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California and the Clean Air Act (CAA) Waiver: Frequently Asked Questions

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SUMMARY

In the Air Quality Act of 1967 (P.L. 90-148), later amended to the Clean Air Act (CAA; codified at 42 U.S.C. §§7401 et seq.), Congress preempted state governments from adopting their own air pollutant emissions standards for new motor vehicles and new motor vehicle engines. Notwithstanding, Congress decided to provide an exemption for the State of California. Under CAA Section 209, California can apply to the U.S. Environmental Protection Agency (EPA) for a waiver from the federal preemption, and EPA is to grant this waiver absent certain disqualifying conditions. As of 2024, California has used this authority to receive more than 100 federal preemption waivers for new and amended state-level vehicle emissions standards. Further, in the CAA Amendments of 1990 (P.L. 101-549), Congress allowed other states to adopt California's vehicle emissions standards under certain conditions. As of 2024, 17 states and the District of Columbia have used the authority under CAA Section 177 to adopt some subset of California's standards. California estimates that itself and these "Section 177 States" accounted for more than 40% of new light-duty vehicle registrations and 25% of new heavy-duty vehicle registrations in the United States in 2023.

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August 30, 2024

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As of August 2024, California currently has seven waiver or authorization requests filed and pending EPA action: the Heavy-Duty Omnibus Low NO_x (nitrogen oxide) waiver, Small Off-Road Engine authorization, Transport Refrigeration Unit authorization, Advanced Clean Cars II waiver, In-Use Off-Road Diesel-Fueled Fleets authorization, In-Use Locomotive authorization, and Advanced Clean Fleets waiver.

As of August 2024, three bills have been introduced in recent Congresses that seek to modify or revoke California's federal preemption waiver authority under CAA Section 209(b):

- H.R. 1435 (118th) – Preserving Choice in Vehicle Purchases Act. H.R. 1435 would amend Section 209(b) of the CAA to prohibit EPA from issuing waivers to states that directly or indirectly limit the sale or use of new motor vehicles with internal combustion engines. In addition, the bill would require EPA to revoke waivers granted between January 2022 and the date of enactment of the bill. On September 14, 2023, the bill passed the House 222-190 by Yeas and Nays vote. No action has been taken in the Senate.
- S. 2090 (118th) – Preserving Choice in Vehicle Purchases Act of 2023 is the Senate companion bill to H.R. 1435. It was introduced in the Senate on June 21, 2023.
- H.R. 8773 (117th) – Revoking Engine and Vehicle Requirements Act of 2022. H.R. 8773 would have amended the CAA by repealing the waiver authority under Section 209(b) allowing California to adopt or attempt to enforce emission control standards on new motor vehicles. H.R. 8773 was introduced in the House on September 6, 2022.

Congress initially provided California with the federal preemption waiver authority because the state had "demonstrated 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." Further, some in Congress believed that California's "pioneering" efforts "offer[ed] a unique laboratory, with all the resources necessary, to develop effective control devices which can become a part of the resources of this Nation." For several decades, California's authority went unchallenged. However, beginning in the late 2000s, federal, state, and local governments, Congress, and stakeholder groups began to debate more heavily the impact of California's federal preemption waiver authority on matters such as consumer markets, industry economics, public health and welfare, and the environment, among other items. To this day, Congress has remained interested in many issues associated with this authority, including its potential effects on state sovereignty, cooperative federalism, interstate commerce, U.S. energy and industrial policy, international trade and competitiveness, public health, air quality, and climate change.

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This report examines some of the frequently asked questions regarding California's federal preemption waiver authority for new vehicle emissions standards, including its origin, purpose, history, and regulatory process. This report also reviews associated actions by California, other states, the executive branch, Congress, and the federal courts.

What Is the U.S. Environmental Protection Agency's (EPA's) Authority to Regulate Air Pollutant and Greenhouse Gas (GHG) Emissions from Mobile Sources?

The U.S. Environmental Protection Agency (EPA) derives its authority to regulate air pollutant and greenhouse gas (GHG) emissions from mobile sources from Section 202 of the Clean Air Act (CAA), as amended.[1]

CAA Section 202(a) requires EPA to establish standards for emissions of air pollutants from new motor vehicles[2] or new motor vehicle engines that, in the EPA administrator's judgment, cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. Standards under Section 202 must also take into account issues such as technological feasibility, the cost of compliance, useful life of the vehicle, and industry lead time, among other items.[3]

EPA has promulgated standards on new motor vehicles and new motor vehicle engines for emissions of nonmethane organic gases (NMOGs), nitrogen oxides (NO_x), particulate matter (PM), carbon monoxide (CO), and formaldehyde (a proxy for air toxics in general).[4] Other sections of the CAA require EPA to set standards for different types of mobile sources (e.g., locomotives, marine vessels, small off-road engines, and aircraft, among others).[5]

In the 2007 decision *Massachusetts v. EPA*, the Supreme Court held that EPA has the authority to regulate GHG emissions from new motor vehicles or new motor vehicle engines as "air pollutants" under CAA Section 202.[6] In the 5-4 decision, the Court's majority concluded that EPA must either decide whether GHG emissions from new motor vehicles contribute to air pollution that may reasonably be anticipated to endanger public health or welfare or provide a reasonable explanation why it cannot or will not make that decision.

[1] 42 U.S.C. §7521.

[2] The term *motor vehicle* means any self-propelled vehicle designed for transporting persons or property on a street or highway. 42 U.S.C. §7550(2).

[3] 42 U.S.C. §7521(a).

[4] 40 C.F.R. Subchapter C, Part 86; 40 C.F.R. Subchapter U. For more discussion of these standards, see CRS In Focus IF12433, *Automobiles, Air Pollution, and Climate Change*, by Richard K. Lattanzio.

[5] For example, 42 U.S.C. §7547; 42 U.S.C. §7571.

[6] Massachusetts v. EPA, 549 U.S. 497, 528-529 (2007). The majority held that "[t]he Clean Air Act's sweeping definition of 'air pollutant' includes '*any* air pollution agent or combination of such agents, including *any* physical, chemical ... substance or matter which is emitted into or otherwise enters the ambient air.... ' ... Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt 'physical [and] chemical ... substances[s] which [are] emitted into ... the ambient air.' The statute is unambiguous" (pp. 528-529).

In December 2009, EPA promulgated findings that GHGs endanger both public health and welfare and that GHG emissions from new motor vehicles contribute to that endangerment.[7] With these findings, the CAA required EPA to establish GHG standards for the contributing sources. EPA has since promulgated standards on new motor vehicles for emissions of carbon dioxide (CO_2), methane (CH_4), and nitrous oxide (N_2O).[8]

What Is California's Authority to Regulate Air Pollutant and Greenhouse Gas Emissions from Mobile Sources?

The State of California derives its authority to regulate air pollutant and GHG emissions from mobile sources through a variety of state statutes within the bounds set by the federal CAA.

In 1959, prior to the enactment of the CAA, California enacted legislation requiring the State Department of Public Health to establish air quality standards and necessary controls for motor vehicles.[9]

> It shall be the duty of the State Director of Public Health to determine by February 1, 1960, the maximum allowable standards of emissions of exhaust contaminants from motor vehicles which are compatible with the preservation of public health including prevention of irritation to the senses.[10]

In developing the ensuing standards, the Department of Public Health was required under state law to hold hearings with public notice and provide opportunities for interested persons to participate. As directed, the Department of Public Health—then later the Motor Vehicle Pollution Control Board and the California Air Resources Board (CARB)—developed the country's first set of vehicle emissions standards during the 1960s, including crankcase requirements[11] and exhaust emissions standards. These state standards came prior to the enactment of the CAA.

In the decades that have followed the enactment of the CAA, CARB has adopted, implemented, and enforced a wide array of state-level mobile source air pollution controls within the bounds set by the CAA.[12]

In July 2002, California became the first state to enact legislation requiring reductions of GHG emissions from new motor vehicles. The legislation, Assembly Bill (AB) 1493, required CARB to adopt regulations requiring the "maximum feasible and cost-effective reduction" of GHG

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[7] U.S. Environmental Protection Agency (EPA), "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule," 74 *Federal Register* 66496, December 15, 2009. Although generally referred to as simply "the endangerment finding," it comprised two separate findings finalized by the EPA administrator: (1) a finding that six greenhouse gases (GHGs) endanger public health and welfare, and (2) a separate "cause or contribute" finding that the combined emissions of GHGs from new motor vehicles and new motor vehicle engines contribute to the GHG pollution that endangers public health and welfare.

[8] 40 C.F.R. Subchapter C, Part 86. For more discussion of these standards, see CRS In Focus IF12433, *Automobiles, Air Pollution, and Climate Change*, by Richard K. Lattanzio.

[9] Ch. 200, §1, Cal. Stats. Regular Session, 1959, p. 2091, https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1959/59Vol1_59Chapters.pdf.

[10] Ibid.

[11] *Crankcase emissions* are defined as airborne substances emitted to the atmosphere from any part of the engine crankcase's ventilation or lubrication systems. The crankcase is the housing for the crankshaft and other related internal parts (40 C.F.R. §1042.901). These emissions are separate from engine exhaust, or tailpipe, emissions.

[12] See Cal. Health and Safety Code, Division 26, Part 5.

emissions from any vehicle whose primary use is noncommercial personal transportation.[13] The reductions applied to motor vehicles manufactured in model year (MY) 2009 and thereafter. Under this authority, CARB adopted regulations in September 2004 and subsequently implemented and enforced them within the bounds set by the federal CAA.

What Is Federal Preemption of State Vehicle Emissions Standards?

The concept of *federal preemption* arises from the Supremacy Clause of the Constitution. The Supremacy Clause declares federal law (including the Constitution, treaties, and statutes) to be "the supreme Law of the Land."[14] Federal law, accordingly, supersedes or displaces inconsistent or conflicting state laws.[15] By statute, Congress can preempt state laws or regulations within a field entirely, preempt only state laws or regulations that conflict with federal law, allow states to seek a waiver from a preemption, or allow states to act freely.[16]

In the Air Quality Act of 1967 (P.L. 90-148), later amended to the CAA, Congress preempted states from adopting their own emissions standards for new motor vehicles or new motor vehicle engines (i.e., for those vehicles driven on streets or highways). CAA Section 209(a) provides that

> 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, 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.[17]

This preemption allows automakers some level of nationwide regulatory certainty and a remit from the possibility of a "patchwork quilt" of numerous and differing state-level regulatory programs for emissions from newly manufactured motor vehicles or newly manufactured motor vehicle engines.[18] States do retain the right to control, regulate, or restrict the use, operation, or

[13] Ch. 200, Sec. 3(a), Cal. Stats. Regular Session, 2002, p. 867 (codified at Cal. Health and Safety Code §43018.5), https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/2002/2002_Statutes_1667_Vol_1.pdf. The legislation required that the vehicle emissions standards achieve "the maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles" while accounting for "environmental, economic, social, and technological factors."

[14] U.S. Const. art. VI.

[15] See CRS, "Overview of Supremacy Clause," *Constitution Annotated*, https://constitution.congress.gov/browse/essay/artVI-C2-1/ALDE_00013395/, accessed August 7, 2024).

[16] Gade v. Nat'l Solid Wastes Mgmt. Assn., 505 U.S. 88, 98 (1992). Congress can disavow an intent to preempt certain categories of state law by including a "savings clause" to that effect in federal statutes (see, e.g., 29 U.S.C. §1144(b)) or by allowing federal administrative agencies to grant "preemption waivers" to states in certain circumstances (see 42 U.S.C. §7543(b)).

[17] 42 U.S.C. §7543(a). See also S. Rept. 91-1196, at 32 (1970).

[18] The term *new motor vehicle* means "a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser"; the term *new motor vehicle engine* means "an engine in a new motor vehicle or a motor vehicle engine the equitable or legal title to which has never been transferred to the ultimate purchaser"; and with respect to imported vehicles or engines, such terms mean "a motor vehicle and engine, respectively, manufactured after the effective date of a regulation issued under section 7521 which is applicable to such vehicle or engine (or which would be applicable to such vehicle or engine had it been manufactured for importation into the United States)." 42 U.S.C. §7550(3).

movement of registered or licensed motor vehicles within their jurisdiction, and many have state-level laws to these effects.[19]

What Is the Clean Air Act Waiver?

The Clean Air Act waiver is a provision under CAA Sections 209(b) and 209(e) that allows the State of California to request a waiver or authorization[20] from federal preemption of state-level regulatory programs for emissions from new motor vehicles or their engines or new nonroad vehicles or their engines.[21] EPA must grant the CAA waiver before California's rules may be enforced.

Preemption of State Emissions Standards for New Motor Vehicles or New Motor Vehicle Engines

Although the initial congressional discussions during the drafting the Air Quality Act of 1967 favored preempting new motor vehicle emissions standards in all 50 states, the California congressional delegation negotiated a special exception for California. They argued for this exemption because of California's local and regional air pollution challenges and pioneering efforts in regulating vehicle emissions.[22] At that time, Congress concluded that

> although the situation may change, in the 15 years that auto emissions standards have been debated and discussed, only the State of California has demonstrated 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.[23]

Further, Representative John E. Moss of California stated that continuation of California's "pioneering" efforts "offer[s] a unique laboratory, with all the resources necessary, to develop effective control devices which can become a part of the resources of this Nation."[24]

Thus, CAA Section 209(b) provides that

> [t]he [EPA] Administrator shall, after notice and opportunity for public hearing, waive application of this section [the preemption of State emissions standards] 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,

[19] 42 U.S.C. §7543(d).

[20] Section 209(b) of the Clean Air Act refers to the permission EPA may grant California to enforce its own emissions standards for on-road vehicles as a "waiver" of preemption, while Section 209(e) permits EPA to "authorize" California to enforce its own emissions standards for nonroad vehicles. 42 U.S.C. §7543(b), (e)(2)(A). Although Congress used different terms, the action the CAA permits EPA to take with regard to on-road and nonroad vehicles is the same. As a result, CRS uses the terminology of "waiver" and "authorization" in a similar method throughout this report.

[21] 42 U.S.C. §7543(b) and (e).

[22] For a short history of California's air pollution challenges and mitigation actions, see California Air Resources Board, "History," https://ww2.arb.ca.gov/about/history.

[23] 113 Cong. Rec. 30975, 1967. For additional history behind CAA Section 209(b), see National Academies of Sciences, Engineering, and Medicine, *State and Federal Standards for Mobile-Source Emissions* (Washington, DC: National Academies Press, 2006), https://doi.org/10.17226/11586.

[24] 113 Cong. Rec. 30975, 1967.

> 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.[25]

Only California can qualify for such a preemption waiver because it is the only state that adopted new motor vehicle emissions standards "prior to March 30, 1966."[26]

EPA is to grant the waiver absent certain disqualifying conditions. CAA Section 209(b) lists three conditions under which EPA may determine that California does not qualify for a preemption waiver:

1. the determination of the State is arbitrary and capricious,
2. such State does not need such State standards to meet compelling and extraordinary conditions, or
3. such State standards and accompanying enforcement procedures are not consistent with Section 202(a) of the CAA.[27]

If the EPA administrator determines that any of these three conditions are not met, the statute requires that the administrator deny California's request for a waiver.

Preemption of State Emissions Standards for New Nonroad Vehicles or New Nonroad Vehicle Engines

The CAA Amendments of 1990 (P.L. 101-549) added Section 209(e),[28] which provides for a similar scheme of federal preemption to allow California to seek EPA authorization to adopt and enforce emissions standards for some new nonroad vehicles and new nonroad vehicle engines.[29] To be granted authorization, California's regulations must conform to the same requirements for new motor vehicles and new motor vehicle engines in Section 209(b) discussed above.

CAA Section 209(e)(1) prohibits all states, including California, from adopting or enforcing air pollutant emissions standards for two specific classes of new nonroad vehicles or new nonroad vehicle engines. These preempted classes are

1. new engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower, and
2. new locomotives or new engines used in locomotives.[30]

CAA Section 209(e)(2) provides an authorization for California to adopt and enforce standards and other requirements relating to the control of emissions from all other classes of new nonroad vehicles and engines under conditions similar to those in Section 209(b).[31]

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[25] 42 U.S.C. §7543(b)(1).

[26] S. Rept. 403, 90th Cong., 1st Sess., 1967.

[27] 42 U.S.C. §7543(b)(1).

[28] 42 U.S.C. §7543(e).

[29] The term *nonroad vehicle* means "a vehicle that is powered by a nonroad engine and that is not a motor vehicle or a vehicle used solely for competition." 42 U.S.C. §7550(11). The term *nonroad engine* means "an internal combustion engine (including the fuel system) that is not used in a motor vehicle or a vehicle used solely for competition, or that is not subject to standards promulgated under section 7411 of this title or section 7521 of this title." 42 U.S.C. §7550(10).

[30] 42 U.S.C. §7543(e)(1).

[31] 42 U.S.C. §7543(e)(2).

California's Waivers and Authorizations

According to EPA records, since 1967, CARB has submitted more than 100 waiver or authorization requests for new or amended state-level vehicle emissions standards or "within the scope" determinations (i.e., a request that EPA rule on whether a new state regulation is within the scope of a waiver or authorization that EPA has already issued).[32] The waivers and authorizations cover California regulations for light-duty vehicles, heavy-duty vehicles, buses, motorcycles, off-highway recreational vehicles, small off-road engines, in-use locomotives, commercial harbor craft, personal watercraft, ocean-going vessels, at-berth shore power, zero-emission vehicles, portable diesel equipment, evaporative emissions, refueling vapor recovery, idling requirements, onboard diagnostics, warranty programs, label specifications, assembly-line test procedures, nonroad durability requirements, defect reporting, in-use recall, in-use enforcement testing, and certification fees, among others.

Since 1967, EPA has granted waivers, authorizations, and "within the scope" determinations for all but one of California's requests. The sole denial, in 2008, was for California's initial waiver request for its MY2009 light-duty vehicle GHG emissions standards.[33] Further, EPA once withdrew a California waiver. The sole withdrawal of a granted waiver, in 2019, was for California's waiver for its light-duty vehicle GHG standards applicable to MY2021-MY2025.

What Is the Process by Which California Applies for a Waiver?

CAA Section 209(b) allows California to seek a waiver from the federal preemption provision that prohibits states from enacting emissions standards for new motor vehicles or new motor vehicle engines.[34] In such a circumstance, EPA must grant a waiver before California's rules may be enforced. When California files a waiver request, EPA publishes a notice for public hearing and written comment regarding California's request in the *Federal Register*. The written comment period remains open for a period of time after the public hearing. Once the comment period expires, EPA reviews the comments, and the EPA administrator determines whether the requirements for obtaining a waiver as provided under CAA Section 209(b) have been met. EPA publishes its determination in the *Federal Register*.

Further, CAA Section 209(e) allows California to seek authorization to enforce its own standards for certain new nonroad vehicles and new nonroad vehicle engines, despite the preemption provision that prohibits states from enacting emissions standards for such vehicles.[35] When California files an authorization request, EPA publishes a notice for public hearing and written comment regarding California's request in the *Federal Register*. The written comment period remains open for a period of time after the public hearing. Once the comment period expires, EPA reviews the comments, and the EPA administrator determines whether the requirements for

[32] EPA, "Vehicle Emissions California Waivers and Authorizations," https://www.epa.gov/state-and-local-transportation/vehicle-emissions-california-waivers-and-authorizations#state (listing *Federal Register* notices of waiver requests and decisions); Letter from Kevin de Leon, President pro Tempore, California Senate, et al. to Xavier Becerra, Attorney General, California Department of Justice, March 16, 2017.

[33] EPA, "California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emissions," 73 *Federal Register* 12156, March 6, 2008. For more on this denial and the subsequent actions, see the section "What Is the History of California's Clean Air Act Waivers for Motor Vehicle Greenhouse Gas Emissions?" in this report.

[34] 42 U.S.C. §7543(b).

[35] 42 U.S.C. §7543(e).

obtaining an authorization as provided under CAA Section 209(e) have been met. EPA publishes the authorization in the *Federal Register*.

How Can Other States Adopt California's Vehicle Standards?

Under certain conditions, other states can adopt California's vehicle emissions standards through provisions in CAA Sections 177 and 209(e).[36]

The federal preemptions in CAA Sections 209(a) and 209(e) provide automakers some level of nationwide regulatory certainty and a remit from the possibility of a "patchwork quilt" of numerous and differing state-level regulatory programs for emissions from new vehicles or engines. However, some states with air pollution control issues (e.g., those with CAA State Implementation Plans for one or more criteria pollutants under the CAA's National Ambient Air Quality Standards[37]) have looked for ways to reduce air pollution from the mobile source sector, including the possibility of greater reductions from new vehicles or engines.

To this end, the CAA Amendments of 1990 (P.L. 101-549) included provisions to allow other states to adopt California's emissions standards for new motor vehicles or new motor vehicle engines under certain conditions.[38] CAA Section 177 requires that the state must have an EPA-approved State Implementation Plan, that the standards adopted by the state be identical to the California standards for which a waiver or authorization has been granted, and that adoption of such standards provide at least a two-year manufacturer lead time. States are not required to seek EPA approval under the terms of Section 177.[39]

As of 2024, 17 states and the District of Columbia have adopted some subset of California's motor vehicle air pollutant and GHG emissions standards under these provisions (see **Figure 1**).[40] CARB estimates that California and the "Section 177 States" accounted for 40.2% of new light-duty vehicle registrations and 25.5% of new heavy-duty vehicle registrations in 2023.[41]

For new nonroad vehicles and new nonroad vehicle engines, CAA Section 209(e)(2) includes a provision that permits other states to adopt the standards for which California has received EPA authorization, similar to the provisions for new motor vehicles and new motor engines in Section

[36] 42 U.S.C. §7507; 42 U.S.C. §7543(e)(2)(B).

[37] The CAA requires EPA to set National Ambient Air Quality Standards (NAAQS) for six commonly found air pollutants known as *criteria air pollutants*. For a discussion of Clean Air Act National Ambient Air Quality Standards and State Implementation Plans, see CRS Report RL30853, *Clean Air Act: A Summary of the Act and Its Major Requirements*, by Richard K. Lattanzio.

[38] 42 U.S.C. §7507.

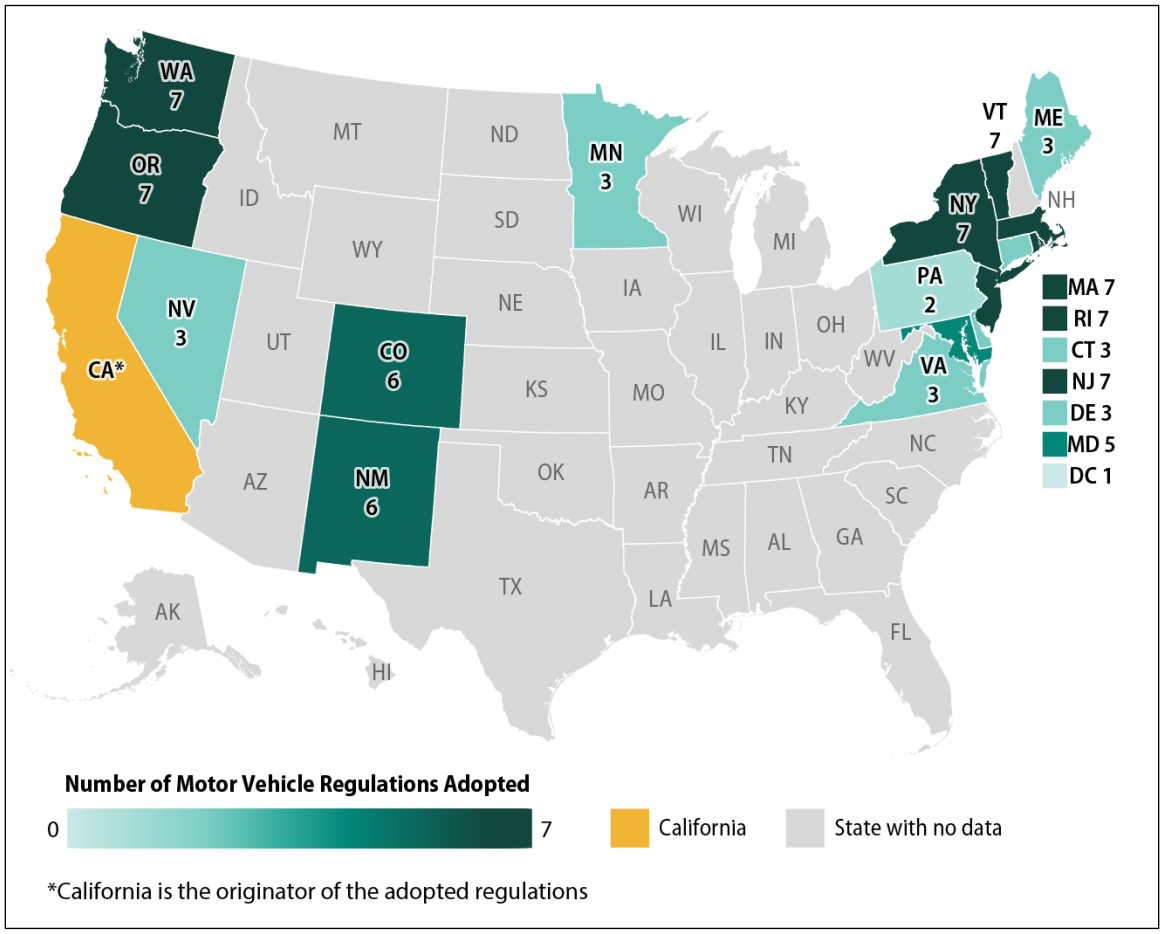
[39] Similar requirements for new nonroad vehicles and engines are included under 42 U.S.C. §7543(e)(2)(b).

[40] The Section 177 states are Colorado, Connecticut, Delaware, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia.

[41] California Air Resources Board (CARB), "Section 177 States Regulation Dashboard," https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/states-have-adopted-californias-vehicle-regulations. CARB calculates the percentages for state share of U.S. light-duty vehicle registrations using data from the National Automobile Dealers Association (NADA) report *NADA Data 2023 Annual Financial Profile of America's Franchised New-Car Dealerships*. CARB calculates the percentages for state share of U.S. heavy-duty vehicles registered using "Trucks" and "Buses" data from the Federal Highway Administration (FHWA) report *State Motor-Vehicle Registrations – 2022*, Table MV-1.

177.[42] States can adopt such standards so long as the standards are identical to those adopted by California and California and the state provide at least two years before the standard takes effect.[43]

Figure 1. States That Have Adopted a Selection of California's Motor Vehicle Standards



Source: CRS, with data from California Air Resources Board, "States That Have Adopted California's Vehicle Regulations," https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/states-have-adopted-californias-vehicle-regulations, accessed June 10, 2024.

Notes: The California standards in the figure are noncomprehensive. They represent the seven light- and heavy-duty motor vehicle emissions standards that date from 1990 and include Advanced Clean Cars II, Low Emission Vehicle Criteria Pollutant, Low Emission Vehicle Greenhouse Gas, Zero-Emission Vehicle, Advanced Clean Trucks, Heavy-Duty Omnibus, Heavy-Duty Phase 2 Greenhouse Gas. The years by which each state adopted (or is scheduled to adopt) the respective standards are listed on CARB's website. Debate exists on the legal status of adoption of certain standards in some states (e.g., Virginia).

[42] 42 U.S.C. §7543(e)(2)(B). In order for a state to be eligible to adopt California standards, the state must have an EPA-approved State Implementation Plan.

[43] Ibid. §7543(e)(2)(B)(i), (ii). In the Consolidated Appropriations Act of 2004, Congress prohibited states other than California from adopting emissions standards for "spark ignition engines" smaller than 50 horsepower. P.L. 108-199 §428(c), (d), 118 Stat. 418 (2004). The act included a provision that grandfathered any state standards that were adopted before September 1, 2003. Ibid. §428(e), 118 Stat. 419. EPA has adopted regulations implementing these provisions. 40 C.F.R. §1074.110(b).

Which California Waiver Requests Are Currently Pending?

As of August 2024, California has seven waiver or authorization requests filed and pending EPA action.[44]

Heavy-Duty Omnibus Low NO_x Waiver Request

On January 31, 2022, CARB submitted a request that EPA grant a waiver of preemption and an authorization under the CAA for a regulation that would establish criteria pollutant exhaust emissions standards for new MY2024 and subsequent model year on-road medium- and heavy-duty engines and vehicles. The regulation would also establish emissions-related requirements for some off-road engines.[45]

Small Off-Road Engine (SORE) Authorization Request

On December 20, 2022, CARB submitted a new authorization request to EPA for its 2016 and 2021 amendments to its Small Off-Road Engine (SORE) regulations. The 2016 SORE Amendments would include improvements to evaporative emissions certification procedures, revisions to the compliance testing procedure, and updates to the evaporative emissions certification test fuel. The 2021 SORE Amendments would establish exhaust and evaporative emissions standards and associated test procedures for MY2024 and subsequent model engines and equipment that would be significantly more stringent than existing procedures.[46]

Transport Refrigeration Unit Authorization Request

On December 29, 2022, CARB submitted a new authorization request to EPA for its amendments to its In-Use Diesel-Fueled Transport Refrigeration Units and Generator Sets (collectively, ''TRU'') regulations. These would include, among other provisions, a requirement that certain TRUs manufactured after a certain date use a refrigerant less than or equal to a specified global warming potential (GWP), a requirement that nontruck TRUs meet specified particulate matter (PM) standards, a requirement that TRU owners transition a percentage of their truck fleet TRUs to zero-emission technology, and a requirement that owners of certain facilities be subject to registration and reporting requirements.[47]

[44] EPA granted a request for CARB's Ocean-Going Vessels At-Berth regulation on October 20, 2023. EPA, "California State Nonroad Engine Pollution Control Standards; Ocean Going Vessels At-Berth; Notice of Decision," 88 *Federal Register* 72461, October 20, 2023.

[45] EPA, "California State Motor Vehicle Pollution Control Standards and Nonroad Engine Pollution Control Standards; The 'Omnibus' Low NO_X Regulation; Request for Waivers of Preemption; Opportunity for Public Hearing and Public Comment," 87 *Federal Register* 35765, June 13, 2022.

[46] EPA, "California State Nonroad Engine Pollution Control Standards; Small Off-Road Engines; Requests for Authorization; Opportunity for Public Hearing and Comment," 88 *Federal Register* 33143, May 23, 2023.

[47] EPA, "California State Nonroad Engine Pollution Control Standards; In-Use Diesel-Fueled Transport Refrigeration Units (TRU) and TRU Generator Sets and In-Use Off-Road Diesel Fueled Fleets; Requests for Authorization; Opportunity for Public Hearing and Comment," 89 *Federal Register* 32422, April 26, 2024.

Advanced Clean Cars II Waiver Request

On May 22, 2023, CARB submitted a request that EPA grant a waiver of preemption under the CAA for its Advanced Clean Cars II regulation. The regulation would establish criteria and GHG pollutant emissions standards for new MY2026 and subsequent model year California on-road light- and medium-duty vehicles. The regulation would include two sets of requirements, one for conventional vehicles powered by internal combustion engines and one for zero-emission vehicles (with plug-in hybrid electric vehicles subject to both sets).[48]

In-Use Off-Road Diesel-Fueled Fleets Authorization Request

On November 2, 2023, CARB submitted a new authorization request to EPA for its amendments to its In-Use Off-Road Diesel-Fueled Fleets regulation. The regulation would require fleets of in-use off-road diesel-fueled vehicles to phase out the operation of their oldest and highest-emitting diesel vehicles and would prohibit such fleets from acquiring high-emitting vehicles. The regulation would also require fleets to fuel their vehicles with specified renewable diesel.[49]

In-Use Locomotive Authorization Request

On November 7, 2023, CARB submitted a new authorization request to EPA for its In-Use Locomotive regulation. The regulation contains several provisions that would apply to any locomotive operator that operates a locomotive in the State of California. The regulation would include a ''Spending Account'' provision and an ''In-Use Locomotive Operational Requirement,'' which, according to CARB, would start January 1, 2030, and would allow only locomotives with an original engine build date less than 23 years old to operate in California, with some exceptions. Further, the regulation would include an idling requirement in the form of a 30-minute Automatic Engine Stop Start (AESS) and would impose registration, reporting, and recordkeeping requirements on locomotive operators for all activity in California.[50]

Advanced Clean Fleets Waiver Request

On November 15, 2023, CARB submitted a request that EPA grant a waiver of preemption and an authorization under the CAA for CARB's Advanced Clean Fleets regulation. The regulation would require affected state and local government fleets, drayage truck fleets, federal government agency fleets, and large commercial fleets to incorporate zero-emitting on-road medium and heavy-duty vehicles and light-duty package delivery vehicles into their fleets, beginning in MY2024. The regulation would additionally require that all new California medium- and heavy-duty vehicles sold be zero-emitting vehicles starting in MY2036.[51]

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[48] EPA, "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 *Federal Register* 88908, December 26, 2023.

[49] EPA, "California State Nonroad Engine Pollution Control Standards; In-Use Diesel-Fueled Transport Refrigeration Units (TRU) and TRU Generator Sets and In-Use Off-Road Diesel Fueled Fleets; Requests for Authorization; Opportunity for Public Hearing and Comment," 89 *Federal Register* 32433, April 26, 2024.

[50] EPA, "California State Nonroad Engine Pollution Control Standards; In-Use Locomotive Regulation; Requests for Authorization; Opportunity for Public Hearing and Comment," 89 *Federal Register* 14484, February 27, 2024.

[51] EPA, "California State Motor Vehicle Pollution Control Standards; Advanced Clean Fleets Regulation; Request for Waiver of Preemption and Authorization; Opportunity for Public Hearing and Public Comment," 89 *Federal Register* 57151, July 12, 2024.

What Is the History of California's Clean Air Act Waivers for Motor Vehicle Greenhouse Gas Emissions?

Although EPA has granted California more than 100 waivers across multiple administrations for various mobile source emissions standards, waivers for California's GHG emissions standards have been far more controversial. Since the early 2000s, changes in presidential administration often meant changes to EPA's approach to granting waivers for GHG emissions standards. The following section summarizes the differing approaches taken by each administration starting with that of President George W. Bush.

Actions Under the Bush Administration

In July 2002, California became the first state to enact legislation requiring reductions of GHG emissions from new motor vehicles. The legislation, AB 1493, required CARB to adopt regulations requiring the "maximum feasible and cost-effective reduction" of GHG emissions from any vehicle whose primary use is noncommercial personal transportation.[52] The reductions applied to new MY2009 motor vehicles and thereafter. Under this authority, CARB adopted regulations in September 2004, and submitted a request to EPA in December 2005, for a federal preemption waiver.

In 2008, EPA denied California's request for a waiver.[53] As it explained in its decision, EPA concluded that "California does not need its GHG standards for new motor vehicles to meet compelling and extraordinary conditions" because "the atmospheric concentrations of these greenhouse gases is [sic] basically uniform across the globe" and are not uniquely connected to California's "peculiar local conditions."[54]

Actions Under the Obama Administration

In 2009, EPA reconsidered and reversed its prior waiver denial, granting the waiver for California's MY2009 and subsequent model year GHG emissions standards.[55] In reversing its denial, EPA determined that the "better approach" is for the agency to evaluate whether California "needs" state standards "to meet compelling and extraordinary conditions" based on California's need for its motor vehicle program as a whole, not solely based on GHG standards addressed in the waiver request.[56] Under this approach, EPA concluded that it cannot deny the waiver request

[52] Ch. 200, Sec. 3(a), Cal. Stats. Regular Session, 2002, p. 867 (codified at Cal. Health and Safety Code §43018.5), https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/2002/2002_Statutes_1667_Vol_1.pdf.

[53] EPA, "California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emissions," 73 *Federal Register* 12156, March 6, 2008.

[54] Ibid., pp. 12159-12169.

[55] EPA, "California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles," 74 *Federal Register* 32744, July 8, 2009.

[56] Ibid., pp. 32761-32763.

because California has "repeatedly" demonstrated the need for its motor vehicle program to address "serious" local and regional air pollution problems.[57]

Upon receiving the 2009 waiver, CARB joined EPA and the National Highway Traffic Safety Administration (NHTSA, which administers the Corporate Average Fuel Economy [CAFE] program)[58] to develop the National Program. The National Program was designed to align federal fuel economy standards, federal GHG emissions standards, and California's adopted GHG emissions standards under one rubric such that the regulated entities (i.e., the automakers) would be able to produce a single fleet of motor vehicles that could comply with all three regulatory programs.

Three key provisions of the 2009 agreement between the Administration, the automakers, and the State of California were that (1) EPA would grant California a waiver for its MY2017-MY2025 standards known as Advanced Clean Cars (ACC) I (the agency did so in January 2013),[59] (2) California would accept vehicles complying with the federal greenhouse standards as meeting the California standards,[60] and (3) the automakers would drop their outstanding suit challenging the California standards.

Shortly after the 2009 agreement, EPA and NHTSA engaged in a series of rulemakings that set out increasingly stringent GHG and fuel economy standards. It was these standards that California agreed to deem compliant with its ACC I standards for which it was granted a waiver in 2013. EPA and NHTSA promulgated a joint rulemaking affecting MY2012-MY2016 light-duty vehicles in May 2010. This was known as the Phase 1 standards.[61]

The agencies promulgated a second phase of CAFE and GHG emissions standards affecting MY2017-MY2025 light-duty vehicles in October 2012.[62] As part of the Phase 2 rulemaking, EPA and NHTSA made a commitment to conduct a midterm evaluation (MTE) for the latter half of the standards, MY2022-MY2025.[63] Through the MTE, the EPA administrator was to determine whether EPA's standards for MY2022-MY2025 were still appropriate given the latest available data and information.[64]

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[57] Ibid., pp. 32762-32763.

[58] NHTSA derives its authority to regulate the fuel economy of motor vehicles from the Energy Policy and Conservation Act of 1975 (EPCA; P.L. 94-163) as amended by the Energy Independence and Security Act of 2007 (EISA; P.L. 110-140), as codified at 49 U.S.C. §§32901-32919.

[59] EPA, "California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's Advanced Clean Car Program and a Within the Scope Confirmation for California's Zero Emission Vehicle Amendments for 2017 and Earlier Model Years," 78 *Federal Register* 2112, January 9, 2013 (hereinafter 78 *Federal Register* 2112).

[60] Letter from Mary D. Nichols, Chairman, CARB, to Ray LaHood, Secretary, U.S. Department of Transportation, and Lisa Jackson, Administrator, Environmental Protection Agency, July 28, 2011, https://www.epa.gov/sites/production/files/2016-10/documents/carb-commitment-ltr.pdf. The condition set forth by CARB was that the "deemed to comply" provision was contingent upon EPA adopting "a final rule that at a minimum preserves the greenhouse reduction benefits set forth in U.S. EPA's December 1, 2011 Notice of Proposed Rulemaking for 2017 through 2025 model year passenger vehicles." CARB Resolution 12-11, January 26, 2012, p. 20.

[61] EPA, "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule," 75 *Federal Register* 25324, May 7, 2010.

[62] EPA and NHTSA, "2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards; Final Rule," 77 *Federal Register* 62624, October 15, 2012.

[63] Ibid., p. 62652.

[64] The rulemaking specified EPA as the agency to determine whether the standards established for MY2022-MY2025 are appropriate. See ibid.

In November 2016, EPA released a proposed determination stating that the MY2022-MY2025 standards remained appropriate and that a rulemaking to change them was not warranted.[65] In January 2017, during the final days of the Obama Administration, then-EPA Administrator Gina McCarthy finalized the determination and stated that "the standards adopted in 2012 by the EPA remained feasible, practical and appropriate."[66]

Actions Under the Trump Administration

In March 2017, EPA and NHTSA announced their joint intention to reconsider the Obama Administration's final determination and reopen the MTE process.[67] In April 2018, EPA released a revised final determination, stating that the MY2022-MY2025 standards were "not appropriate and, therefore, should be revised."[68] The notice stated that the January 2017 final determination was based on "outdated information, and that more recent information suggested that the current standards were too stringent."[69]

In August 2018, EPA and NHTSA proposed amendments to the existing CAFE and GHG emissions standards, the Safer Affordable Fuel-Efficient Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks (SAFE Vehicles Rule).[70] Further, EPA proposed to withdraw California's CAA preemption waiver for its vehicle GHG standards applicable to MY2021-MY2025.[71] Separately, NHTSA contended that the Energy Policy and Conservation Act of 1975, as amended (EPCA; P.L. 94-163; the statutory basis for the CAFE standards), preempts California's standards because the statute preempts state laws related to federal fuel economy standards.[72]

NHTSA's Interpretation of EPCA Preemption

In September 2019, EPA and NHTSA finalized the Safer, Affordable, Fuel-Efficient (SAFE) Vehicles Rule, Part One: One National Program (SAFE rule or Part One rule).[73] In the Part One rule, NHTSA asserted its statutory authority to set nationally applicable fuel economy standards under EPCA. At the time, NHTSA interpreted EPCA as preempting state and local GHG standards because such standards are "related to" fuel economy standards.[74] The principle that

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[65] EPA, "Proposed Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards Under the Midterm Evaluation," 81 *Federal Register* 87928, December 6, 2016.

[66] EPA, "Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards Under the Midterm Evaluation," EPA-420-R-17-001, January 2017, https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P100QQ91.txt.

[67] EPA, "News Release: EPA to Reexamine Emission Standards for Cars and Light-Duty Trucks—Model Years 2022-2025," March 15, 2017, https://www.epa.gov/archive/epa/newsreleases/epa-reexamine-emission-standards-cars-and-light-duty-trucks-model-years-2022-2025.html.

[68] EPA, "Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light-Duty Vehicles: Notice; Withdrawal," 83 *Federal Register* 16077, April 13, 2018.

[69] Ibid.

[70] EPA and NHTSA, "The Safer, Affordable, Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks," 83 *Federal Register* 42986, August 24, 2018.

[71] Ibid.

[72] Ibid., p. 43232.

[73] EPA and NHTSA, "The Safer, Affordable, Fuel-Efficient (SAFE) Vehicles Rule, Part One: One National Program," 84 *Federal Register* 51310, September 27, 2019 (hereinafter 84 *Federal Register* 51310).

[74] Ibid., p. 51313. NHTSA concluded that any state or local law or regulation regulating or prohibiting CO_2 tailpipe emissions from automobiles is "*expressly* and *impliedly* preempted by EPCA." Ibid., p. 51356 (emphasis added). "Pre-
(continued...)

Congress can preempt state laws or regulations or allow states to act under certain circumstances[75] led NHTSA to several conclusions in the Part One rule.

EPCA's preemption provisions state that when a federal fuel economy standard is in effect, a state "may not adopt or enforce a law or regulation *related to* fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard."[76] In 2019, NHTSA explained that "as a practical matter, regulating fuel economy controls the amount of tailpipe emissions of carbon dioxide, and regulating the tailpipe emissions of carbon dioxide controls fuel economy."[77] Thus, NHTSA concluded in the 2019 Part One rule that any state or local law that regulates or prohibits carbon dioxide (CO_2) emissions from automobiles is *related to* fuel economy standards and is therefore preempted under EPCA as invalid (i.e., void *ab initio*).[78]

NHTSA also determined that EPCA preempted state and local zero-emission vehicle (ZEV) mandates because they have a *direct or substantial effect of regulating or prohibiting* CO_2 tailpipe emissions from automobiles.[79] For example, California's ZEV program required that a certain percentage of a manufacturer's fleet of passenger cars, light-duty trucks, and medium-duty vehicles sold in the state produce zero exhaust emissions of certain pollutants, including CO_2.[80] NHTSA reasoned that such ZEV mandates affect the average fuel economy achieved by the manufacturer's fleet.[81] Thus, NHTSA concluded that EPCA preempts state ZEV mandates, such as California's ZEV program, because they are *related to* average fuel economy standards.[82] Because NHTSA's revised CAFE standards for MY2021-MY2026 went into effect in June 2020,[83] EPCA preempted California GHG standards and ZEV mandates for those model years under the interpretation articulated in the Part One rule.

NHTSA described certain state and local GHG requirements that EPCA would not preempt because they have "no bearing on fuel economy."[84] For example, NHSTA noted that leaking refrigerants from vehicle air conditioning units may emit GHGs when the unit is recharged or when it is crushed at the end of the vehicle's life.[85] Because state or local laws specifically regulating or prohibiting vehicular refrigerant leakage are not related to a vehicle's fuel economy or tailpipe CO_2 emissions, NHTSA concluded that EPCA would not preempt such state or local

emption may be either expressed or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)). For further background on federal preemption, see CRS Report R45825, *Federal Preemption: A Legal Primer*, by Jay B. Sykes and Nicole Vanatko.

[75] See the section "What Is Federal Preemption of State Vehicle Emissions Standards?" in this report.

[76] 49 U.S.C. §32919(a) (emphasis added).

[77] 84 *Federal Register* 51310, p. 51313 (codified at 49 C.F.R. Parts 531, app. B; 533, app. B).

[78] 84 *Federal Register* 51310, p. 51324. *Ab initio* is defined as "[f]rom the beginning." "Ab Initio," in *Black's Law Dictionary*, 11th ed., Bryan A. Garner, ed. (Thomson Reuters, 2019).

[79] 84 *Federal Register* 51310, p. 51320.

[80] Cal. Code Regs. tit. 13, §1962.2.

[81] 84 *Federal Register* 51310, p. 51320.

[82] Ibid.

[83] EPA and NHTSA, "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks; Final Rule," 85 *Federal Register* 24174, April 30, 2020.

[84] 84 *Federal Register* 51310, p. 51314.

[85] Ibid.

laws if they were narrowly drafted or severable from preempted tailpipe CO_2 emissions standards.[86]

NHTSA adopted regulatory text adding EPCA's statutory preemption provisions and its interpretation in new appendixes to Parts 551 and 553 of Title 49 of the *Code of Federal Regulations*.[87]

EPA's Interpretation of Section 209(b)

The 2019 Part One rule also addressed the CAA Section 209(b) preemption waiver that EPA had granted California in 2013. This waiver covered California's GHG and ZEV standards for MY2021-MY2025 passenger cars and light- and medium-duty trucks.[88] EPA concluded that the 2013 California preemption waiver was "invalid, null, and void" and withdrew it on two separate grounds. First, EPA recognized NHTSA's determination that EPCA preempts and voids *ab initio* California CO_2 tailpipe emissions standards and ZEV mandates.[89] Second, EPA determined that California did not need its GHG or ZEV standards for MY2021-MY2025 passenger cars, light-duty trucks, and medium-duty vehicles to meet "compelling and extraordinary conditions."[90]

EPA's decision to withdraw the waiver was based on an interpretation of CAA Section 209(b)(1)(B) that was different from its interpretation in the 2013 waiver decision. In 2013, EPA reviewed whether California "needed" its motor vehicle program as a whole to reduce air pollution, and not solely based on GHG standards addressed in the waiver request.[91] Under that approach, EPA concluded that it would not deny the waiver request because California had "repeatedly" demonstrated the need for its motor vehicle program to address "compelling and extraordinary" local and regional air pollution problems.[92]

In its 2019 interpretation, EPA concluded that the text of Section 209(b)(1)(B) requires the agency to assess whether California needs the standards at issue in the waiver to address compelling and extraordinary conditions, not whether California generally needs a separate state vehicle emissions program to address air pollution from vehicles.[93] EPA reasoned that Congress intended "compelling and extraordinary conditions" to refer to state-specific pollution problems that have a "particular nexus" to vehicle emissions and the health effects from such pollution.[94] Based on this interpretation of Section 209(b)(1)(B), EPA determined that global GHG emissions and their effects are outside the scope of local or regional air pollution and do not present ''compelling and extraordinary conditions'' specific to California.[95] EPA explained that California does not "need" its own vehicle GHG standards because the standards will not "meaningfully" address global air

[86] Ibid.

[87] Ibid.

[88] 78 *Federal Register* 2112. For more information on the CAA's preemption provisions, see the section "What Is the Clean Air Act Waiver?" in this report.

[89] 84 *Federal Register* 51310, p. 51338.

[90] Ibid., p. 51350.

[91] 78 *Federal Register* 2112.

[92] Ibid., p. 2129.

[93] 84 *Federal Register* 51310, p. 51344.

[94] Ibid., pp. 51340, 51350 (concluding that this interpretation of the "compelling and extraordinary" provision "is the best, if not the only, reading of that provision."). EPA's interpretation appears similar, but not identical, to its reasoning in a previous waiver denial in 2008. Ibid., pp. 51339-51340. EPA noted that its 2019 interpretation of CAA §209(b)(1)(B) took a different approach from its 2008 waiver denial. Ibid.

[95] Ibid., p. 51349.

pollution problems associated with GHG emissions.[96] The withdrawal of the California waiver became effective in November 2019.[97]

EPA's Interpretation of Section 177

The waiver withdrawal also affects the states that have adopted the California motor vehicle GHG emissions standards. CAA Section 177 allows states, under certain conditions, "to adopt and enforce new motor vehicle emissions standards that are identical to the California standards for which a waiver has been granted for [a given] model year."[98] Section 177 requires that the state adopting the standards have an approved CAA State Implementation Plan to meet or attain national ambient air quality standards (NAAQS) for certain specified pollutants (ozone, carbon monoxide, nitrogen dioxide, sulfur dioxide, lead, and particulate matter).[99]

At the time of the withdrawal, 14 additional states and the District of Columbia had adopted California's vehicle GHG standards, and 12 of those states had also adopted California's ZEV mandates.[100] Because EPA withdrew the California waiver, these states and the District of Columbia had no authority under CAA Section 177 to enforce these vehicle GHG standards in their states, and no other states could adopt California's GHG standards.

In the 2019 Part One rule, EPA also finalized a new interpretation narrowing the scope of CAA Section 177. EPA concluded that Section 177 does not extend to California's GHG standards because this section applies only to California standards that address criteria pollutants that affect regional or local air quality.[101] EPA reasoned that Section 177 was intended to assist states in reducing emissions of pollutants that are subject to the NAAQS, which tend to have more local effects, and "not to address global air pollution" such as GHGs.[102] Therefore, if EPA were to grant California a waiver in the future for new motor vehicle standards for a global pollutant such as GHGs, states would not be able to adopt those standards under EPA's current interpretation of Section 177's applicability.

[96] Ibid., pp. 51340-51349.

[97] Ibid., pp. 51310, 51350.

[98] 42 U.S.C. §7507.

[99] Ibid.

[100] States that adopted both California's low emission vehicles (LEV) GHG standards and ZEV mandates at the time of this rulemaking were Colorado, 5 Colo. Code Reg. §1001-24; Connecticut, Conn. Agencies Regs. §22a-174-36c; Maine, 06-096-127 Me. Code R. §§1-12; Maryland, Md. Code Regs. 26.11.34.09; Massachusetts, 310 Mass. Code Regs. 7.40; New Jersey, N.J. Admin. Code §7:27-29; New York, N.Y. Comp. Codes R. and Regs. tit. 6, §§218-4.1, 218-8.1-8.5; Oregon, Or. Admin. R. 340-257-0040, -0050, -0080; Rhode Island, 250-120 R.I. Code R. Part 37; Vermont, 12-031-001 Vt. Code R. §5-1106(6); Virginia, 2021 Va. Leg. Serv. 1st Sp. Sess. ch. 263 (H.B. 1965) (West); and Washington, Wash. Rev. Code §70A.30.010, Wash. Admin. Code 173-423-050. States that adopted LEV GHG standards only are Delaware, 7-1000-1140 Del. Admin. Code §5; Pennsylvania, 25 Pa. Code §126.411; and the District of Columbia, D.C. Code §50-731. Minnesota, Nevada, and New Mexico are considering adopting California's vehicle GHG standards. See "Proposed Permanent Rules Relating to Clean Cars; Notice of Intent to Adopt Rules with a Hearing," 45 Minn. Reg. 663, December 21, 2020; Nevada Division of Environmental Protection, "Clean Cars Nevada," https://ndep.nv.gov/air/clean-cars-nevada, accessed January 27, 2021; New Mexico Governor Michelle Lujan Grisham, "Executive Order on Addressing Climate Change and Energy Waste Prevention," Exec. Order 2019-003, January 29, 2020, https://www.governor.state.nm.us/wp-content/uploads/2019/01/EO_2019-003.pdf.

[101] 84 *Federal Register* 51310, p. 51350.

[102] Ibid., p. 51351.

Actions Under the Biden Administration

In March 2022, EPA reissued the 2013 waiver for California's Advanced Clean Cars (ACC) I regulations (which covered California's GHG and ZEV standards for MY2021-MY2025 passenger cars and light- and medium-duty trucks); at the same time, NHTSA repealed the SAFE rule.[103] In reissuing the waiver, EPA stated that it had limited ability to rescind previously granted waivers and that the SAFE rule that withdrew the ACC I waiver exceeded the agency's authority.[104] EPA also concluded that its rescission of the ACC I waiver was based on a flawed interpretation of Section 209(b) and that it had improperly considered preemption under EPCA as a basis for rescinding the waiver.[105] EPA's reissuance of the waiver was challenged in *Ohio v. EPA*.[106] As discussed in more detail below, EPA's decision was sustained.[107] NHTSA, for its part, concluded that in issuing the SAFE rule it had exceeded its authority to issue a regulation interpreting the scope of preemption under EPCA.[108]

EPA's and NHTSA's Reinterpretation of EPCA Preemption

In EPA's 2022 reissuance of the 2013 waiver, EPA determined that it was improper for EPA in the SAFE rule to consider EPCA preemption when determining whether to rescind the waiver for ACC I.[109] Section 209(b) lists the statutory factors by which EPA must evaluate whether to grant a waiver.[110] EPCA preemption is not among these factors.[111] According to EPA, it was improper for EPA to consider a factor that Congress did not intend it to consider.[112]

Moreover, NHTSA, the agency entrusted to administer EPCA, had formally withdrawn its conclusions that state or local regulations of tailpipe CO_2 emissions are "related to" fuel economy standards and therefore preempted under EPCA.[113] Accordingly, EPA explained, even if it could consider EPCA preemption in its evaluation of a waiver, the predicate (i.e., NHTSA's 2019 preemption determination) for EPA's prior decision to withdraw the ACC I waiver no longer existed.[114]

NHTSA withdrew its conclusions regarding preemption of state and local GHG emissions regulations because it too found that the earlier conclusions rested on flawed interpretations of EPCA.[115] In its 2021 withdrawal, NHTSA determined that Section 32919, the preemption

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[103] EPA, "California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision," 87 *Federal Register* 14332, March 14, 2022 (hereinafter 87 *Federal Register* 14332); NHTSA, "Corporate Average Fuel Economy (CAFE) Preemption," 86 *Federal Register* 74236, December 29, 2021 (hereinafter 86 *Federal Register* 74236).

[104] 87 *Federal Register* 14332, p. 14344.

[105] Ibid., pp. 14352, 14368.

[106] 98 F.4th 288 (D.C. Cir. 2024).

[107] Ibid.

[108] 86 *Federal Register* 74236, p. 74238.

[109] Ibid., p. 14368. Two district court cases have evaluated the interaction between EPCA's preemption provision and Section 209(b). Both found that EPCA's preemption provision does not preempt California from adopting greenhouse gas standards nor does it preclude EPA from issuing a waiver for such standards. Both cases are discussed in more detail below. See "Conflicts with the Energy Policy and Conservation Act (EPCA)."

[110] 42 U.S.C. §7543(b)(1).

[111] Ibid.

[112] 87 *Federal Register* 14332, p. 14369.

[113] Ibid., p. 14371; 86 *Federal Register* 74236, p. 74238.

[114] 87 *Federal Register* 14332, p. 14369.

[115] 86 *Federal Register* 74236, p. 74238.

provision of EPCA, does not confer on NHTSA rulemaking authority to issue regulations interpreting the scope of preemption under EPCA.[116] NHTSA also determined that its preemption regulations ignored "substantially important federalism interests" and "failed to account for legally relevant factors, such as reliance interests of states and local jurisdictions in longstanding programs."[117]

EPA's Reinterpretation of Section 209(b)(1)(B): "Compelling and Extraordinary Conditions"

Pursuant to Section 209(b)(1)(B), EPA must grant a waiver unless California "does not need such State standards to meet compelling and extraordinary conditions."[118] In the SAFE rule, EPA interpreted this provision as requiring EPA to evaluate whether California needs each standard for a particular pollutant (e.g., NO_x) to meet compelling and extraordinary circumstances.[119]

In the 2022 waiver, EPA returned to the interpretation it put forward in its original 2013 waiver.[120] It reinterpreted "such State standards" in light of Section 209(b)(1), which requires California to determine that its standards are "in the aggregate at least as protective" as the federal standards.[121] According to EPA and contrary to the SAFE rule, California's need for a waiver must be evaluated based on the "aggregate" of all of California's regulations subject to waivers—not based on whether the standard for a specific pollutant is more stringent than the federal standards.[122] This interpretation, EPA reasons, gives meaning to the term "aggregate" in Section 209(b)(1) and ensures that both EPA and California "review the same standards that California considers in making its protectiveness determination."[123]

EPA similarly found flaws in its own determination in the SAFE Rule that California did not "need" the ACC I regulations to meet "compelling and extraordinary conditions."[124] EPA noted that ACC I serves to reduce both GHG emissions and emissions of criteria pollutants.[125] A consequence of reducing GHG emissions is a reduction in criteria pollutants.[126] Moreover, by increasing the number of cars sold that emit no emissions whatsoever, ACC I will further reduce criteria pollutant emissions.[127] According to EPA, California air suffers from high levels of some criteria pollutants and the ACC I regulations will help alleviate that problem.[128]

EPA went on, however, to explain that California "needs" the ACC I standards to address the impacts of climate change on California.[129] California, EPA determined, is particularly affected by global climate change, "including increasing risk from record-setting fires, heat waves, storm

[116] Ibid.

[117] Ibid., pp. 74328-74329.

[118] 42 U.S.C. §7543(b)(1)(B).

[119] 84 *Federal Register* 51310, p. 51344.

[120] 87 *Federal Register* 14332, p. 14358.

[121] Ibid.

[122] Ibid.

[123] Ibid.

[124] Ibid., p. 14363.

[125] Ibid.

[126] Ibid., p. 14364.

[127] Ibid.

[128] Ibid.

[129] Ibid., p. 14365.

surges, sea-level rise, water supply shortages and extreme heat."[130] Locally elevated CO_2 can also have local impacts on, for instance, ocean acidification along California's coast.[131] "Thus, like criteria pollution, emissions of [greenhouse gases] can lead to locally elevated concentrations with local impacts, in addition to the longer-term global impacts resulting from global increases in [greenhouse gas] concentrations."[132]

Finally, EPA determined that Section 209(b)(1)(B) does not require California's ACC I regulations to "independently solve" global climate change.[133] Although ACC I will not by itself reduce GHG emissions enough to prevent impacts from climate change from affecting California, "California's policy judgment that an incremental, directional improvement will occur and is worth pursuing is entitled ... to great deference."[134]

EPA's Reinterpretation of Section 177

In the SAFE rule, EPA interpreted Section 177, which permits states to adopt California emissions standards that have received a waiver, as not permitting states to adopt California's GHG standards.[135] In its 2022 waiver reissuance, EPA determined this interpretation was flawed and withdrew it.[136] EPA first noted that Section 177 provides no role for EPA whatsoever:[137] Section 177 simply provides states authority to adopt California standards that have been granted a waiver by EPA.[138] Accordingly, EPA's prior interpretation was "nonregulatory and nonbinding."[139] EPA further determined that, because it plays no role in states' ability to adopt California standards under Section 177, it was "inappropriate" for it "to offer an interpretive view" of Section 177.[140]

What Actions Has Congress Taken Regarding the Waiver?

As of August 2024, three bills have been introduced in recent Congresses that seek to modify or revoke California's federal preemption waiver authority under CAA Section 209(b).[141]

H.R. 1435 (118th) – Preserving Choice in Vehicle Purchases Act

H.R. 1435 would amend Section 209(b) of the CAA to prohibit EPA from issuing waivers to states that directly or indirectly limit the sale or use of new motor vehicles with internal combustion engines. In addition, the bill would require EPA to revoke waivers granted between

[130] Ibid.

[131] Ibid., p. 14366.

[132] Ibid.

[133] Ibid.

[134] Ibid.

[135] 84 *Federal Register* 51310, p. 51350.

[136] 87 *Federal Register* 14332, p. 14374.

[137] Ibid., p. 14375.

[138] Ibid.; 42 U.S.C. §7507.

[139] 87 *Federal Register* 14332, p. 14375.

[140] Ibid.

[141] CRS searched for bills introduced during the 116th-118th Congresses on Congress.gov using the keywords *motor vehicle*, *Clean Air Act*, *Section 209(b)*, and *waiver*. Search results are current as of August 20, 2024.

January 2022 and the date of enactment of the bill. H.R. 1435 was introduced in the House on March 8, 2023, and referred to the House Subcommittee on Environment, Manufacturing, and Critical Materials and the House Committee on Energy and Commerce.[142] On September 14, 2023, the bill passed the House 222-190 by Yeas and Nays vote.[143] The bill was received in the Senate and was referred to the Senate Committee on Environment and Public Works on September 18, 2023. As of August 2024, the Senate has taken no subsequent action on the bill.[144]

In June 2023, the House Committee on Energy and Commerce, Subcommittee on Environment, Manufacturing, and Critical Materials, held a hearing titled *Driving Affordability: Preserving People's Freedom to Buy Affordable Vehicles and Fuel*.[145] The hearing discussed four pieces of legislation, including H.R. 1435. Statements from the Subcommittee Chair, Ranking Member, and witnesses reflected a range of views regarding H.R. 1435. A selected and abridged sample of these statements include the following:

- Chair Representative Bill Johnson: "The intent of the Clean Air Act is clear. Congress never directed California to dictate America's vehicle emissions, and also did not authorize the EPA to force vehicles that the agency does not like off the road."[146]
- Ranking Member Representative Paul Tonko: "Given its history and extraordinary air quality challenges, California has the ability to request the preemption waiver for its vehicle emission standards, provided that they are at least as stringent as federal standards, necessary to meet compelling and extraordinary conditions."[147]
- Joseph Goffman, Principal Deputy Administrator for the Office of Air and Radiation at EPA: "Congress granted California the authority to regulate emissions from vehicles over 50 years ago and continually re-enacted that authority through periodic reauthorizations of the Clean Air Act. Congress sought to give the state the power to address its unique and ongoing air quality challenges and to give other states the option to adopt the innovative clean car and truck technologies California pioneered."[148]
- Neil Caskey, CEO, National Corn Growers Association: "We support uniform vehicle standards for both fuel economy and GHG emissions, relying on a full lifecycle analysis to ensure a level playing field for all types of fuels and vehicles."[149]

[142] All actions, H.R. 1435 – Preserving Choice in Vehicles Act, https://www.congress.gov/bill/118th-congress/house-bill/1435/all-actions.

[143] House of Representatives Roll Call Vote number 391, 118th Cong., 1st sess., September 14, 2023, https://clerk.house.gov/Votes/2023391.

[144] All actions, H.R. 1435 – Preserving Choice in Vehicles Act, https://www.congress.gov/bill/118th-congress/house-bill/1435/all-actions.

[145] U.S. Congress, House Energy and Commerce Committee, Subcommittee on Environment, Manufacturing, and Critical Materials, *Driving Affordability, Preserving People's Freedom to Buy Affordable Vehicles and Fuel*, hearings, 118th Cong., 1st sess., June 22, 2023 (hereinafter *Driving Affordability* hearing), https://congressional.proquest.com/congressional/docview/t39.d40.tr06220123.o15?accountid=12084.

[146] Ibid.

[147] Ibid.

[148] Written testimony of Joseph Goffman, *Driving Affordability* hearing, https://docs.house.gov/meetings/IF/IF18/20230622/116147/HHRG-118-IF18-Wstate-GoffmanJ-20230622.pdf.

[149] Written testimony of Neil Caskey, *Driving Affordability* hearing, https://docs.house.gov/meetings/IF/IF18/20230622/116147/HHRG-118-IF18-Wstate-CaskeyN-20230622.pdf.

- Chet Thompson, President and CEO, American Fuel and Petrochemical Manufacturers: "The Choice in Automobile Retail Sales Act of 2023 and Preserving Choice in Vehicle Purchases Act do not prevent EPA from setting tailpipe standards, nor do they prevent California from seeking waivers to address compelling and extraordinary conditions unique to Californians. The bills simply reaffirm the fact that EPA and California do not have the authority to ban vehicle powertrain technologies and limit mobility options for consumers."[150]
- Genevieve Cullen, President, Electric Drive Transportation Association: "At this inflection point for the market, this disruption and uncertainty would work against U.S. market leadership and consumers' access to EV choices. Vehicle manufacturers and the complex supply chains that support them, and the EV ecosystem, have made substantial investments in reliance on the current regulatory regimes."[151]

The committee report accompanying H.R. 1435 (H.Rept. 118-169) indicated that the bill was proposed in response to CARB's August 2022 decision to approve a regulation that would limit the sale of new internal combustion engine vehicles in California and promote the sale of zero-emission vehicles.[152] The report emphasized the cost and functionality of electric vehicles and current consumer preferences as justification to amend CAA Section 209(b) and to thereby prevent CARB from promulgating its proposed regulation. The committee found that H.R. 1435 would not result in new or increased budget authority, entitlement authority, or tax expenditures or revenues. There was no Congressional Budget Office (CBO) estimate for the bill at the time the report was filed.

The minority views opposed H.R. 1435 on the grounds that it would upend the electric vehicle supply chain and create uncertainty for the automotive industry.[153] The minority also recognized California as a leader in setting air pollution standards.[154]

S. 2090 (118th) – Preserving Choice in Vehicle Purchases Act of 2023

S. 2090 is the Senate companion bill to H.R. 1435. S. 2090 would amend Section 209(b) of the CAA to prohibit EPA from issuing waivers to states that directly or indirectly limit the sale or use of new motor vehicles with internal combustion engines. In addition, the bill would require EPA to revoke waivers granted between January 2022 and the date of enactment of the bill. S. 2090 was introduced in the Senate on June 21, 2023, and referred to the Senate Committee on Environment and Public Works.[155] No further action has been taken on the bill.

[150] Written testimony of Chet Thompson, *Driving Affordability* hearing, https://docs.house.gov/meetings/IF/IF18/20230622/116147/HHRG-118-IF18-Wstate-ThompsonC-20230622.pdf.

[151] Written testimony of Genevieve Cullen, *Driving Affordability* hearing, https://docs.house.gov/meetings/IF/IF18/20230622/116147/HHRG-118-IF18-Wstate-CullenG-20230622.pdf.

[152] U.S. Congress, House Committee on Energy and Commerce, *Preserving Choice in Vehicle Purchases Act*, report to accompany H.R. 1435, 118th Cong., 1st sess., H.Rept. 118-169, p. 3.

[153] Ibid., p. 15.

[154] Ibid.

[155] All actions, S. 2090 – Preserving Choice in Vehicle Purchases Act of 2023, https://www.congress.gov/bill/118th-congress/senate-bill/2090/all-actions.

H.R. 8773 (117th) – Revoking Engine and Vehicle Requirements Act of 2022

H.R. 8773 would have amended the CAA by repealing the waiver authority under Section 209(b) allowing California to adopt or attempt to enforce emission control standards on new motor vehicles. H.R. 8773 was introduced in the House on September 6, 2022, and then referred to the House Committee on Energy and Commerce and the Subcommittee on Environment and Climate Change.[156] No further action was taken on the bill.

Can Clean Air Act Waivers Be Reviewed Under the Congressional Review Act?

California's CAA federal preemption waivers cannot be reviewed under the Congressional Review Act (CRA) because the waiver granted by EPA is not a *rule* as that term is defined in the CRA. Rather, the waiver is considered an *order* not subject to the CRA.

The CRA (5 U.S.C. §§801-808) provides a mechanism for Congress to review federal agency actions that meet the CRA's definition of *rule*.[157] Enacted in 1996, the CRA requires agencies to report the issuance of rules to Congress and provides Congress with special fast-track procedures under which to consider legislation that overturns a rule.[158] Pursuant to the CRA, Congress can nullify a rule by a joint resolution of disapproval that passes both houses of Congress and is signed by the President or through a two-thirds majority vote in each house if the President vetoes the resolution.[159]

For an agency action to be eligible for review under the CRA, it must qualify as a rule as defined by the CRA.[160] The CRA adopts the definition of *rule* contained in the Administrative Procedure Act (APA), though it creates three exceptions to that definition, none of which is relevant to the EPA waiver.[161] Importantly, the APA's definition of *rule* does not include *orders*. Because the CRA incorporates the APA's definition of *rule*, the CRA does not apply to orders issued by agencies.

The APA defines two primary categories of agency actions—*rules* and *orders*. The APA defines a *rule* as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."[162] The APA's definition of rule, however, does not include agency actions known as *orders*.[163] Orders are the product of

[156] All actions, H.R. 8773 – Revoking Engine and Vehicle Requirements Act of 2022, https://www.congress.gov/bill/117th-congress/house-bill/8773/all-actions.

[157] See 5 U.S.C. §§801, 804. For more information about the CRA, see CRS Report R45248, *The Congressional Review Act: Determining Which "Rules" Must Be Submitted to Congress*, by Valerie C. Brannon and Maeve P. Carey (hereinafter *The Congressional Review Act*); CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis.

[158] 5 U.S.C. §§801-808. For further explanation regarding these fast-track procedures, see *The Congressional Review Act*.

[159] 5 U.S.C §801.

[160] Ibid.; 5 U.S.C. §804(3) (defining "rule").

[161] 5 U.S.C. §804(3).

[162] 5 U.S.C. §551(4).

[163] Ibid.

agency adjudications.[164] The APA defines *order* as "the whole or part of a final disposition ... of an agency in a matter other than a rule making but including licensing."[165]

Taken together, in the words of one federal court of appeals, the definitions provide that "[a]n adjudication ... is virtually any agency action that is not rulemaking."[166] As a general matter, "adjudications resolve disputes among specific individuals in specific cases, whereas rulemaking affects the rights of broad classes of unspecified individuals."[167] Further, adjudications impose "immediate effect[s]" on parties in a proceeding, while rulemakings are "prospective" in nature and have "a definitive effect on individuals only after the rule subsequently is applied."[168]

Because the CRA's special procedures are not available until rules are submitted to Congress, if an agency does not submit a rule to Congress, this could potentially frustrate Congress's ability to review rules under the act.[169] Consequently, Members of Congress who think a particular agency action should have been submitted can ask the U.S. Government Accountability Office (GAO) for a formal opinion on whether the specific action satisfies the CRA definition of *rule*.[170] If GAO determines the action is a *rule*, GAO's opinion acts as a stand-in to trigger the CRA process.[171]

In March 2022, EPA issued a notice that reinstated the 2013 waiver for California's ACC I regulations that had previously been withdrawn in 2019.[172] EPA did not submit the notice to Congress pursuant to the CRA, believing that its action was an adjudicatory order, not a rule.[173] A Member of Congress asked GAO to review the notice to determine whether the notice was a *rule* pursuant to the CRA.[174] On November 30, 2023, GAO issued an opinion determining that EPA's reinstatement of a waiver for California regulations setting emissions standards for GHG emissions from cars and trucks was an "adjudicatory order" not subject to the CRA.[175] GAO explained that the waiver notice was a "final disposition granting California a form of permission which meets the definition of order."[176] GAO added that the waiver notice was particular to California, based on consideration of particular facts, and had immediate effect in California.[177]

What Actions Have Been Taken in the Federal Courts Regarding the Waiver?

The California waiver has not been the subject of much litigation since its inclusion in the Air Quality Act of 1967. Only since 2019 have EPA's decisions to grant or rescind waivers been

[164] Ibid. §551(7).

[165] Ibid. §551(6).

[166] Yesler Terrace Cmty. Council v. Cisneros, 37 F.3d 442, 448 (9th Cir. 1994).

[167] Ibid.; United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 245-246 (1973); see also Michael Asimow and Ronald M. Levin, *State and Federal Administrative Law*, 3rd ed. (West Academic, 2009), p. 62.

[168] *Yesler Terrace Cmty.*, 37 F.3d at 448.

[169] *The Congressional Review Act*.

[170] Ibid.

[171] Ibid.

[172] U.S. Government Accountability Office, "Environmental Protection Agency—Applicability of the Congressional Review Act to Notice of Decision on Clean Air Act Waiver of Preemption," B-334309, November 30, 2023.

[173] Ibid., p. 1.

[174] Ibid.

[175] Ibid., p. 3.

[176] Ibid., p. 5.

[177] Ibid., pp. 5-6.

subject to sustained legal challenge.[178] Many of these more recent challenges arose in relation to California's regulation of GHG emissions.[179] A number of these legal challenges went unresolved by the courts because the Biden Administration reversed course on some actions carried out by the Trump Administration before the courts could render decisions on the merits.[180] Although the change in administration left some disputes unresolved, those disputes are likely to be the subject of future challenges in the federal courts. The courts have, however, rendered a handful of decisions addressing the constitutionality of the California waiver and its relationship with EPCA.

The Constitutionality of Section 209(b): The Equal Sovereignty Doctrine

In the 2024 case *Ohio v. EPA*, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) held that Section 209(b) did not violate the equal sovereignty doctrine of the U.S. Constitution.[181] In 2013, EPA granted a waiver to California to regulate GHG emissions from cars and light trucks in MY2017-MY2025.[182] The regulation was known as the ACC I rule. In 2019, EPA rescinded the waiver for ACC I.[183] Then, in 2022, EPA reinstated the waiver.[184] A group of states and industry associations brought suit against EPA for reinstating the waiver for the ACC I rule, arguing, among other things, that Section 209(b) violates the equal sovereignty doctrine of the Constitution.[185]

The equal sovereignty doctrine is a limitation on Congress's legislative power.[186] Where it applies, it limits Congress's authority to enact legislation that treats different states differently without sufficient justification.[187] The Supreme Court has invoked the doctrine on just two occasions, both in the voting rights context.[188]

In *Shelby County v. Holder*, the Supreme Court struck down Section 5 of the Voting Rights Act (VRA) as unconstitutional.[189] To remedy the racial discrimination in voting that was endemic during the Jim Crow era, the VRA required jurisdictions with a history of racial discrimination against voters to obtain "preclearance" from the Department of Justice or a federal court before

[178] See, for example, Union of Concerned Scientists v. NHTSA, No. 19-1230 (D.C. Cir.) (challenging, among other things, EPA's withdrawal of California's waiver for its Advanced Clean Cars [ACC] I program); Ohio v. EPA, 98 F.4th 288 (D.C. Cir. 2024) (per curiam) (challenging EPA's reinstatement of the waiver for California's ACC I program).

[179] Union of Concerned Scientists v. NHTSA, No. 19-1230 (D.C. Cir.) (challenging, among other things, EPA's withdrawal of California's waiver for its ACC I program); Ohio v. EPA, 98 F.4th 288 (D.C. Cir. 2024) (per curiam) (challenging EPA's reinstatement of the waiver for California's ACC I program).

[180] See Stipulation of Dismissal, Union of Concerned Scientists v. NHTSA, No. 19-1230 (D.C. Cir. July 9, 2024) (dismissing the case).

[181] 98 F.4th 288, 314 (D.C. Cir. 2024) (per curiam). The petitioners also argued that EPA's waiver violated Section 209(b) because California does not "need" its stricter GHG emissions regulations to meet "compelling and extraordinary circumstances" and that EPCA preempts state GHG standards.

[182] 78 *Federal Register* 2112.

[183] 84 *Federal Register* 51310.

[184] 87 *Federal Register* 14332.

[185] Ohio v. EPA, 98 F.4th at 293-294.

[186] U.S. Const. amdt. X; CRS, "Equal Sovereignty Doctrine," *Constitution Annotated*, https://constitution.congress.gov/browse/essay/amdt10-4-3/ALDE_00013628/['equal',%20'sovereignty'], accessed June 11, 2024.

[187] Ibid.

[188] Ibid.; Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009); Shelby Cnty. v. Holder, 570 U.S. 529, 544 (2013).

[189] *Shelby Cnty.*, 570 U.S. at 557.

changing their voting procedures.[190] The Court held, "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[191] The Court found increases in African American voter registration rates and turnout in covered jurisdictions no longer justified applying the preclearance requirement to those jurisdictions.[192]

The parties challenging Section 209(b) in *Ohio v. EPA* argued that by granting California more sovereign authority to regulate than other states enjoy, Congress violated the equal sovereignty doctrine.[193] The D.C. Circuit disagreed, finding that no court had ever applied the equal sovereignty doctrine to Congress's exercise of its powers pursuant to the Commerce Clause of the Constitution.[194] The Supreme Court in *Shelby County* was evaluating Congress's authority to regulate elections pursuant to the Fifteenth Amendment to the Constitution.[195] Unlike the Fifteenth Amendment, which permits Congress to enforce its terms through "appropriate legislation," the Commerce Clause is a grant of plenary power to Congress.[196] In addition, the Court in *Shelby County* held that the VRA was a significant intrusion into the states' traditional power to regulate elections.[197]

By contrast, Section 209(b) regulates interstate pollution, which, according to the D.C. Circuit, all agree falls squarely within Congress's authority to regulate pursuant to the Commerce Clause.[198] *Shelby County*, the D.C. Circuit held, "does not support requiring a heightened justification for disparate intrusions into areas over which the Constitution grants Congress such comprehensive control."[199]

Finally, the D.C. Circuit explained, *Shelby County* did not create a categorical bar against Congress providing different levels of sovereign authority to different states.[200] Rather, *Shelby County* held that the equal sovereignty doctrine "required only that Congress show the disparate treatment is sufficiently related to the problem that it targets."[201] The D.C. Circuit found it "counterintuitive" for the petitioners to read the Commerce Clause as imposing a categorical bar on treating states differently when the Commerce Clause grants Congress "primacy over interstate commerce."[202]

On July 2, 2024, industry association petitioners asked the Supreme Court to review the D.C. Circuit's decision.[203] They argue that the D.C. Circuit's determination that they lack constitutional standing to bring a challenge to EPA's ACC I waiver was wrongly decided and that EPA's decision to grant the ACC I waiver was unlawful.[204] On July 5, 2024, state petitioners led by Ohio

[190] Ibid. at 537-538.

[191] Ibid. at 542 (quoting *Nw. Austin*, 557 U.S. at 203).

[192] Ibid. at 557.

[193] Ohio v. EPA, 98 F.4th 288, 307 (D.C. Cir. 2024).

[194] Ibid.

[195] Ibid. at 309.

[196] Ibid.

[197] Ibid.

[198] Ibid. at 310.

[199] Ibid.

[200] Ibid.

[201] Ibid.

[202] Ibid.

[203] Petition for a Writ of Certiorari, Diamond Alternative Energy, LLC. v. EPA, No. 24-7 (U.S. July 2, 2024).

[204] Ibid. at I.

joined the industry associations in asking the Supreme Court review the D.C. Circuit's decision.[205] The state petitioners argue that Section 209(b) is unconstitutional because it violates the equal sovereignty doctrine.[206]

Conflicts with the Energy Policy and Conservation Act (EPCA) and California Regulation of Greenhouse Gases

Several legal challenges to waivers for GHG emissions have argued that EPCA preempts California regulations that are "related to fuel economy standards" and that, as a result, EPA cannot grant a waiver pursuant to Section 209(b). EPCA—which was first enacted in the 1970s to, in part, improve vehicle fuel efficiency—contains an express preemption provision that prohibits "a State or political subdivision of a State" from "adopt[ing] or enforc[ing] a law or regulation related to fuel economy standards ... covered by an average fuel economy standard" pursuant to EPCA.[207] As noted above, the Trump Administration interpreted this language as prohibiting EPA from issuing a waiver to California pursuant to Section 209(b) because the Trump Administration believed that GHG emissions standards necessarily affected fuel economy and accordingly were "related to" fuel economy standards.[208]

A number of challenges based on this interpretation of EPCA have been brought to EPA waivers for California GHG emissions standards. Despite the number of challenges, only two have resulted in decisions on the merits.[209] Both decisions upheld EPA's authority to grant waivers for GHG emissions standards.[210] Both decisions, however, lack any precedential value to bind future court decisions because they were issued by federal district courts.[211]

The U.S. District Court for the District of Vermont was the first court to address the potential for conflict between EPCA and the CAA in *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*.[212] The court held that EPCA did not conflict with or preempt California GHG regulations that had received a waiver from EPA.[213] Analyzing the enactment histories of both EPCA and Section 209(b), the court noted that just two years after Congress enacted EPCA, it amended Section 209(b) and was well aware of the relationship between fuel economy and emissions regulations.[214] The House report that accompanied the amendment stated, "The experience of the stricter California standards shows that tighter standards do not necessarily mean a fuel economy reduction."[215]

EPCA's enactment history points in the same direction, the court found. EPCA contains a provision that requires NHTSA to consider "other motor vehicle standards of the government on

[205] Petition for a Writ of Certiorari, Ohio v. EPA, No. 24-13 (U.S. July 5, 2024).

[206] Ibid. at i.

[207] 49 U.S.C. §32919(a).

[208] 84 *Federal Register* 51310.

[209] See Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295 (D. Vt. 2007); Central Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F. Supp. 2d 1151 (E.D. Cal. 2007). The petitioners in *Ohio v. EPA* also raised this issue, but the D.C. Circuit did not address the merits because the court found that the petitioners lacked constitutional standing to bring that claim. 98 F.4th 288, 299 (D.C. Cir. 2024).

[210] *Green Mountain*, 508 F. Supp. 2d at 350-357; *Central Valley*, 529 F. Supp. 2d at 1171-1179.

[211] *Green Mountain*, 508 F. Supp. 2d at 350-357; *Central Valley*, 529 F. Supp. 2d at 1171-1179.

[212] *Green Mountain*, 508 F. Supp. 2d at 346.

[213] Ibid. at 350-357.

[214] Ibid. at 346.

[215] Ibid. (citing H.R. Rep. No. 95-294, at 301-302 (1977)).

fuel economy" when setting fuel economy standards.[216] When EPCA was enacted in 1975, it explicitly included in the term "other motor vehicle standards" California emissions standards that received a waiver from EPA.[217] The provision that explicitly identified California standards as "other motor vehicle standards" was ultimately dropped from the statute in 1994 because that provision dealt with a modification process that applied only to MY1978-MY1980.[218] The 1994 recodification, the court found, was not intended to work any substantive change to EPCA.[219]

Based on this history, the court held that once EPA grants California a waiver, California's regulations "become[] a motor vehicle standard of the government, with the same stature as a federal regulation" that NHTSA must take into consideration when setting fuel economy standards.[220]

In *Central Valley Chrysler-Jeep Inc. v. Goldstene*, the U.S. District Court for the Eastern District of California similarly held that EPCA did not conflict with or preempt California's GHG emissions standards.[221] Relying heavily on the Supreme Court's opinion in *Massachusetts v. EPA* and the *Green Mountain* decision, the court held that EPCA's provision requiring NHTSA to consider "other motor vehicle standards of the government on fuel economy" included California regulations that had received a waiver from EPA pursuant to Section 209(b).[222] The court reasoned that this language in EPCA, instead of preempting California regulations, requires that NHTSA "harmonize milage standards" with California emissions standards that have been granted a waiver.[223] The court added that this approach is reflected in the Supreme Court's discussion of EPCA and the CAA in *Massachusetts*.[224] In *Massachusetts*, the Court explained that the purposes of EPCA and the CAA are sufficiently different to permit both statutes to operate independently.[225] Referring to the respective requirements of the CAA and EPCA, the Supreme Court wrote "[t]he two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency."[226]

Pending Litigation: *Western States Trucking Association, Inc. v. EPA*

In April 2023, EPA issued a waiver for California GHG emission control standards for heavy-duty vehicles that, among other things, require manufacturers to produce and sell increasing percentages of zero-emission heavy-duty vehicles and "near zero-emission" heavy-duty vehicles

[216] Ibid.

[217] Ibid.

[218] Ibid.

[219] Ibid. (citing P.L. 103-272, 108 Stat. 745 (1994)).

[220] Ibid. at 347.

[221] *Central Valley*, 529 F. Supp. 2d at 1171-1179.

[222] Ibid. at 1173-1174.

[223] Ibid.

[224] Ibid.

[225] Ibid. at 1166.

[226] Ibid. (quoting Massachusetts v. EPA, 549 U.S. 497, 532 (2007)).

in California.[227] Soon thereafter, trucking industry groups filed a petition for review in the D.C. Circuit seeking to have the waiver vacated.[228]

The petitioners raise three main arguments.[229] First, they argue that EPA's decision to issue a waiver in this case violates the major questions doctrine.[230] The major questions doctrine precludes an agency from exercising regulatory authority over an issue of vast economic or political significance without clear congressional authorization to do so.[231] The petitioners argue that the CAA does not clearly provide EPA with the authority to authorize California to mandate vehicle electrification—an issue of vast economic and political importance.[232]

Second, the petitioners argue that, because waivers issued by EPA must be "consistent" with Section 202(a) of the CAA, and Section 202(a) does not permit EPA to mandate electric vehicles, EPA cannot issue a waiver that has the effect of mandating electric vehicles.[233]

Third, the petitioners argue that the waiver violates Section 209(b)(1)(B), which requires EPA to deny a waiver if California does not "need" the waiver "to meet compelling and extraordinary conditions."[234] The petitioners claim that California's electric-vehicle mandates are aimed at addressing climate change.[235] Climate change, the petitioners assert, is a global phenomenon that affects California as much as any other place on the planet.[236] In addition, any emissions reductions achieved by California's regulation, the petitioners argue, will not meaningfully address the effects of climate change.[237]

A group of 19 states also challenged EPA's waiver.[238] The state petitioners raise two primary arguments.[239] First, in a nearly identical argument to that raised in *Ohio v. EPA* discussed above, they argue that Section 209(b) violates the equal sovereignty doctrine.[240] Second, they argue that the waiver violates Section 202(a)(3)(C).[241] As noted above, Section 209(b) requires that in order

[227] EPA, "California State Motor Vehicle and Engine Pollution Control Standards; Heavy-Duty Vehicle and Engine Emission Warranty and Maintenance Provisions; Advanced Clean Trucks; Zero Emission Airport Shuttle; Zero-Emission Power Train Certification; Waiver of Preemption; Notice of Decision," 88 *Federal Register* 20688, April 6, 2023.

[228] Petition for Review at 2, Western States Trucking Association, Inc. v. EPA (No. 23-1143) (D.C. Cir. June 6, 2023).

[229] Initial Brief for Private Petitioners at xx-xxi, Western States Trucking Association, Inc. v. EPA (No. 23-1143) (D.C. Cir. Nov. 3, 2023) (hereinafter Initial Brief).

[230] Initial Brief at 19.

[231] West Virginia v. EPA, 597 U.S. 697, 716 (2022). For more information about the major questions doctrine, see CRS In Focus IF12077, *The Major Questions Doctrine*, by Kate R. Bowers.

[232] Initial Brief at 20.

[233] Ibid. at 28.

[234] Ibid. at 39.

[235] Ibid. at 42-53.

[236] Ibid.

[237] Ibid.

[238] Petition for Review at 2, Iowa v. EPA (No. 23-1144) (D.C. Cir. June 5, 2023). The state petitioners' challenge was consolidated with the industry petitioners' challenge under the caption *Western Trucking Association, Inc. v. EPA*. Order at 1, Western States Trucking Association v. EPA (No. 23-1143) (D.C. Cir. June 6, 2023).

[239] Brief of Petitioners the States of Iowa, Alabama, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Utah, West Virginia, and Wyoming at vi, Western States Trucking Association, Inc. v. EPA (No. 23-1143) (D.C. Cir. Nov. 3, 2023) (hereinafter Brief of the States).

[240] Ibid. at 17-23.

[241] Ibid. at 28-38.

for California to receive a waiver, its regulations must be consistent with Section 202(a).[242] Pursuant to Section 202(a)(3)(C), EPA cannot impose certain emissions limits for heavy-duty vehicles sooner than four years after it promulgates the standard.[243] The state petitioners argue that California's regulations do not provide the four-year lead time required by Section 202(a)(3)(C) and, accordingly, EPA cannot issue a waiver for those regulations unless the regulations are consistent with Section 202(a).[244]

In December 2023, the court issued an order holding the case in abeyance until the D.C. Circuit issues rulings in two other related cases—*Ohio v. EPA* and *Texas v. EPA*.[245] As discussed above, the D.C. Circuit rendered an opinion in *Ohio v. EPA* in April 2024, holding that Section 209(b) did not violate the equal sovereignty doctrine.[246] The court has yet to issue an opinion in *Texas v. EPA*.

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[242] 42 U.S.C. §7521(a).

[243] 42 U.S.C. §7521(a)(3)(C).

[244] Brief of the States at 17-23.

[245] Per Curiam Order at 1, Western States Trucking Association, Inc. v. EPA (No. 23-1143) (D.C. Cir. Dec. 21, 2023). The petitioners in *Texas v. EPA*, which has already been argued and submitted to the court for a decision, raise the question of what authority Section 202(a) provides EPA to regulate electric vehicles.

[246] 98 F.4th 288 (D.C. Cir. 2024).