

# Congress of the United States

Washington, DC 20510

February 27, 2024

The Honorable Michael S. Regan  
Administrator  
US Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20004

Dear Administrator Regan,

We urge you to reject the California Air Resources Board's (CARB) request for a waiver of preemption under Section 209(b) of the Clean Air Act (CAA) for its Advanced Clean Cars II (ACC II) regulations. Granting a waiver for this radical regulation is legally suspect and does not conform with the process for past waivers granted to the state for previous regulations. Worse, administratively permitting California a waiver of its administratively created requirements would forcibly transform the national auto market and limit purchasing options to expensive electric vehicles (EV), which most Americans and Californians do not want and cannot afford. Further, granting this waiver will make the United States more reliant upon China for the critical minerals needed for EV batteries, adding cost and instability to the EV supply chain. Finally, approving the ACC II waiver request clearly runs afoul of multiple provisions of the CAA, the Energy Policy and Conservation Act (EPCA), and would be inconsistent with statements that you have made before Congress.

Under ACC II, California imposes unrealistically stringent requirements on manufacturers to sell a growing percentage of new, zero-emission vehicles (ZEVs) as part of their fleet sales into the California market. The mandate would start by requiring 35 percent of fleet sales consist of ZEVs in model year 2026 and ultimately reach 100 percent in 2035. This explicit ban on new internal combustion engine (ICE) and gasoline-hybrid vehicles after 2035 will disparately impact low-income Americans by limiting their new vehicle options to ZEVs, which are 33 percent more expensive than the average non-luxury vehicle.<sup>1</sup>

The Biden Administration, California, and other ZEV proponents claim that ZEV prices will reach parity with ICE vehicles within the next few years. Based on the current experience of manufacturers curtailing targets for ZEV production, dealers holding surplus ZEV inventory, and a lack of willing buyers, it appears this claim only holds up if non-ZEV prices are significantly increased to offset ZEV sales losses.<sup>234</sup>

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<sup>1</sup> Sean Tucker, *Average New Car Price Falls Below Sticker for First Time in Almost 2 Years*, Kelley Blue Book, Apr. 13, 2023, <https://www.kbb.com/car-news/average-new-car-price-falls-below-sticker-for-first-time-in-almost-2-years/>.

<sup>2</sup> Jack Ewing, *Automakers Delay Electric Vehicle Spending as Demand Slows*, The New York Times, Nov. 7, 2023, <https://www.nytimes.com/2023/11/07/business/energy-environment/electric-vehicles-sales.html>.

<sup>3</sup> Mike Colias, *GM Scales Back EV Plans as Buyers Hesitate*, The Wall Street Journal, Oct. 24, 2023, <https://www.wsj.com/business/autos/general-motors-gm-q3-earnings-report-2023-5064f4c2>.

<sup>4</sup> Noah Bressner, *Inside America's Electric Vehicle Whiplash*, Axios, Jan. 19, 2024, <https://www.axios.com/2024/01/19/ev-cars-ford-lightning-gm-chevy-blazer-cuts>.

Importantly, the high price of ZEVs is dictated by the costs of critical minerals needed for batteries and other ZEV components, most of which are produced and refined abroad, led by China. Current projections show that demand for critical minerals will greatly increase should ZEV mandates such as California's be enacted. Perversely, this increased materials demand is occurring just as domestic production of these materials is lagging the Biden Administration's electrification policy goals.<sup>5</sup> Without a significant and unforeseen sea change in domestic and allied production, supplies, processing, and costs, it is unreasonable to assume that costs and availability of ZEVs will, on their own, reach parity with ICE vehicles over the timelines in ACC II.

Setting aside the unachievable economics of the proposal, the California waiver provisions in CAA section 209 were never intended to address global climate change. Instead, these provisions were designed to assist California in addressing serious and chronic in-state criteria air pollutant issues, such as those related to ozone and particulate matter (PM). CAA section 209 expressly preempts certain state and local standards on mobile sources, including vehicle emissions.<sup>6</sup> However, due to California's extraordinarily poor air quality related to smog<sup>7</sup> at the time that Section 209 was enacted, California was the only state Congress gave the ability to apply for a waiver from preemption.<sup>8</sup> Significantly, California's waiver request support document acknowledges addressing serious local pollution issues was the reason for the waiver's origin.<sup>9</sup> Until 2005, California had requested waivers for regulations that directly regulate criteria air pollutants, in line with the original congressional intent of section 209. It was not until December of 2007, when the State sought to use a novel expansion of the waiver to regulate greenhouse gas emissions, that the EPA denied a California waiver request for the first time.<sup>10</sup>

The subject of the waiver at issue is not criteria air pollutants but greenhouse gases.

Looking specifically at Congress's direct instructions regarding the waiver in the CAA, approving the California Waiver request for ACC II, as finalized, would be inconsistent with the requirements of Section 209(b)(1)(A)-(C).

California has not proven any uniquely Californian impacts from greenhouse gas emissions are sufficient to justify that ACC II is necessary to meet "*compelling and extraordinary conditions*." Yet, California moves forward with a rule that not only limits purchase options for vehicles, but also costs workers' jobs in other states that have not adopted the California vehicle standards.

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<sup>5</sup> U.S. Department of the Interior and U.S. Geological Survey, *Mineral Commodity Summaries 2023*, <https://pubs.usgs.gov/periodicals/mcs2023/mcs2023.pdf>.

<sup>6</sup> Clean Air Act (CAA), 42 U.S.C. § 7543(a).

<sup>7</sup> Smog refers to a mixture of criteria pollutants largely made up of ground level ozone.

<sup>8</sup> CAA, 42 U.S.C. § 7543(b).

<sup>9</sup> Letter from Steven S. Cliff, CARB, dated May 22, 2023, EPA-HQ-OAR-2023-0292. The ACC II Waiver Support Document, attached to the letter from Mr. Cliff, are both available at EPA-HQ-OAR-2023-0292. <https://www.regulations.gov/document/EPA-HQ-OAR-2023-0292-0034> at 36.

<sup>10</sup> Letter from Administrator Stephen L. Johnson to the Honorable Arnold Schwarzenegger (Dec. 19, 2007), <https://www.epa.gov/sites/default/files/2016-10/documents/20071219-slj.pdf>.

Last year, Stellantis put 3,600 workers in Ohio and Michigan on notice that they could lose their jobs if the EPA approves the California waiver request.<sup>11</sup>

Section 209(b)(1)(B) of the CAA prohibits the Administrator from granting a waiver request if the Administrator finds that “such State does not need such State standards to *meet compelling and extraordinary conditions* [emphasis added] ...”.<sup>12</sup> First, ACC II will not result in a material reduction of global greenhouse gas emissions. According to the CARB’s waiver support document, ACC II regulations will result in a total of 395.1 million metric tons (MMT) of avoided carbon dioxide-equivalent (CO<sub>2e</sub>) emissions over the course of 15 years.<sup>13</sup> This 15-year total, would offset just 0.724 percent of total global CO<sub>2e</sub> emissions in 2021 alone.

As such, climate change is a global issue, and any benefits that may result from California’s avoidance of greenhouse gas emissions will be diluted across the world and does not fulfill any public health or environmental imperative within the jurisdiction of California, which accounts for a mere 0.48 percent of the global population.<sup>14</sup> We note there is nothing in ACC II that could guarantee these projected emissions reductions would not be offset by emissions increases in other countries – and likely will be from China’s increasing greenhouse gas emissions. Moreover, the CARB has provided no evidence that its projected CO<sub>2e</sub> emissions reductions from ACC II regulations will reduce global temperatures or prevent impacts from global climate change. No reasonable person would interpret such a *de minimis* avoidance of global greenhouse gas emissions to be “*compelling and extraordinary*” to the state of California.

Second, the words “such state” needing “such state standards” to “*meet compelling and extraordinary conditions*” in Section 209(b)(1)(B) requires a unique, state-specific link between the emissions, the pollution, and the material impacts of that pollution. The use of the word “such” adds specificity to the state (California) and to the contents of the standards that the state must need. The words “*compelling and extraordinary*” indicate that the conditions must be overwhelming, and remarkable or unique. And the word “meet” requires that the standard adequately address the conditions. In other words, California must need the specific contents of the California standards to address overwhelming and unique air pollution issues. If California’s conditions are not unique or sufficiently disparate from conditions across the country, it cannot justify that California *needs such California standards*.

California’s ACC II is also disqualified from being granted a waiver under Section 209(b)(1)(A) because California’s public health protectiveness determination is arbitrary and capricious. In its analysis, the CARB chose to ignore certain lifecycle emissions for ZEVs that were considered for ICE vehicles. This was meant to thumb the scale in favor of ZEVs for purposes of cost-benefit analysis. It projected significant PM emission reductions, without examining increased PM emissions from increased tire wear rates that would result from mandating significantly

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<sup>11</sup> *California Kills Auto Jobs in Toledo*, The Wall Street Journal, Dec. 11, 2023, [https://www.wsj.com/articles/california-kills-auto-jobs-in-toledo-electric-vehicle-mandate-15c44a5c?mod=MorningEditorialReport&mod=djemMER\\_h](https://www.wsj.com/articles/california-kills-auto-jobs-in-toledo-electric-vehicle-mandate-15c44a5c?mod=MorningEditorialReport&mod=djemMER_h).

<sup>12</sup> CAA, 42 U.S.C. § 7543(b)(1)(B).

<sup>13</sup> CARB, *supra* note 7.

<sup>14</sup> U.S. Census Bureau, *Quick Facts California*, <https://www.census.gov/quickfacts/fact/table/CA/PST045223> (Last visited Feb. 16, 2024).

heavier ZEVs.<sup>15</sup> ZEVs also face a wide array of issues that were unaccounted for in California’s analysis that will impede consumer adoption such that the ACC II mandates are unachievable. These include, a lack of accessible and operational charging infrastructure, significantly reduced performance in extreme temperatures, and impacts on grid reliability likely to result from increased demand on the electric system to charge ZEV batteries. The CARB did not fully consider the facts and circumstances of this action, and arbitrarily disregarded reasonable and important facts in its request for a waiver. As a result, the state’s waiver request should not be granted because under Section 209(b)(1)(A) of the Clean Air Act the request is arbitrary and capricious.

Additionally, granting the waiver raises potential violations of the “major questions doctrine.” The major questions doctrine dictates “a clear statement is necessary for a court to conclude that Congress intended to delegate authority of this breadth to regulate a fundamental sector of the economy.”<sup>16</sup> A policy decision of this magnitude would qualify as a “major question,” due to its nationwide economic and political significance, yet the authority for a ZEV mandate is not clearly stated in Section 209 or 202 of the Clean Air Act. Section 209(b)(1)(C) prohibits the Administrator from granting a waiver request if it is found that “such state standards and accompanying enforcement procedures are not consistent” with Section 202(a) of the CAA.<sup>17</sup> Section 202(a) authorizes the EPA—not California—to set nationwide emission standards.<sup>18</sup> But it does not clearly state that EPA is allowed to establish specific vehicle technology sales mandates, as the ACC II regulations do with regard to ZEV sales mandates.

Approving California’s request for a waiver of preemption for its ACC II regulations would also be unlawful under the EPCA, which preempts states from adopting or enforcing regulations related to a fuel economy standard. Setting fleetwide fuel economy standards is an interstate commerce issue and is statutorily the purview of the National Highway Traffic Safety Administration (NHTSA) through its Corporate Average Fuel Economy (CAFE) standards program.

Finally, in a Congressional hearing in May 2023, you were asked if you support a ban on new ICE vehicles starting in 2035. You responded, “No. Not at all.”<sup>19</sup> The ACC II regulations ban new ICE vehicles in 2035, in no uncertain terms, and approving such a waiver would be contrary to commitments you previously made to Congress.

In conclusion, we urge you to reject California’s waiver request. California’s waiver for ACC II regulations would result in significant negative consequences not only for Californians, but for

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<sup>15</sup> Emission Analytics, *Gaining Traction, Losing Tread Pollution From Tire Wear Now 1,850 Times Worse Than Exhaust Emissions*, <https://www.emissionsanalytics.com/news/gaining-traction-losing-tread#:~:text=The%20headline%20conclusion%20we%20draw,previous%20figure%20for%20aggressive%20driving> (last visited Feb. 16, 2024).

<sup>16</sup> *West Virginia v. EPA*, 597 U.S. \_\_\_ (2022) (internal quotation marks removed).

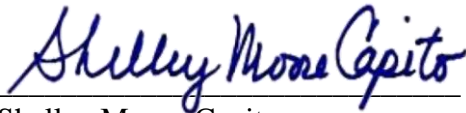
<sup>17</sup> CAA, 42 U.S.C. § 7543(b)(1)(C).

<sup>18</sup> CAA, 42 U.S.C. § 7543(a).

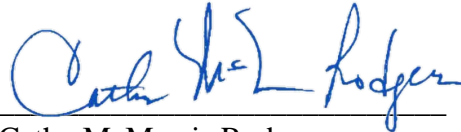
<sup>19</sup> *Hearing on the Fiscal Year 2024 Environmental Protection Agency Budget: Hearing Before the House Energy and Commerce Subcommittee on Environment, Manufacturing, and Critical Materials*, 118<sup>th</sup> Cong. (May 10, 2023), <https://energycommerce.house.gov/events/environment-manufacturing-and-critical-materials-subcommittee-hearing-the-fiscal-year-2024-environmental-protection-agency-budget>.

American workers and consumers, including those living in states that have not adopted the California vehicle standards. Approving the waiver is clearly prohibited by all three subparagraphs under Section 209(b)(1), as well as the EPCA. And it would be contrary to statements that you have made before Congress. We remind you that Congress is the branch of government that delegates your agency's regulatory authority and defines its scope. We urge you to follow the law and stand by your commitments to Congress in resolutely denying this backdoor national ZEV mandate being pursued by a single state.

Sincerely,



Shelley Moore Capito  
Ranking Member  
Environment & Public Works Committee



Cathy McMorris Rodgers  
Chair  
Committee on Energy & Commerce



Markwayne Mullin  
United States Senator



John Joyce, M.D.  
Member of Congress