a step further in a 1975 waiver grant, and *his* discussion *does* explicitly invoke "deference":

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[40] 36 Fed. Reg. 17,458, 17,458/3 (Aug. 31, 1971).

[41] *Id.* at 17,459/1.

> It is worth noting here, however, that even on this issue [whether the California regulations at issue provide adequate lead time] *I would feel constrained to approve a California approach to the problem which I might also feel unable to adopt at the Federal level in my own capacity as a regulator*. The whole approach of the Clean Air Act is to force the development of new types of emission control technology where that is needed by compelling the industry to "catch up" to some degree with newly promulgated standards. Such an approach to automotive emission control may be attended with costs, in the shape of a reduced product offering, or price or fuel economy penalties, and by risks that a wider number of vehicle classes may not be able to complete their development work in time. *Since a balancing* of these risks and costs against the potential benefits from reduced emissions *is a central policy decision for any regulatory agency*, under the statutory scheme outlined above *I believe I am required to give very substantial deference to California's judgment on this score*.[42]

This certainly pushes beyond the 1971 analysis. EPA is now openly saying that it is "constrained" to waive preemption for California regulations that the Agency is "unable to adopt at the Federal level." But again, look at what EPA actually had in front of it:

> California adopted 1977 standards of .41 gm/mi HC, 9.0 g/mi CO and 1.5 gm/mi NOx, and . . . they requested a waiver of Federal preemption for these standards and for the accompanying test and enforcement procedures, including the assembly-line test procedures. It is that waiver request which is the subject of this decision.[43]

Again: what was at stake in 1975, setting aside whether EPA reached the right result in that instance, was still recognizably in the ballpark of Congress's intent in 1967: allowing California to seek a preemption waiver for its regulatory efforts to address its "unique problems": criteria and related traditional pollutants from internal combustion engines that contribute to those problems. Not global issues, not banning the internal combustion engine.

Puzzlingly, in the Restoration, EPA described the Revocation as a "singular snapshot of th[e] task" of "work[ing] to determine how section 209(b)(1)(B) should be interpreted and applied to GHG standards . . . ."[44] But under the Restoration's view, there is *no need* to interpret or apply the waiver statute to GHG regulation *any differently* than to criteria-pollutant regulation. Under the Restoration's view, California can just

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[42] 40 Fed. Reg. 23,102, 23,104/1-2 (May 28, 1975) (emphases added). Administrator Train's framing of the "whole approach" of the Act as forcing developments in "emission control technology" further confirms that the Act generally and the waiver provision specifically is about improving the emissions performance of vehicles—not banning vehicles that emit.

[43] *Id.* at 23,103/2.

[44] 87 Fed. Reg. at 14,337/1.

do as it pleases, with EPA acting as a rubber stamp. The Restoration's wholesale abandonment of any of the Revocation's acknowledgment that a California waiver request for GHG regulation might meet a different fate than historical waiver requests for criteria-pollutant regulation calls into question just how much "work" EPA now thinks this "task" requires of it, both in restoring what the Revocation revoked and in the face of the instant Request.

Elsewhere in the Restoration, EPA notes that, with the two exceptions of 2008 and 2019, it has always simply given California what it asked for. We're not sure this has the significance that EPA appears to think it does. EPA casts this as evidence that 2008 and 2019 were illicit aberrations. We submit the otherwise unbroken stream of grants suggests that EPA has been asleep at the switch.

The Restoration announced its general position of hyper-deference and abdication of responsibility thus:

> In waiver decisions, EPA has thus recognized that congressional intent in creating a limited review of California waiver requests based on the section 209(b)(1) criteria was to ensure that the federal government did not second-guess the wisdom of state policy.[45]

But this isn't about the "wisdom" of California's policy. It's about the *legality* of it as a matter of the Clean Air Act's preemption provision and the Act's, yes, *limited* opportunity for a waiver of that preemption. One principle should be noncontroversial: EPA owes California no deference over the meaning of the statute that EPA administers.

B. First Denial Prong: California's Protectiveness Determination Is "Arbitrary and Capricious."

It is unusual for Congress to task a federal agency with reviewing the determination of a state agency applying the "arbitrary and capricious" standard familiar from federal *judicial* review of *federal* agency actions. But that is what Congress commanded in the first prong, and EPA may not ignore this command. The thrust of arbitrary and capricious review is well-known to the Agency from litigation to which the Agency is frequently a party, and even if EPA is more practiced in arguing that *its* regulations *aren't* arbitrary and capricious, its duty in the waiver context is to adopt a more critical lens and actually *apply* the standard. However, EPA's application of that prong, as epitomized in its Restoration, bears no resemblance to actual arbitrary and capricious review.

A decade ago, the Supreme Court in *Michigan v. EPA* reiterated basic axioms of administrative law:

> Federal administrative agencies are required to engage in "reasoned decisionmaking." *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374

[45] 87 Fed. Reg. at 14,342/3.

> (1998) (internal quotation marks omitted). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Ibid.* It follows that agency action is lawful only if it rests "on a consideration of the relevant factors." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).[46]

In so doing, the *Michigan* Court was in line with the seminal *State Farm* Court's articulation of arbitrary-and-capricious review:

> The Department of Transportation accepts the applicability of the "arbitrary and capricious" standard. It argues that under this standard, a reviewing court may not set aside an agency rule that is *rational*, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute. We do not disagree with this formulation.[47]

Rationality is therefore an indispensable requirement for an agency's actions to survive arbitrary and capricious review. On the question of what is and isn't rational, *Michigan* offered:

> One would not say that it is even rational, never mind "appropriate," to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.[48]

The word "appropriate" is in quotation marks because *Michigan* considered (and rejected) EPA's position that it was not required to consider costs under a statutory provision tasking it to determine whether it was "appropriate and necessary" to regulate power plants under CAA § 112, the air toxics program.[49] But although the case hinged directly on EPA's construction of statutory text and is therefore, strictly speaking, more of a "*Chevron* case" than a *"State Farm*" one, *this* passage teaches that to disregard a wild disproportion between costs and benefits is irrational, and therefore arbitrary and capricious.[50]

Yet this type of disregard is precisely what EPA says that it is *required* to impose on itself *when conducting arbitrary and capricious review* of CARB's findings. The Restoration says this in bold type:

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[46] 576 U.S. 743, 750 (2015) (internal citations simplified).

[47] 463 U.S. at 42-53 (emphasis added).

[48] 576 U.S. 743, 752 (2015).

[49] *See id.* at 751.

[50] It also may be arbitrary and capricious to ignore tradeoffs between benefits in health and welfare directly attributed to a regulation on the one hand, and harms to health and welfare caused by deprivations in income or other burdens imposed by those regulations on the other.

> "[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 my decision under section 209."[51]

Here, the Restoration is quoting the 2013 Waiver Grant for ACC I, which in turn quoted a 1971 waiver grant. But EPA cites no *judicial* precedent for this position, not even its old standby *MEMA*. And even if *MEMA*'s general blessing of a deferential EPA approach could at the time have been viewed as applying to this position, the position cannot survive *Michigan*.

It's true that the Restoration deploys this quote in the specific context of the second denial prong, the "need" prong—which we'll address below—but this approach of abdication infects EPA's construction of all three prongs, and of the statute as a whole. And it's particularly inappropriate when EPA is explicitly tasked by Congress to apply arbitrary and capricious review to CARB's findings, as is the case in the first prong.[52]

EPA's position on what exactly it would take for the first denial prong to ever be met is difficult to identify. The 2022 Restoration never explicitly says what it would take for a waiver request to be denied under this prong. The closest it comes is this:

> Historically, EPA draws a comparison between the numerical stringency of California and federal standards in making the requisite finding as to whether California's protectiveness determination is arbitrary and capricious.

That's not enough, as shown above. Now, EPA may respond by saying that its hands are tied and that it *cannot* engage in a more typical arbitrary-and-capricious review because of other text in the waiver statute. In this regard, EPA may have tried to steal a base in the 2022 Restoration when it said this, in a footnote appended to the sentence quoted above:

> Section 209(b)(2) provides that if each State [California] standard is at least as stringent as comparable applicable Federal standards then such standard shall be deemed to be as protective of public health and welfare as such federal standards *for purposes of section 209(b)(1)(A).*[53]

But that's not actually what (b)(2) says. Rather, Section 209(b)(2) instead says this:

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[51] 87 Fed. Reg. at 14,366/3 (quoting the 2013 Waiver Grant, 78 Fed. Reg. at 2,134, which in turn was quoting a Nixon Administration waiver grant which appears to be the first time EPA articulated this position, 36 Fed. Reg. 17,458, 17,458/3 (August 31, 1971)).

[53] 87 Fed. Reg. at 14,372/2 n.301 (emphasis added).

> If each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards *for purposes of paragraph (1).*[54]

Why did EPA muff the reference here? Simple sloppiness? Or was EPA laying the groundwork to argue that, regardless of what the *normal* bounds of arbitrary and capricious review might be, under *this* Congressionally mandated arbitrary and capricious review it can only consider the stringency of California's standards, not whether those standards were adopted in a manner that would normally fail arbitrary and capricious review?

The distinction between "for purposes of paragraph (1)" and "for purposes of Section 209(b)(1)(A)" is significant. Congress's actual words refer to *California's* determination in the root text of paragraph 1, where Congress contemplated a California determination that its standards were, in the aggregate, at least as protective as federal ones. Section 209(b)(2) provides that, if each California standard is at least as stringent as the corresponding federal one, then that determination on California's part is a slam-dunk. But the first denial prong, Section 209(b)(1)(A), tasks EPA with considering whether California's determination is arbitrary and capricious. And, as explained above, that determination rightly encompasses more than just relative stringency; it includes an inquiry into basic rationality.

It makes no sense that Congress would have in one breath in the 1977 Amendments added this arbitrary and capricious review denial prong, only to simultaneously wipe it out by adding 209(b)(2). Yet that is what EPA's mischaracterization in the 2022 Restoration of the referent of Section 209(b)(2) would amount to. Section 209(b)(2) instead was simply added to preserve the *status quo*. The waiver provision in its 1967 form required the federal government to waive preemption "unless [it] finds that [California] does not require standards more stringent . . . ." This necessarily entailed as precedent a determination that California's standards were, in fact, more stringent. Section 209(b)(2), added in 1977, is therefore rightly read to provide only that California's protectiveness determination is an easier one if *all* its standards are more stringent than the corresponding federal ones—*not* that EPA's arbitrary and capricious review under the first denial prong is strangled in the crib and left a dead letter.

CEA is ill-equipped, in a 60-day comment period beginning the day after Christmas, to dig down into CARB's ACC II record and contest its spreadsheets and cost estimates. Our point here is simply to demonstrate that EPA cannot rationally plug its ears to comments on that front adduced by other, more numerate parties. To do so is *not* to engage in arbitrary and capricious review, but rather to engage in extra-textual abdication. EPA, not typically known for deferring overmuch to the several states, has, over the decades, engaged in improper *hyper*-deference to California's waiver requests. That is not in keeping with arbitrary and capricious review and, we submit, defies Congressional intent.

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[54] 42 U.S.C. § 7543(b)(2) (emphasis added).

C. Second Denial Prong: California "does not need such State standards to meet compelling and extraordinary conditions."

The proper construction of the second denial prong is straightforward: When California submits a waiver request, EPA must deny it if California does not need the standards subject to the request to meet air quality conditions that are compelling and extraordinary. Compelling means exigent, and extraordinary in this statutory context means particularized to California in a sufficiently specific way. Rather like the issue of "redressability" in standing analysis, California cannot possibly be said to "need" a standard to "meet" such conditions if the standard would not have a material impact on those conditions. The conditions are not "compelling and extraordinary" if they do not have a sufficiently specific nexus with California emissions, California pollution, and Californian health and welfare impacts from that California pollution. This is the interpretation EPA adopted in the 2019 Revocation, only to jettison it in the 2022 Restoration. It is the correct interpretation, and EPA's disavowal of it in the Restoration is unsound. EPA's current interpretation of the second denial prong is absurd on its face and cannot be squared with the text, context, history, and purpose of the provision.

1. *Threshold Issue:*

Q?: What is the Scope of EPA's Analysis under the Second Denial Prong?

A: EPA Must Determine Whether California "Needs" a Regulatory Program To Regulate a Particular* Type *of Pollutant,* viz.*, Criteria Pollutants* vs. *Greenhouse Gases. EPA May Not Adopt a "Whole-Program" Interpretation That Renders the Second Denial Prong a Nullity.

EPA's position as articulated in the Restoration is as follows: the second denial prong only authorized EPA to "examine[] whether California needs a separate motor vehicle program *as a whole—not specific standards*—to address the state's compelling and extraordinary conditions."[55]

Unlike its position with respect to what "arbitrary and capricious" means in the first denial prong, EPA's position with respect to the second denial prong is crystal clear—and impossible to accept as an absurd reading of the statute. EPA says that, until the day that California has *no* compelling and extraordinary air quality problems necessitating its adoption of its own vehicle emission standards, then *any* standards California wishes to submit for a waiver request will sail through without having to face meaningful scrutiny under this prong, *no matter what* those standards are or whether California actually "needs" them to do *anything* – let alone to "meet compelling and extraordinary conditions." This might be an easier way for EPA to administer the statute, since it means the second denial prong will never in the foreseeable future

[55] 2022 Restoration, 87 Fed. Reg. at 14,333/2 (emphasis added).

be triggered and EPA never needs to do any meaningful analysis under it.[56] But that's not the statute that Congress wrote.

In the September 2023 oral argument on challenges to the Restoration, the judges evinced clear skepticism of EPA's reading. We direct the reader in particular to the audio of this argument beginning at around 45:45, where one judge observes the fundamental absurdity of "whole-program":

> Here's why I have a problem with [the "whole-program" interpretation]: I could say that I need to have a nutritious meal in order to sustain myself. And so at every meal I'm going to have some protein, some vegetables, some fruits, and a dozen donuts. I think that my doctor would say, yeah, you need the meal, but you don't need the dozen donuts at every meal. What you seem to be saying is that EPA can just ignore a California plan that has a dozen donuts in it, because in the aggregate the meal sustains. That doesn't make any sense.[57]

No, it doesn't.

In the Restoration, EPA gave the following reasons why it was reverting to the "whole-program" interpretation:

- The words "such State standards" in the second denial prong "refer[] back to standards 'in the aggregate' in [the root text of] Section 209(b)(1), which addresses the protectiveness finding that California must make for its waiver requests";

- Reading the provision other than on a "whole-program" basis "would conflict with Congress's 1977 amendment to the waiver provision to allow

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[56] EPA was apparently too embarrassed of the following claim to put it anywhere but a footnote in the Restoration, and so we'll respond to it in a footnote too: It asserted that the whole-program "approach does not make section 209(b)(1)(B) a nullity, as EPA must still determine whether California does not need its motor vehicle program to meet compelling and extraordinary conditions as discussed in the legislative history. Conditions in California may one day improve such that it may no longer have a need for its motor vehicle program." 87 Fed. Reg. at 14,336/2 n.22.

Given that EPA itself has in the past glossed "compelling and extraordinary conditions" as referring to "the factors that tend to cause pollution-the '*geographical* and climatic conditions that, when combined with large numbers and high concentrations of automobiles, create serious air pollution problems,'" *Am. Trucking Ass'n v. EPA*, 600 F.3d 624, 627 (2010) (emphasis added) (quoting EPA in the record before the court), we may be waiting a very, *very* long time before these conditions as EPA understands them cease—until the very geography of the state changes. "California/ tumbles into the sea/That'll be the day I go back to Annandale," Steely Dan, My Old School (1973)—and apparently that'll be the day that, under EPA's reading, the second denial prong ever stirs to life again.

[57] *See* Audio from Oral Argument, *Ohio v. EPA*, No. 22-1018 (D.C. Circuit argued Sept. 15, 2023) (questioning of Wilkins, J.—appointed by President Obama, for the record).

California's standards to be 'at least as protective' as the federal standards 'in the aggregate,'" which EPA assets "must mean that some of California's standards may be weaker than federal standards counterbalanced by others that are stronger," whereas "[if] [] a waiver can only be granted if each standard on its own meets a compelling need, then California could never have a standard that is weaker than the federal standard, rendering Congress's 1977 amendment inoperative"; and

- "Since 1967, in various amendments to section 209, Congress has also not disturbed this reading of [the second waiver denial prong] as calling for the review of the standards as a whole program. Likewise, Congress has also not placed any additional constraints on California's ability to obtain waivers beyond those now contained in section 209(b)(1)."[58]

The "whole program" reading tracks "such standards" back to the standards on which CARB makes its protectiveness determination—but this is *not* the *literal* reading of the text. Again, that text is:

> The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted *standards* (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that *the State standards* will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that . . . (B) such State does not need *such State standards* to meet compelling and extraordinary conditions . . . .

42 U.S.C. § 7543(b)(1) emphases added.

If one were to robotically track the "such State standards" in the second denial prong back up to the root text of (b)(1), *why stop at "the State standards?"* Shouldn't you keep tracking back to the "*standards*" adopted prior to March 30, 1966? If not, to what precisely is the phrase "the State standards" referring? In other words, a *truly* literal reading of the text would interpret every reference to "standards" in 209(b) as referring only to California's standards that pre-dated the cutoff date given by the Air Quality Act of 1967. Under *that* reading, the California waiver would've been a one-time affair, solely to allow California to "grandfather" in its pre-April 1966 standards. That is, there's nothing on the literal face of this provision to show that Congress anticipated the waiver would or could ever be requested or granted more than once.

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[58] 87 Fed. Reg. at 14,358/2-14,359/3. EPA in this same general section of the Restoration also said that it was departing from the Revocation's view that the constitutional doctrine of equal sovereignty weighed against the "whole-program" approach, *id.* at 14,360/1; that issue is discussed in Section V.B below.

Don't mistake us. We are not saying that this is the proper construction of the statute. We are pointing out that EPA's ostensible "plain text" reading of "such State standards" is nothing of the sort. EPA, ever since its creation, has approved many waiver requests. This means that it is *not* merely applying the unambiguous, literal meaning of the words of the waiver provision. And once that's made clear, the question then becomes: *what remains to justify EPA's "whole-program" reading of the second prong?*

In its 2021 Notice of Reconsideration of the 2019 Revocation, EPA suggested that the Revocation had created an improper double standard under which California's *criteria* regulations would be subject to a "whole-program" analysis under the second denial prong, while its *GHG* regulations would be subject to a standard-by-standard analysis under that prong. This suggestion was contained in one of the questions on which it solicited comment:

> [W]as it permissible for EPA to construe section 209(b)(1)(B) as calling for a consideration of California's need for a separate motor vehicle program where criteria pollutants are at issue and a consideration of California's specific standards where GHG standards are at issue?[59]

The 2021 Notice did not cite any particular provision of the 2019 Revocation in posing this question for comment. Then, in the 2022 Restoration, EPA said the following:

> As previously explained, in reviewing waiver requests EPA has applied the traditional [i.e., "whole-program"] interpretation in the same way for all air pollutants, criteria and GHG pollutants alike. In SAFE 1, however, EPA reinterpreted section 209(b)(1)(B) and further set out a particularized nexus test and applied this test separately to GHG standards at issue. SAFE 1 then concluded that no nexus exists for GHG emissions in California. SAFE 1 further posited that California must demonstrate "compelling and extraordinary circumstances sufficiently different from the nation as a whole to justify standards on automobile emissions which may, from time to time, need to be more stringent than national standards." This has resulted in potentially different practical results depending on whether GHG standards or criteria emission pollutants are at issue, a distinction neither found in nor supported by the text of section 209(b)(1)(B) and legislative history. Specifically, SAFE 1 would have the ACC program MYs 2017–2025 criteria pollutants standards subject to review under the traditional interpretation while GHG standards at issue would be subject to review under the SAFE 1 particularized nexus test or individualized scrutiny. This uneven application is even more irreconcilable given that California's motor vehicle emission program includes two GHG standards for highway heavy-duty vehicles that EPA previously reviewed under the traditional approach. EPA acknowledges that ascribing different meanings to the same statutory text

[59] 86 Fed. Reg. 22,421, 22,429/1 (Apr. 28, 2021).

> in the same provision here, depending on its application, "would render every statute a chameleon." Nothing in either section 209 or the relevant legislative history can be read as calling for a distinction between criteria pollutants and GHG standards and thus, the individualized scrutiny under the SAFE 1 particularized nexus test. Nothing in section 209(b) can be read as calling for EPA to waive preemption only if California seeks to enforce criteria pollutant standards.[60]

None of this begging-the-question analysis holds up. The proper interpretation of the statute does not subject California's criteria program to a different analysis than its GHG program. It subjects them to the same standard: does California need such standards to meet compelling and extraordinary conditions? Congress created the waiver mechanism in 1967 due to its understanding that at that time criteria pollutant standards would pass this test; GHG standards do not, for the reasons given in the 2019 Restoration and as discussed below.

And EPA is wrong to say that "[n]othing in section 209(b)" supports this approach. The statute's terms do: "need," "address," and especially "compelling and extraordinary," again as discussed below. And the legislative history, to boot, supports the correct interpretation, as the history contemporaneous with the 1967 creation of the waiver mechanism explained that it was to allow California to target its "unique" problems (which provides a useful gloss on the statutory term "extraordinary"). EPA cannot embrace in an entirely extratextual manner legislative history that speaks of "broadest possible deference," abuse that legislative history to adopt an "anything-goes" approach, and then disregard legislative history that actually illuminates textual language in that it focuses interpretation and application of the "compelling and extraordinary" term on California's unique conditions and ensures that California's special privilege is kept within the bounds that motivated its creation.

Finally, EPA's 2022 Restoration repeatedly insinuates, without quite having the guts to claim it directly, that the D.C. Circuit in its 2010 opinion *American Trucking Association v. EPA* upheld its "whole-program" approach.[61] Nothing doing. In the

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[60] 87 Fed. Reg. at 14,361/2-3 (footnotes omitted).

[61] *See* 87 Fed. Reg. at 14,353/2-3 ("EPA has interpreted the phrase 'in the aggregate' as referring to California's program as a whole, rather than each State standard, and as such not calling for the Agency's standard-by-standard analysis of California's waiver request. . . . The D.C Circuit has also stated that '[t]he expansive statutory language gives California (and in turn EPA) a good deal of flexibility in assessing California's regulatory needs. We therefore find no basis to disturb EPA's reasonable interpretation of the second criterion.") (citing *Am. Trucking Ass'n v. EPA*, 600 F.3d 624, 627 (D.C. Cir. 2010) (*ATA*), 14,365/2 n.314 ("*CARB notes* that EPA's reasoning that the 'compelling and extraordinary conditions' criteria should be viewed as a '*program as a whole' was upheld as 'eminently reasonable'* in *ATA* . . .") (citing *ATA*, 600 F.3d at 627-29) (emphases added).

passage which EPA cites CARB as "noting" this alleged upholding by the D.C. Circuit, the court actually said *this*:

> ATA [the American Trucking Association] argues that EPA erred in applying the second [waiver denial] criterion. In particular, ATA argues that EPA erroneously found that California "need[s]" the specific TRU [transportation refrigeration unit] rule at issue "to meet compelling and extraordinary conditions" in California. 42 U.S.C. § 7543(e)(2)(A)(ii). In advancing this argument, ATA challenges EPA's interpretation of the statute and contends that EPA applied the statutory standard in an arbitrary and capricious manner.
>
> With respect to the statutory language, EPA concluded that "compelling and extraordinary conditions" refers *to the factors that tend to cause pollution—the "geographical and climatic conditions that, when combined with large numbers and high concentrations of automobiles, create serious air pollution problems."* The expansive statutory language gives California (and in turn EPA) a good deal of flexibility in assessing California's regulatory needs. We therefore find no basis to disturb EPA's reasonable interpretation of the second criterion. *See Chevron* . . . .[62]
>
> ATA relatedly argues that EPA unreasonably determined that California "needs" the TRU rule. *But EPA explained that California continues to suffer from "some of the worst air quality in the nation."* For purposes of our deferential arbitrary and capricious review, EPA's analysis of this second criterion was reasonable and reasonably explained.[63]

To the extent that this case is relevant at all, it supports the 2019 Revocation's interpretation, not the 2022 Restoration's. As an initial matter, it's far from clear that the case is in fact relevant. First, it dealt not with a waiver request and grant under Section 209(b), but rather with a separate waiver provision under Section 209(e), dealing with nonroad engines.[64] That provision was added in the 1990 Clean Air Act Amendments,[65] and unlike the original, historical, on-road engine waiver provision whose origin and evolution are narrated above, it *explicitly* names California and is not framed in terms of a "waiver" from preemption at all: Section 209(e)(1) provides a new and separate preemption provision with respect to nonroad engines and nonroad vehicles, and Section 209(e)(2) provides for EPA to "authorize" California to regulate in

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[62] Of course, relying on a *Chevron*-infused precedent is precarious at a moment when the Supreme Court is directly considering abrogating the *Chevron* doctrine, *see generally Loper Bright Enterprises, Inc. v. Raimondo*, Sup. Ct. No. 22-451; *Relentless, Inc. v. Department of Commerce*, Sup. Ct. No. 22-1219 (both argued Jan. 17, 2024). But, as the discussion below shows, that's far from the biggest flaw with EPA's and CARB's attempt to claim support on this point from this D.C. Circuit case.

[63] *ATA*, 600 F.3d at 627-28.

[64] *Id.*

[65] Pub. L. No. 101-549, Sec. 222(b), 104 Stat. 2502 (Nov. 15, 1990).

that area under certain circumstances, in a parallel but not identical construct to the Section 209(b) waiver mechanism at issue here.[66] Second, the regulation at issue in *ATA* was a criteria-pollutant regulation, not a GHG one,[67] and so the court had no reason to address (and, in fact, did not address) the question of whether EPA's interpretation of the second denial prong bears at all on whether and how that prong or the waiver provision as a whole can be applied to California GHG regulations.

But, third, look at the passages italicized in the quote above: they say nothing about the "whole-program" interpretation. Instead, they speak of "factors that tend to cause pollution—the 'geographical and climatic conditions that, when combined with large numbers and high concentrations of automobiles, create serious air pollution problems'"; and credit EPA's statement that "California continues to suffer from 'some of the worst air quality in the nation.'" These statements are precisely in line with the interpretation that even the different waiver provision at issue in *ATA* was intended to allow California to address what in 1990 Congress understood to be its criteria-pollutant driven, local, unique conditions and pollution problem. They have nothing to do with the application of a "whole program" approach to allow California climate regulations to sail through the second denial prong on the back of the state's historical need for its own criteria pollutant program.[68]

2. *Q: What Are "Compelling and Extraordinary Conditions?"*

A: They Are Conditions with a Particularized, State-Specific Nexus to California's Unique Conditions.

Having now dispensed with EPA's "whole-program" approach, we need to consider whether climate change is a "compelling and extraordinary condition" within the meaning of the statute. The plain text here suggests that Congress was setting a high bar for what would qualify, but we have searched the Restoration in vain for any explicit construction of this term.[69] As for the validity of the *Revocation's* construction of

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[66] *See* 42 U.S.C. § 7543(e)(2) (". . . the Administrator shall, after notice and opportunity for public hearing, authorize California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines" under certain conditions).

[67] *See ATA*, 600 F.3d at 626.

[68] Perhaps sensing that the "whole-program" approach is no longer defensible, the 2022 Restoration also claimed to find that California needs its own vehicle GHG emission regulation program even under the 2019 Revocation's interpretation of the second denial prong, because of its determinations that GHG standards and ZEV sales mandates have criteria emission benefits and that California needs ACC I's standards to address California's climate change impacts. *See esp*. 87 Fed. Reg. at 14,363/3-13,365/1. The latter contention is dealt with below in the section on "need to meet." The former is dealt with below at the end of the entire section discussing the second denial prong.

[69] The closest we could come up with is at 87 Fed. Reg. at 14,336/2:

it, well, it's not just the legislative history that shows that the waiver was intended for California's "unique" problems.[70] EPA itself used this word in 1975 when it determined that the second waiver denial prong was not triggered in the waiver grant by Administrator Train discussed above:

> *Compelling and extraordinary conditions continue to exist in the State of California*. . . . Furthermore, the latest data reveal that, following an improvement between the years of 1967 and 1972, the trend reversed and the oxidant concentrations in the South Coast area have actually worsened during 1973 and 1974. The evidence thus graphically demonstrates that *California is struggling with an air pollution problem of unique proportions*, and that it is one which is not necessarily improving.[71]

Even EPA's 2022 Restoration refutes itself on this point. While the main text purports to renounce any suggestion that "compelling and extraordinary conditions" need to be in any way "unique" to California, buried in a footnote, EPA says this:

> EPA acknowledges that in 1977 Congress amended the waiver provision to allow for California *to address its unique combination of air quality problems* and that California only be required to demonstrate stringency in the aggregate and that therefore some pollutant standards may not be as stringent.[72]

We couldn't have put it better ourselves. And, again, this appropriate reading of the 1977 amendment (albeit not the one EPA actually chose to rely on in the Restoration), combined with the appropriate reading of the initial purpose and consistent text of the

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> EPA had explained at length in its earlier 2009 GHG waiver decision that California does have compelling and extraordinary conditions directly related to regulation of GHGs. This conclusion was supported by additional evidence submitted by CARB in the ACC program waiver proceeding, including reports that demonstrate record-setting wildfires, deadly heat waves, destructive storm surges, and loss of winter snowpack. Many of these extreme weather events and other conditions have the potential to dramatically affect human health and well-being.

Perhaps EPA's construction of "compelling and extraordinary," then, is "extreme." But this does not explain why only one state would have been given latitude to strike out on its own to address "extreme" conditions, or why the contemporaneous legislative history speaks of California's "unique" problems.

[70] Dictionary definitions also tend to support an interpretation trending towards "unique." "1a: going beyond what is usual, regular, or customary: extraordinary powers; b: exceptional to a very marked extent: extraordinary beauty." Merriam-Webster Online Dictionary, "Extraordinary," *available at* https://www.merriam-webster.com/dictionary/extraordinary (last visited Feb. 19, 2024). Both these definitions require a *comparison* between the thing that is said to be "extraordinary" and the, well, *ordinary* baseline against which it is compared. And that is precisely what EPA declined to provide in the Restoration, as shown below.

[71] 40 Fed. Reg. at 23,104/2.

[72] 87 Fed. Reg. at 14,372/2 n.401 (emphasis added).

waiver provision ("compelling and extraordinary" being meant to limit the waiver to California's "unique problems"), shows why the waiver can't be used for climate.

Oddly enough, EPA in the Restoration *does* repeatedly describe California as "unique." However, EPA cannot make that statement with regard to California's *climate impacts*. No, the best that EPA can do on that front is to say that California is

> *particularly* impacted by climate change, including increasing risks from record-setting fires, heat waves, storm surges, sea-level rise, water supply shortages and extreme heat, and [] climate-change impacts in California are therefore "compelling and extraordinary conditions" for which California needs the GHG standards and ZEV sales mandate.[73]

We have no idea what EPA means here by "particularly impacted." What we do know is that EPA makes no attempt to show that California is entitled to a preemption waiver for purposes of climate regulation based on anything specific to California that distinguishes it from any other state. And in failing to show that, EPA fails to make the case that the waiver can be applied to climate regulations.

But still, EPA *does* describe California—not its climate impacts, but the state itself—as "unique." The Restoration quotes the 2013 waiver grant here:

> "California's climate—much of what makes the state so unique and prosperous—is already changing, and those changes will only accelerate and intensify in the future."[74]

And in turn, the 2013 waiver grant was quoting a document submitted by CARB in support of its ACC I waiver request. Still, in 2013, EPA only felt the need to quote this once. By 2022, in the Restoration, EPA for some reason felt compelled to quote this "unique and prosperous" language *three times*.[75] The Restoration doubles as a tourist brochure for the Golden State! But it's precisely because California has outsized market power that the special prerogative Congress gave them must be properly construed, in order to avoid constitutional concerns and to give full force in all regards to Congress's intent in creating the waiver provision and amending it in 1977. Again, that intent was to give California the ability to seek waivers to address its unique, local criteria problems, not the ability to seek a waiver to address global climate change.

In 2013, EPA describes this CARB "unique and prosperous" claim as "evidenc[ing] *sufficiently different* circumstances in California." Sufficiently different *than what*, EPA did not say in 2013. But the unmistakable implication is that California's *climate impacts* are "sufficiently different" *from climate impacts in other states* to justify the waiver, in 2013, in 2022, and presumably, in the current EPA's view, today. Yet EPA

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[73] *Id.* at 14,363/3 (emphasis added).

[74] *Id.* at 14,354/3 n.193 (quoting 78 Fed. Reg. at 2,129/2 (2013 waiver grant)).

[75] *See also* 87 Fed. Reg. at 13,365/2, 13,365/3 n.315.

will not and likely cannot actually *say that*. Hence, we still witness all its efforts to renounce any suggestion that the statutory term "compelling and extraordinary conditions" requires conditions specifically linked to California emissions and sufficiently unique to the state. In the 2022 Restoration, again, EPA retreated to saying merely that California was "particularly" impacted by climate change.

It has become clear by now that EPA has no affirmative interpretation of what "compelling and extraordinary conditions" means, let alone a coherent explanation of why climate impacts constitute such conditions in a matter compatible with Section 209(b)'s affording of a unique privilege to California. By contrast, the correct interpretation of this phrase, as set forth in the 2019 Revocation and as evident already from the contemporaneous legislative history from the 1967 creation of the waiver mechanism, is that this phrase refers to California's "unique" problems, as glossed by the 2019 Revocation's construct of a particularized, state-specific nexus between California emissions, pollution, and impacts.[76] Criteria pollution likely met this test, at least at the time that Congress first created the waiver; climate change doesn't.

3. *What Does It Mean To "Need" a Standard To "Meet" Conditions?*

*A: The Standard Must Have a Material, non-*de minimis *Effect on Those Conditions.*

If it was difficult to determine what EPA thinks "compelling and extraordinary conditions" are, it's downright impossible to tell what it thinks "needing" standards to "meet" them means. It's not a good sign that the Restoration almost universally speaks of "addressing" conditions rather than "meeting" them—a departure from statutory text that doesn't bode well for the Agency's fidelity to it.

It's clearer what EPA thinks that "need . . . to meet" does *not* mean: in its eyes, this does not require any showing that the standard will have any material effect on the problem at issue.[77] Notably, EPA does not factually contest the Revocation's

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[76] EPA's favorite case *MEMA* seemed to understand this point perfectly well: "The protectiveness determination California must make to request a waiver and the need finding the Administrator must make to deny one are both logically tied to air quality[,] that is, to conditions in the air which require the regulation of emissions in the first instance." 627 F.2d at 1113. Again, a close reading of *MEMA* reveals that it is perfectly consistent with the proper understanding of the waiver provision as allowing California to seek to establish its own regulations to meet its own *air quality* issues arising to *its own criteria-pollutant emissions*—not to tilt in a *de minimis* fashion at climate change impacts caused by *global* emissions.

[77] Again, the dictionary's not looking good for EPA's position. The relevant Merriam-Webster online definitions are as follows: "4: to conform to especially with exactitude and precision: aa concept to meet all requirements; 5: to pay fully: SETTLE: could not meet his loans; 6: to cope with: was able to meet every social situation; 7: to provide for: enough money to meet our needs." Merriam-Webster Online, "meet," *available at* https://www.merriam-webster.com/dictionary/meet (last visited Feb. 19, 2024). While "need" may not require a *complete* solution to a problem, surely it requires at least a partial, meaningful, non-*de minimis* one.

observation that even the most stringent alternative considered to the 2012 joint EPA/DOT rulemaking, which covered the entire nation, not just one state, was projected (by the Obama Administration, no less) to result in a "decrease [in] global temperatures by only 0.02° C in 2100"—but it apparently believes this observation is irrelevant to its statutory inquiry, because

> since the inception of the waiver program, EPA has never applied a test to determine whether a California waiver request under 209(b)(1) would independently solve a pollution problem. EPA has never applied a *de minimis* exemption authority to California waiver request under section 209(b)(1). EPA believes there is no basis for exercise of such a test under section 209(b), considering that CARB continues to maintain that emissions reductions in California are essential for meeting the NAAQS.[78]

Wait, what's this about the NAAQS—I thought this was a climate regulation? Don't worry, we'll get to that in a bit (the short version is that EPA is playing three-card-monte in the Restoration). For now, just take a look at what EPA is saying: EPA's position is that the question whether a standard will have more than a *de minimis* effect on a condition is *irrelevant* to the inquiry whether California "needs" that standard to "meet" that condition. This cannot be correct.

The closest EPA ever comes to affirmatively defining "need"—and it's not very close—is when it says that

> in *demonstrating the need* for GHG standards at issue, CARB *attributed GHG emissions reductions* to vehicles in California. . . . CARB further noted that there might be a GHG emission deficit if only the Federal GHG standards were implemented in California. The GHG emissions from California cars, therefore, are particularly relevant to both California's air pollution problems and GHG standards at issue.[79]

Okay, so maybe you "need" a standard to "meet" a problem so long as the standard will reduce emissions that are linked to a problem. Will it fix the problem? Well, no. Will it have any meaningful effect on the problem at all? Also no.

Huh?

The discussion above demonstrates that, once the second denial prong is properly construed, climate-focused regulations must be denied under that prong. EPA and CARB seem to realize this on some level, which is why both the Restoration and CARB's Waiver Request Support Document labor to portray ACC II as really being a criteria-pollutant program after all. CARB's Waiver Request Support Document

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[78] 87 Fed. Reg. at 14,366/2 (footnotes omitted).

[79] 87 Fed. Reg. at 14,366/1-2 (footnote omitted) (emphases added).

mentions criteria pollutants before it mentions GHG.[80] EPA's 2022 Restoration did largely the same, for that matter.[81]

This isn't fooling anyone. This is nothing more than trying to resuscitate "whole-program" by coming at it from a slightly different angle. The argument is that California *needs* to regulate GHG, including an electric-vehicle mandate (and for all we can tell from the instant Notice, up to and including imposition of an internal-combustion-engine-ban) because in so doing it will also incidentally reduce *criteria* pollutants. Under this logic, the second denial prong would not be triggered by *any* California regulation that had the incidental effect of reducing criteria pollutants *regardless* of the stated purpose of the regulation and regardless of any counterproductive effects it might have, any illegality obvious on the face of the regulation (so long as it was compatible with Section 202(a)), no matter . . . yes, this actually is EPA's position. Whether California "needs" GHG standards, in EPA's eyes, really is the same as asking whether California *wants* GHG standards.

Again, we'll leave it to the more scientifically and technically skilled commenters to contest CARB's claims of criteria benefits. Our interest is in maintaining the integrity of the statute and the accountability of regulation thereunder. It was and is apparently very politically important for California to claim that it's tackling climate and doing its part to save the world. Yet for a legal justification of why it deserves a waiver, it pivots to criteria. This type of shell game should not be countenanced.

D. Third denial prong: "such State standards and accompanying enforcement procedures are not consistent with" CAA Section 202(a).

On this prong, we can be briefer. EPA historically only considered under this prong whether California's standards are compatible with Section 202(a)'s requirement that EPA's standards provide enough lead time "to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period."[82] And this may have been the right approach when California was duly tinkering within the box established by the plain intent of Section 202(a) and of the waiver mechanism: building a better mousetrap, finding ways to improve the emissions performance of internal combustion engine-powered vehicles.

But, separate and apart from the question of the *pollutant* and *pollution problem* at issue in California's regulations, there comes a time when the *form* and *mode* of the regulation has to be compared to Section 202(a). That section is premised on a determination from the EPA Administrator that *emissions* from vehicles pose a danger. Its every provision is directed towards *emission performance*. Whether EPA can set

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[80] CARB, Clean Air Act § 209(b) Waiver Request Support Document 1 (May 22, 2023), *docketed at* EPA-HQ-OAR-2023-0292-0034.

[81] *See* 87 Fed. Reg. at 14,332/1 (ACC I's regulations "are designed to control smog- and soot-causing pollutants and GHG emissions in a single coordinated package . . .").

[82] *See, e.g.*, *MEMA*, 627 F.2d at 1105.

standards that can only be met by auto manufacturers' increasing production of electric vehicles and averaging their ostensibly CO_2 emission-free nature[83] is a fraught question beyond the scope of this matter.[84] But the legality under Section 202(a) of a *ban* on cars with direct tailpipe emissions doesn't seem a particularly hard question, especially in light of the major-questions doctrine. This may be why EPA couldn't even bring itself in the Notice to acknowledge that this is precisely what's at issue in California's Request, and why Administrator Regan was so quick to tell Congress he opposes such a ban. But the moment of ultimate truth will come when EPA rules on the Request.

Once again, *MEMA* is surprisingly resonant, though not in the way EPA hopes, and the opinion helps show just why an internal combustion engine ban cannot be squared with Section 202(a):

> [T]he only time that a new motor vehicle is capable of polluting the environmental is when it is out on the road. The purpose of the Clean Air Act is to reach precisely that kind of pollution.[85]

Just so—this is the statute's purpose, rather than wreaking a fundamental change in our nation's transportation and fuel economy. Whatever the reach of the Clean Air Act's waiver provision, it does not reach *that* far.

V. Two Other Considerations Require EPA To Deny California's Waiver Request: EPCA Preemption and the Doctrine of Equal Sovereignty.

A. EPCA Preemption Applies to California's CO_2 Standards.

In addition to questions of interpretation and application of the CAA, the 2019 Revocation gave an additional reason why aspects of the 2013 ACC I waiver must be revoked: as DOT determined in its portion of the SAFE Step One final action, EPCA preempts state and local vehicle CO_2 regulation, because that type of regulation is inextricably interlinked, the other side of the same coin, as fuel-economy regulation, which EPCA expressly preempts. EPA reasoned that it could not use a CAA Section 209(b) waiver to authorize what EPCA (with no waiver provision) preempts.

In the 2022 Restoration, EPA determined that it was inappropriate for it to have considered this issue, since it is beyond the four corners of the waiver statute. Because DOT had since rescinded its preemption regulation (without, it's important to note, actually determining that it had been incorrect and that state CO_2 regulations are *not* preempted—like EPA, DOT apparently *has no position* on that question at the

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[83] CO_2 emission-free, that is, if you only look at them in motion, and not their production or where the energy that charges them comes from; California cannot claim a waiver from the laws of physics.

[84] It's also a question, we note, that is the subject of pending litigation in the D.C. Circuit.

[85] *MEMA*, 627 F.2d at 1095.

moment), EPA determined it was best to also take no position on this issue and to decline to consider it as a potential reason why it should not restore the waiver. And in so doing, it relied primarily on, what else, but *MEMA*.[86]

It's true that *MEMA* blessed EPA's refusal to entertain First Amendment objections to certain California regulations for which EPA had granted a waiver, saying that Section 209 "requir[es] no broad policy judgments on constitutionally sensitive matters."[87] But that's not what the Revocation essayed: whether DOT's portion of the Revocation final rule was correct in its preemption position isn't a "broad policy judgment," and the issue is no more "constitutionally sensitive" than any other preemption question.

MEMA also noted that "nothing in section 209 categorically forbids the Administrator from listening to constitutionally-based challenges,"[88] which is correct. Given this fact, EPA needs to come up with a better reason for attempting to duck this issue other than "I would prefer not to."[89]

And *MEMA* reassured that "petitions are assured through a petition for review here that their contentions will get a hearing" because "when, as here, petitions have exhausted their administrative remedies, a failure to have raised the constitutional claims before the Administrator would not bar them from asserting the claims to this court."[90]

Whatever the accuracy of this statement as a description of the law of the D.C. Circuit in 1979, it appears that this is no longer the case—just last year, that court said starkly that constitutional challenges (which a preemption challenge ultimately is, as it depends on the application of the Supremacy Clause), *must be asserted before the agency in comments*:

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[86] *See* 87 Fed. Reg. at 14,376/3. EPA also seeks support for its "see no evil" approach from *ATA*, but while that opinion did bless EPA's refusal in that waiver proceeding to entertain the argument "that California's rule is a de facto national rule because many trucks pass through California and will be subject to the rule," agreeing with EPA that "ATA [was] seeking improperly to engraft a type of constitutional Commerce Clause analysis onto EPA's Section 7543(e) waiver decisions that is neither present in nor authorized by the statute," 600 F.3d at 628 (internal quotation marks omitted), the EPCA preemption issue is no "improper[] engraft[ing]"—it's been at the heart of the question whether the waiver can apply to California's GHG regulations for a generation now, it's the elephant in the room, and EPA's continued efforts to evade it must eventually fail.

[87] 627 F.2d at 1115.

[88] *Id.*

[89] Herman Melville, Bartleby, the Scrivener: A Story of Wall Street (1853).

[90] *Id.*

> In substance, [petitioner's] argument is that the EPA's rule is unlawful because the statute authorizing it is an unconstitutional delegation of legislative power. . . . Because [petitioner's] challenge is to the Phasedown Rule, any objections to that rule had to be made first to the EPA. 42 U.S.C. § 7607(d)(7)(B). [Petitioner] did not do that here. So we may not consider its nondelegation claim now. Requiring litigants to first bring nondelegation challenges to the EPA may seem futile. After all, the agency cannot change Congress's grant of broad discretion. But the Clean Air Act's exhaustion rule has no exception for futile challenges. *Texas Municipal Power Agency v. EPA*, 89 F.3d 858, 876 (D.C. Cir. 1996) (per curiam) (no futility exception); *see also Lead Industries Association Inc. v. EPA*, 647 F.2d 1130, 1172-74 (D.C. Cir. 1980) (*no exception for constitutional challenges to the rulemaking process*).[91]

This is why we (and, surely, other commenters) are reiterating this issue in these comments: we have to, in order for them to eventually obtain a hearing before the D.C. Circuit (and, potentially, the Supreme Court). For all the reasons stated in DOT's portion of the SAFE Step One final action, EPCA preemption applies to California's GHG regulations, and for all the reasons stated in EPA's portion of that final action, that's an independent reason why the waiver can't be used on those regulations. EPA's (and DOT's) rescinding their prior words and actions and pretending that this isn't a real issue won't make it go away.

B. Equal Sovereignty As a Background Principle Limiting the Reach of the Waiver Mechanism.

EPA's ostrich act on this point is even more pitiful than on EPCA preemption. In the Restoration, the Agency flatly says that it "*has not considered* whether section 209(a) and section 209(b) are unconstitutional under the Equal Sovereignty Doctrine."[92] But the Revocation never said that they were—instead, it said that the doctrine was a background principle of which it was mindful in reaching its determination that the waiver was intended to be restricted to California's unique, local air problems, which, as shown above, is already amply demonstrated by the text and legislative history of the waiver provision.[93]

The Restoration again relies on *MEMA* to bless its plugging its ears to this issue,[94] playing dumb on the fundamental concept of avoiding statutory constructions that raise constitutional concerns, but this evasion can only last so long. It seems we'll have to wait for the courts to weigh in on whether this doctrine does in fact confirm

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[91] *Heating, Air Conditioning & Refrigeration Distributors Int'l v. EPA*, 71 F.4th 59, 65 (D.C. Cir. 2023) (emphasis added).

[92] 87 Fed. Reg. at 14,377/3 (emphasis added).

[93] *See generally* 84 Fed. Reg. 51,347/1-2, 51,349/2 n.281.

[94] *See* 87 Fed. Reg. at 14,377/2.

what non-constitutional interpretation already teaches, since EPA is now determined to give no view whatsoever on that question.

VI. Conclusion.

It was, to say the least, imprudent for EPA to issue its Notice at the time and in the manner that it did. The Clean Air Act does not give EPA a deadline to provide notice, seek comment on, or rule on a California waiver request. So the timing of EPA's Notice was discretionary—and it is baffling that EPA chose to issue the Notice when and how it did.

EPA sat on the Request for seven months before issuing the Notice. Indeed, while the fact that California had submitted its request was reported the day after the date of the Waiver Request Support Document,[95] EPA did not update the website where it lists waiver requests for some months.[96] And it did not publish the Notice until Boxing Day 2023. Since EPA apparently felt no haste to even tell the public that it had received the Request, let alone publish official notice and solicitation of comment regarding the Request, its decision to belatedly post it towards the end of 2023 is puzzling. Its decision to issue the Notice without acknowledging that the Request is a request for authority to ban internal combustion engines isn't just puzzling, it's insulting to all values of transparency, accountability, and the rule of law.

The timing of the Notice is inexplicable in large part because fundamental issues underpinning the Request are currently under litigation in the D.C. Circuit challenge to the Restoration, and may well go from there to the Supreme Court. If one or more challengers were to prevail on their arguments that the waiver provision is facially unconstitutional, or that it cannot reasonably be read to apply to climate regulations, then the Request would be dead on arrival. And if that happens, then any time EPA has already spent or will have spent on the Notice, processing comments on the Notice, or on drafting what is almost certain to be a final grant of the Request will be for naught. *So: Why now?*

Well, perhaps California is getting nervous as ACC II's effectiveness comes closer and closer. Perhaps auto manufacturers, often cowed into compliance by their fear of

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[95] *See* David Shepardson, Exclusive: California seeks EPA approval to ban sales of new gasoline-only vehicles by 2035 (Reuters May 23, 2023), *available at* https://www.reuters.com/business/autos-transportation/california-seeks-us-approval-end-gas-only-new-vehicle-sales-by-2035-2023-05-23/ (last visited Feb. 18, 2024).

[96] State and Local Transportation—Vehicle Emissions California Waivers and Authorizations (EPA last updated Feb. 12, 2024), *available at* https://www.epa.gov/state-and-local-transportation/vehicle-emissions-california-waivers-and-authorizations (last visited Feb. 18, 2024). EPA does not appear to date the individual entries on this page and it is therefore difficult to determine exactly when it was updated to reflect receipt of the ACC II Waiver Request, but it was certainly not so updated with any speed following the apparent date that California sent it, and may not have been updated until late 2023, shortly before EPA issued the instant Notice.

California and EPA, are having second thoughts about whether it's really in their best interests to continue to play along with this farce. Perhaps the Administration is looking to motivate elements of its coalition heading into an election year.

But none of these are reasons for EPA to take this massive gamble. The Agency was under no obligation to issue the Notice when it did, but now that it has, the only sound course is to promptly deny California's Request. At the very least, EPA must not *grant* the Request unless and until the pending litigation has resolved, including any potential Supreme Court review, and only if the resolution is in the Request's favor.

The Notice comes at a comically awkward time, as bad news for those bullish on the forced transition to electric vehicles mounts ever higher.[97] We're not experts in the

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[97] For those who might feign ignorance as to what we mean, here's just a small sampling of such recent news: Coral Davenport, Biden Administration Is Said to Slow Early Stage of Shift to Electric Cars (New York Times Feb. 17, 2024) ("[C]onsumer demand has not been what automakers hoped, with potential buyers put off by sticker prices and the relative scarcity of charging stations."), *available at* https://www.nytimes.com/2024/02/17/climate/biden-epa-auto-emissions.html (last visited Feb. 18, 2024); Mike Colias, Nora Eckert & Sean McLain, The Six Months That Short-Circuited the Electric-Vehicle Revolution—Automakers went all in on battery power, but buyers have proven more hesitant (Wall Street Journal Feb. 14, 2014), *available at* https://www.wsj.com/business/autos/ev-electric-vehicle-slowdown-ford-gm-tesla-b20a748e (last visited Feb. 18, 2024); Robert Bryce, Ford lost $4.7B on EVs last year (newgeography Feb. 8, 2024), *available at* https://www.newgeography.com/content/008083-ford-lost-47b-evs-last-year (last visited Feb. 18, 2024); Dominic Chopping, Volvo, An Early Electric Car Adopter, Cuts Off Funding For Its EV Affiliate (Wall Street Journal Feb. 1, 2024), *available at* https://www.wsj.com/business/earnings/volvo-car-evaluating-potential-reduction-of-shareholding-in-polestar-85e29826 (last visited Feb. 18, 2024); Jerry Hirsch, EV sales start to fall in California, an industry bellwether; Consecutive quarters of falling EV sales could derail state's zero-emission vehicle transition target (Automotive News Jan. 31, 2024), *available at* https://www.autonews.com/retail/ev-bellwether-sales-start-drop-california (last visited Feb. 18, 2024);Emily Schmall & Jenny Gross, Electric Car Owners Confront a Harsh Foe: Cold Weather (New York Times Jan. 17, 2024) ("[C]old snaps this winter have created headaches for electric vehicle owners, as freezing temperatures drain batteries and reduce driving range."), *available at* https://www.nytimes.com/2024/01/17/business/tesla-charging-chicago-cold-weather.html (last visited Feb. 18, 2024); Sean O'Kane, Hertz is selling 20,000 EVs and replacing them with gas cars (TechCrunch Jan. 11, 2024), *available at* https://techcrunch.com/2024/01/11/hertz-sell-evs-tesla-fleet-gm-polestar-gas/ (last visited Feb. 18, 2024); Monica Raymunt & Bloomberg, No one wants to buy used EVs and they're piling up in weed-infested graveyards (Fortune Dec. 22, 2023), *available at* https://fortune.com/2023/12/22/no-one-wants-to-buy-used-ev-piling-weed-infested-graveyards-tesla-bmw-vw/ (last visited Feb. 18, 2024); Jamie L. LaReau, GM buys out nearly half of its Buick dealers across the country, who opt to not sell EVs (Detroit Free Press Dec. 20, 2023), *available at* https://www.freep.com/story/money/cars/general-motors/2023/12/20/gm-buick-dealerships-buyouts/71978066007/ (last visited Feb. 18, 2024); Jennifer Mossalgue, Audi puts big EV push on the back burner (Electrek Dec. 19, 2023), *available at* https://electrek.co/2023/12/19/audi-puts-big-ev-push-on-the-back-burner/ (last visited Feb. 18, 2024);

automobile market. Perhaps some day widespread adoption of electric vehicles will come about.[98] But if it does, it should not stand as a monument to the (claimed) authority of bureaucrats in D.C. and Sacramento to pick winners and losers. And the conditions are patently not ripe for it now. The combined policy pushes of the Biden Administration and California likely constitute the largest government attempt in history to force a product on a populace that does not want it.

In our August 2023 comments on EPA's power-plant proposal, we urged the Agency to change course to avoid falling off the legal and policy cliff towards which it's speeding. Here, we reiterate that call—and we also call on the several states to reject EPA's and California's pincer movement against their citizens and transportation economy. The Agency is becoming increasingly disconnected from reality in its attempts to force the widespread adoption of electric vehicles, both in its own rulemakings and in its acquiescence to California's abuse of the waiver provision. It may take intervention by Article III, a change in Presidential Administration, or both to halt this drive to nowhere.

/s/

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Michael Martinez, Ford cutting 2024 F-150 Lightning production plans by half, suppliers told—The news comes amid an industrywide pullback in EV investment due to slower-than-expected sales growth (Automotive News Dec. 11, 2023), *available at* https://www.autonews.com/manufacturing/ford-cutting-f-150-lightning-ev-production-half-memo-says (last visited Feb. 18, 2024); Charles Kreitz, Major DC car dealer sounds alarm over feds' EV push: 'Everyday Americans' are rejecting mandates (Fox News Dec. 2, 2023), *available at* https://www.foxnews.com/media/major-dc-car-dealer-sounds-alarm-feds-ev-push-everyday-americans-rejecting-mandates (last visited Feb. 18, 2024).

[98] We're still waiting on the flying cars from *The Jetsons*, which debuted in 1962 and was set in 2062.