Texas Public Policy Foundation

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https://www.regulations.gov/document/EPA-HQ-OAR-2023-0292

Docket Operations
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Room B108
Washington, DC 20460

RE: Docket Number EPA-HQ-OAR-2023-0292

To Whom It May Concern:

Introduction

Texas Public Policy Foundation ("TPPF"), Western States Trucking Association ("WSTA") and Construction Industry Air Quality Coalition ("CIAQC") submit the following comments in connection with a Request for Waiver of Preemption (the "Waiver Request") proffered by the California Air Resources Board ("CARB") to the Environmental Protection Agency ("EPA"). The Waiver Request asks the EPA to grant a new waiver of the provisions of the Clean Air Act ("CAA") under Section 209(b) for CARB's regulations applicable to new 2026 and subsequent model year on-road light- and medium-duty vehicles (the "ACC II Regulations"). See 88 Fed. Reg. 88908 (Dec. 26, 2023). The ACC II Regulations require vehicle manufacturers to sell increasing percentages of electric vehicles beginning with the 2026 model year, eventually culminating in complete electrification of all vehicles sold in California by 2035. See Advanced Clean Cars II, CALIFORNIA AIR RESOURCES BOARD, https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/advanced-clean-cars-ii.

WSTA is an association of American truckers, and CIAQC is an organization of construction companies and workers. TPPF is a not-for-profit organization headquartered in Austin, Texas whose mission is, in part, "to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation . . . ." These three organizations write to inform the EPA that they must evaluate CARB's

waiver requests according to the standard prescribed by the plain text of the CAA. EPA has repeatedly and willfully failed to abide by the CAA's statutory text when reviewing CARB waiver requests. Because California does not and cannot show in its waiver requests that these specific emissions standards set forth in the ACC II Regulations are needed to meet "compelling and extraordinary" conditions statewide, the Waiver Request must be denied. Granting it would be ultra vires, arbitrary, and capricious, and would damage liberty and free enterprise interests nationwide.

The Waiver Request Violates Section 209(b)(1)(B) of the CAA

EPA has no authority to waive preemption for the Waiver Request covering the ACC II Regulations, which are aimed at addressing global climate change, because California does not "need" the ACC II Regulations "to meet compelling and extraordinary conditions," in the state, as required by the CAA's Section 209(b)(1)(B). The major-questions doctrine and the federalism canon require EPA to show "clear congressional authorization" before it allows a state to mandate electric vehicles to address a global problem. Section 209(b)(1)(B) not only contains no such authorization, but by its plain text it prohibits EPA from granting the Waiver Request. EPA's contrary reading of Section 209(b)(1)(B) to authorize the Waiver Request would be both contrary to the statutory text of the Clean Air Act and unconstitutional.

A. EPA cannot require electrification of mobile sources, so neither can CARB.

When an agency asserts authority to decide a "major question," it must show "clear congressional authorization" for that authority, not just a "merely plausible textual basis" for it. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609–10 (2022) (quoting *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). A major question is one with "vast economic and political significance." Id. at 2605. And an agency cannot avoid major questions scrutiny by "tailoring" an action to make "extravagant" assertions of authority appear "reasonable." *Utility Air*, 573 U.S. at 324–25.

By any definition, whether EPA may allow states to promulgate regulations forcing electrification of all passenger vehicles — as it appears poised to do here — is a major question. Such a program will "entail billions of dollars in compliance costs," *West Virginia*, 142 S. Ct. at 2604, and "is staggering by any measure." *Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023). Granting a state authority to ban the internal combustion engine outright is something that certainly has "vast . . . economic significance" and requires "clear Congressional authorization."

Not only does EPA's claimed authority here qualify as a major question, but the federalism canon requires "exceedingly clear language" to construe a statute to grant a single state authority to "alter the usual constitutional balance between the States and the Federal government" by regulating to address global problems. Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) (quotations omitted). Courts reject "broad" or "expansive" readings of statutes that "significantly chang[e] the federal-state balance" under this canon of construction. *United States v. Bass*, 404 U.S. 336, 349–50 (1971).

EPA has no authority under the CAA to force electrification of mobile sources. It points to none, and a straightforward reading of the CAA reveals none. While Section 209(b)(1)(B) lets EPA waive the CAA's preemption provisions governing mobile sources upon a showing of "compelling and extraordinary conditions" for a set of specific regulations, it does not let EPA delegate more authority than it possesses under law to CARB. Therefore, absent "clear congressional authorization," EPA cannot grant California (and its agency, CARB) a waiver from the CAA allowing CARB to force mobile source electrification — i.e., to regulate in a way EPA cannot. Such a decision would likewise make EPA the lapdog of CARB when addressing mobile source emissions, flipping the usual federal-state relationship in a manner that violates the federalism canon.

B. CAA's plain text does not allow EPA to grant the Waiver Request.

Section 209(b)(1)(B) allows CARB to receive a waiver for its regulations only if it shows it needs "such State standards" — meaning those particular regulations — "to meet compelling and extraordinary conditions." To unlawfully aggregate more power to itself, EPA has previously misread this requirement in Section 209(b)(1)(B) to mean that CARB need only demonstrate it needs "a separate motor vehicle program as a whole in order to address environmental problems caused by conditions specific to California and/or effects unique to California . . . ." 88 Fed. Reg. 88909 (Dec. 26, 2023). EPA states in the Federal Register notice respecting the Waiver Request that they intend to apply this misreading of the CAA in this instance, *see id*., and have therefore waived their right to use any alternative standard of evaluation.

The plain text of Section 209(b)(1)(B) does not support EPA's interpretation, which renders the other requirement that a waiver request must meet under Section 209 meaningless. Section 209(b)(1) requires that to make a waiver request, a state must have had standards prior to the CAA's adoption which are "in the aggregate, at least as protective of public health and welfare as applicable Federal standards." But EPA's reading of Section 209(b)(1)(B) transforms it into another requirement addressing the aggregate need for California's overall emissions program, making the entirety of that subsection redundant.

EPA cannot justify granting the Waiver Request based on the ACC II Regulations' secondary impact on local criteria-pollution conditions either. When granting other CARB waivers, EPA has done exactly this. But otherwise pre-empted regulations, like the ACC II Regulations, are not "saved from pre-emption simply because the state can demonstrate" an additional, permissible purpose for them. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n,* 505 U.S. 88, 106–07 (1992). It would be ridiculous indeed to allow CARB to evade preemption by reframing its sweeping electrification mandates as simple regulations to beneficially impact local pollution.

Indeed, even if EPA had the power to ban the internal combustion engine (which it does not), the phrase "compelling and extraordinary conditions" in Section 209(b)(1)(B) refers to California's unique local pollution problems, not global climate change. The ordinary meaning of the term "extraordinary" is "most unusual" or "far from common." *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020). Because Section 209(b)(1)(B) operates as a law allowing waiver of regulations applicable to all states, "extraordinary" in this context must mean "unusual" as compared to conditions in other states, not when a broadly shared consideration between states is especially serious. In fact, when a national or international issue is more serious, it is more appropriate for the federal government to be directly responsible. *See Am. Elec. Power Co. v. Connecticut,* 564 U.S. 410, 421 (2011). If "extraordinary" meant "unusual in magnitude," it would be redundant of "compelling" — the other adjective in Section 209(b)(1)(B). "It was clearly the intent" of Section 209(b) to "focus on local air quality problems . . . that may differ substantially from those in other parts of the nation." *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1303 (D.C. Cir. 1979). The global problem of climate change is not a local problem that California may address through its own regulations. Such large-scale issues are a matter for Congressional legislation, should Congress choose to act.

Moreover, California's own conditions related to global climate change are not extraordinary. The state's struggles with "drinking water . . . and wildfires, and effects on agriculture" are "by no means limited to California" and are in fact common across western states. 84 Fed. Reg. 51348 (Sept. 27, 2019). In fact, compared to other western states, California "is estimated to be better-positioned, particularly as regards the Southeast region of the country" with respect to these issues. *Id.* at n.278. Therefore, climate change alone is not enough to justify separate state standards for California. Even if Section 209(b)(1)(B)'s scope were unclear, EPA should not read the statute in a way that creates constitutional problems by allowing California — and only California — to enact mobile source standards targeting the global problem of climate change. Such a reading violates the "fundamental principle of the equality of the states under the Constitution." *Bolln v. Nebraska*, 176 U.S. 83, 89 (1900).

However, even if global climate change had extraordinary effects on California exclusively, its ACC II Regulations will have no meaningful effect on those conditions.

A Section 209(b) waiver is not "need[ed]" under the statute — and therefore not permitted — if a California-specific emission standard would not affect the conditions that supposedly warrant it. Terms of necessity like "need" in federal statutes "must be construed in a fashion that is consistent with the[ir] ordinary and fair meaning . . . so as to limit 'necessary' to that which is required to achieve a desired goal." *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 423 (D.C. Cir. 2000). When previously withdrawing the Advanced Clean Cars waiver, EPA found that California's standards "will not meaningfully address global air pollution problems of the sort associated with [greenhouse-gas] emissions." 84 Fed. Reg. 51349 (Sept. 27, 2019). CARB has not demonstrated that its ACC II Regulations will have any effect on global temperature or physical impacts resulting from anthropogenic climate change in California. By the plain text of Section 209, EPA should therefore deny its Waiver Request.

C. CARB failed to address the issue of emissions associated with electric batteries.

Finally, as with its waiver requests for other regulations seeking to force electrification of mobile sources, nowhere did CARB adequately address the costs associated with infrastructure development or the procurement of raw materials needed to support battery-powered vehicles, including the emissions produced by battery production. Specifically, CARB never addressed the fact that greenhouse emissions associated with manufacturing, processing, and distributing electric vehicle batteries are far higher, on balance, than the emissions associated with traditional mobile sources. This entails that the ACC II Regulations are not "at least as protective of public health and welfare as applicable Federal standards." EPA should therefore deny CARB's Waiver Request on this ground alone.

CARB never conducted a full lifecycle analysis and comparison to understand the full emissions impacts of battery-powered vehicles versus conventional vehicles fueled with lower carbon intensity fuels, and as a result its Waiver Request lacks a true assessment of forced mobile source electrification's impact on the environment. Specifically, CARB did not consider emissions produced by:

- The process of generating electricity to charge electric-vehicle batteries;
- Electric grid updates and repair necessary to allow all Californians to charge electric vehicles;
- Mining the components necessary to produce the batteries;
- Producing and replacing the batteries; or
- Safely disposing of batteries at the end of their useful life.

During the CARB regulatory process, the agency acknowledged that there are "lifecycle impacts" presented by batteries at the end of life. Yet, CARB made no effort

to quantify those impacts nor do they present reasonable or enforceable environmental or economic mitigations for those impacts:

> "Widespread battery recycling ***would*** keep hazardous materials from entering the waste stream, both at the end of a battery's useful life and during its production. ***Work is now under way*** to develop battery-recycling processes that minimize the lifecycle impacts of using batteries in vehicles."[1] [emphasis added]

There is no indication that CARB considered readily available international and national studies relating to BEV battery systems and vehicle lifecycle studies published prior to its adoption of the Regulations. First, the European Union conducted extensive studies and enacted enforceable safeguards to mitigate BEV impacts.[2] Second, the American Transportation Research Institute (ATRI) conducted a lifecycle analysis of zero emission trucks. That reported found that BEVs do not achieve the best performance to reduce greenhouse gases:

> "The report concludes by identifying additional strategies that can reduce CO2 truck emissions for all three energy sources – diesel, electricity and hydrogen. For example, renewable diesel could decrease CO2 emissions to only 32.7 percent of a standard diesel engine without requiring new infrastructure or truck equipment. Finally, hydrogen sourced from solar-power electricity could enable hydrogen fuel cell trucks to emit only 8.8 percent of the baseline diesel CO2."[3]

Under the California Environmental Quality Act, CARB has a legal requirement to consider alternatives to its regulatory proposals. CARB clearly failed to address the environmental consequences of BEVs nor did it adequately perform analysis of alternatives to ACC II Regulations.

EPA lacks authority to grant CARB the ability to force electrification of mobile sources. Additionally, the CAA's plain text does not allow EPA to grant CARB's Waiver Request for the ACC II Regulations. Finally, CARB did not demonstrate that its requiring electric vehicles would be at least as protective of public health and welfare as the EPA's existing standards. On these grounds, the Waiver Request must be denied.

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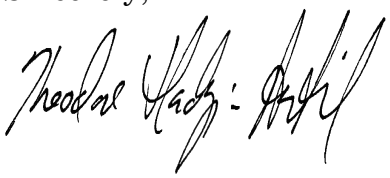
1 Final Environmental Analysis for the Advanced Clean Car II Program p. 33 (accessed on 2/15/2024 at https://ww2.arb.ca.gov/rulemaking/2022/advanced-clean-cars-ii

2 https://environment.ec.europa.eu/topics/waste-and-recycling/batteries_en

3 https://truckingresearch.org/2022/05/new-atri-research-quantifies-the-environmental-impacts-of-zero-emission-trucks/

Sincerely,



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