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States target EPA's revival of California Clean Air Act waiver

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The California Air Resources Board's Arie Jan Haagen-Smit Laboratory, where emissions from thousands of cars, motorcycles and other vehicles are tested each year, in El Monte, Calif., Sept. 25, 2015. | New York Times News Service

On May 12, seventeen states filed a petition for review of EPA's decision to reinstate California's authority to set its own motor vehicle emissions standards. The petition was filed in the U.S. Court of Appeals for the D.C. Circuit. The states intend to argue that the Clean Air Act's provision allowing California – and only California – to set its own emissions standards is unconstitutional because it gives California "special treatment." Twelve of the seventeen states recently made that argument in another pending lawsuit addressing the Clean Air Act's so-called waiver provision. California, nineteen other states, the District of Columbia, and two cities have already moved to intervene in the D.C. Circuit case in support of EPA's decision.

The states' challenge comes as the Biden administration moves to advance its environmental and climate agenda through executive action, in part by rolling back numerous Trump administration actions. Other recent federal environmental and safety actions have attracted challenges from Republican attorneys general, including EPA's own revised greenhouse gas (GHG) emissions standards for motor vehicles, the COVID-19 vaccine requirements for healthcare workers and federal contractors, and federal agencies' consideration of the social cost of carbon. Decisions in these cases could reshape key rules, including ones governing agencies' authority and courts' deference to agencies, and impact the Biden administration's agenda on climate and the environment.

EPA has granted waivers to California nearly continuously since the Clean Air Act was enacted in 1970. If the waiver provision is ultimately struck down, California could permanently lose the ability to enforce its own emissions standards for motor vehicles. Because the Clean Air Act (CAA) is EPA's primary tool to combat climate change, judicial limits on EPA's authority under that law could also significantly inhibit its substantive authority to act on climate.

I. EPA's waiver authority

EPA derives its authority to regulate GHG emissions from motor vehicles from the CAA. 42 U.S.C. §§ 7401-7626. The CAA's Section 209 prohibits states from enacting emissions standards and other emissions-related requirements for new motor vehicles and engines by expressly preempting any state standards. 42 U.S.C. § 7543(a). However, the CAA creates an exemption from federal preemption for California, allowing it to seek a waiver from EPA to implement its own standards. The CAA included the California waiver provision in recognition of California's uniquely severe air pollution problems and because California already had an emissions control program for motor vehicles.

EPA may deny California's waiver request only if it determines that any of three conditions are met: that California's standards are not at least as protective as federal standards; that California does not need the standards to meet compelling and extraordinary conditions; or that California's standards and enforcement procedures conflict with

federal standards. Id. § 7543(b)(1).

The CAA's Section 177 also allows other states to adopt and enforce California's emissions standards. 42 U.S.C. § 7507. States do not require EPA's approval to become a so-called "Section 177 state."

II. California's waiver

EPA has approved waivers for California for nearly the entire history of the Clean Air Act. Since 1970, California has submitted more than 100 applications to EPA for either new waivers or for clarification that regulatory changes fell under existing waivers. In 2007, during the George W. Bush administration, the Supreme Court ruled that GHGs fall within the CAA's definition of "air pollutant," confirming EPA's authority to regulate their emissions. *Massachusetts v. EPA*, 549 U.S. 497, 529 (2007). Before EPA established federal GHG emissions standards for motor vehicles, California applied for a waiver to allow it to set its own. In March 2008, EPA denied California's request.

After the administration changed, EPA reconsidered its waiver denial. In May 2009, the Obama administration, acting through EPA and the National Highway Traffic Safety Administration (NHTSA), reached an agreement with the auto industry and California to harmonize GHG standards for model years (MYs) 2012-2016, with the understanding that California would adopt the same standards to avoid the implementation of two different GHG emissions standards. Accordingly, in July 2009, EPA granted California's waiver request to set its own GHG standards for MYs 2009 to 2016. 74 Fed. Reg. 32744 (July 8, 2009). EPA and NHTSA put these "Phase I" federal emissions standards in place in May 2010 through joint rulemakings for MY 2012-2016 light-duty motor vehicles. 75 Fed. Reg. 25324 (May 7, 2010).

In 2013, EPA granted California its most recent waiver, allowing the state to set GHG standards for MY 2015 through MY 2025 as part of its Advanced Clean Cars (ACC) program. 78 Fed. Reg. 2112 (Jan. 9, 2013). EPA's decision reiterated that the CAA's language "allow[s] California to promulgate individual standards that, in and of themselves, might not be considered needed to meet compelling and extraordinary circumstances, but are part of California's overall approach to reducing vehicle emissions to address air pollution problems." Id. at 2127. It noted that this approach was consistent with congressional intent to give California "the broadest possible discretion to address air pollution problems, "whether or not those problems are local or regional in nature…." Id. at 2128.

III. Recent events

On September 27, 2019, during the Trump administration, EPA and NHTSA finalized the SAFE I rule. 84 Fed. Reg. 51310 (Sept. 27, 2019). With its part of the rule, EPA revoked the 2013 waiver of preemption as to the GHG emissions standards and zero-emissions vehicle mandate within California's ACC program. After the revocation, a number of automakers – BMW, Ford, Honda, Volkswagen, and Volvo – reached voluntary agreements with California to continue to follow stricter GHG emissions standards despite the rollback of federal standards. In exchange, California and the other states enforcing California's standards agreed not to pursue enforcement actions against those companies except through the agreements.

In April 2021, under the Biden administration, EPA announced it would reconsider its withdrawal of the 2013 waiver. 86 Fed. Reg. 22421 (Apr. 28, 2021). On March 14, 2022, EPA rescinded the 2019 withdrawal, again allowing California to enforce its own GHG emissions standards for motor vehicles. The decision recommitted EPA to the "traditional interpretation" of CAA section 209(b), finding that California has a compelling need for its own GHG emissions standards, in part because standards to address GHG emissions also helped California reduce other kinds of pollution, such as emissions from gasoline production and refineries. 87 Fed. Reg. 14332, 14334-36.

IV. The states' challenge

On May 12, 2022, the states of Alabama, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Utah, and West Virginia filed a petition for review in the D.C. Circuit challenging EPA's reinstatement of California's waiver. The petition for review does not include any explanation of the states' legal argument.

Twelve of the states, however, recently filed a motion in the still-pending lawsuit challenging EPA's 2019 withdrawal of California's waiver as part of the now-rescinded SAFE I rule. The motion previews the states' argument in the new challenge: "that Congress has no power to treat California as possessing greater sovereignty than the rest of the States." It argues that "the equal-sovereignty question . . . has dogged California's special status for years."

The states that moved to intervene in support of California's waiver argue that if the waiver provision is struck down, they would lose their current ability under Section 177 to enforce California's motor vehicle emissions standards. The states argue that without the waiver provision, they would suffer from worse air pollution and more severe effects from climate change. Further, they would have to revise their state plans to meet national air quality standards to compensate for their inability to rely on reduced motor vehicle emissions by adding other pollution control measures.

Section 209(b), allowing for California's waiver, has existed since President Nixon signed the Clean Air Act in 1970. No court has ever held that this provision, which has been in near-constant use since 1970, is unconstitutional. The states' motion acknowledges the breadth of its claim, arguing that "the magnitude of a legal wrong is no reason to perpetuate it." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2480 (2020).

If the courts ultimately strike down the waiver provision, California could permanently lose the ability to enforce its own emissions standards for motor vehicles. That could herald a trend of judicial repudiation of EPA action on climate and other environmental issues.

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