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U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
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RE: Comments Submitted by the American Fuel & Petrochemical Manufacturers on California State Motor Vehicle Pollution Control Standards; Advanced Clean Cars II Regulations; Request for Waiver of Preemption; Opportunity for Public Hearing and Public Comment, 88 Fed. Reg. 88,908 (Dec. 26, 2023)

EPA-HQ-OAR-2023-0292

Submitted online via http://www.regulations.gov

The American Fuel & Petrochemical Manufacturers ("AFPM") appreciates the opportunity to comment on the U.S. Environmental Protection Agency's ("EPA" or "Agency") on California State Motor Vehicle Pollution Control Standards; Advanced Clean Cars II Regulations; Request for Waiver for Preemption ("waiver request").[1] In short, EPA should not grant the waiver request because California has not met the legal standard to do so and applying a patchwork approach to a global challenge would not be sound energy or environmental policy.

AFPM is a national trade association whose members own and operate most of the United States' refining and petrochemical manufacturing capacity. AFPM supports sound policies that enable our members to supply the fuel and petrochemicals that growing global populations and economies need to thrive, and to do so in an environmentally sustainable way. Global emission reductions will not be achieved by political rhetoric or hyperbole. In that regard, there is no such thing as a Zero Emission Vehicle ("ZEV"). While ZEVs have no tailpipe emissions, they have significant direct and indirect emissions during charging and other phases of their lifecycle.[2]

[1] California State Motor Vehicle Pollution Control Standards; Advanced Clean Cars II Regulations; Request for Waiver of Preemption; Opportunity for Public Hearing and Public Comment, 88 Fed. Reg. 88,908 (Dec. 26, 2023).

[2] As discussed *infra* pages 10–11 in AFPM's Comments, ZEVs cause criteria pollutant and greenhouse gas ("GHG") emissions and environmental impacts throughout their lifecycle, including from minerals mining, component production, assembly, electricity generation, and other processes. *See, e.g.*, Reuters, *This is How Many Kilometres It Takes for an EV to Become Cleaner Than a Petrol Car* (June 29, 2021) ("Jarod Cory Kelly, principal energy systems analyst at Argonne, said making EVs generates more carbon than combustion engine cars, mainly due to the extraction and processing of minerals in EV batteries and production of the power cells."), https://www.timeslive.co.za/motoring/features/2021-06-29-this-is-how-many-kilometres-it-takes-for-an-ev-to-become-cleaner-than-a-petrol-car/.

AFPM supports technology-neutral, free market solutions that provide consumer choice for purchasing vehicles, including electric vehicles ("EVs"). However, AFPM opposes government mandates for EVs and subsidies that create an unlevel playing field and fail to achieve cost-effective emission reductions.[3] The consumer stands in the best position to determine how much efficiency and other vehicle features should factor into vehicle selection. Absent government mandates, manufacturers produce vehicles responsive to consumer needs, including, but not limited to sticker price, vehicle performance, time spent refueling, the ability to refuel, passenger capacity, cargo capacity, vehicle range, aesthetics, resale value, maintenance costs, insurance premiums, safety, or other configuration options. There is no reason to believe that manufacturers would not respond to consumer demand for greater fuel efficiency and reduced emissions.

Consistent with these positions, AFPM submits the following comments in opposition to California's waiver request.

COMMENTS

As a threshold matter, Section 209(b) of the Clean Air Act ("CAA" or "Act") is unconstitutional—both on its face and as California asks for it to be applied here—and thus no preemption waiver can be awarded under it. The Equal Sovereignty Doctrine presumes that federal laws will not favor or disfavor different states. Yet Section 209(b) affords *only California* the opportunity to develop and adopt its own vehicle emission standards, an authority withheld from every other state. The Constitution does not permit this deviation.

Even so, the Advanced Clean Cars II Regulations ("ACC II") preempted under the CAA because they do not qualify for a waiver under Section 209(b) of the Act. Under that provision, EPA cannot grant California a preemption waiver if (1) California's determination regarding ACC II is arbitrary and capricious, (2) California "does not need" ACC II to meet "compelling and extraordinary conditions," or (3) California's standards and the accompanying enforcement procedures are not consistent with Section 202(a) of the CAA, 42 U.S.C. § 7521(a).[4]

ACC II fails to meet *any* of the aforementioned criteria. To start, a wholly different federal statute preempts this regulation. ACC II is void as a matter of law. California cannot "need" standards that are separately preempted by a different statute, and EPA's approval of a facially invalid state regulation would inherently be arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.[5] Even digging into each of the three statutory requirements (and the state regulation must meet all three), ACC II fails at each step. California's determination that ACC II is as protective as federal standards was arbitrary and capricious, as the state's analysis was incomplete and illegal under California law. The state failed to demonstrate it "needs" ACC II to address "compelling and extraordinary conditions." The state's local air pollution analysis

[3] *See, e.g.*, Todd Johnson, ConservAmerica, *Slow Down: The Case for Technology Neutral Transportation Policy* (Dec. 2020), https://static1.squarespace.com/static/5d0c9cc5b4fb470001e12e6d/t/5fd1580999fe644e8a504a54/1607555090612/CA+Tech+Neutral+Paper+-+12.20+%281%29.pdf.

[4] *See* 42 U.S.C. § 7543(b)(1)(A)–(C).

[5] *See* 5 U.S.C. § 706(2).

was deficient, and greenhouse gas ("GHG") emissions, by nature, are not a local problem. And ACC II is not consistent with Section 202(a) of the CAA—thereby violating the third statutory requirement in CAA Section 209(b)(1). We discuss these issues in greater detail in Section III, *infra*.

I. Statutory Overview

Under Section 202(a) of the CAA, EPA has authority to promulgate standards for the "useful life" of vehicles "applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines which in [its] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[6] The Act preempts all state and local regulation(s) of emissions—including emissions-averaging—from new motor vehicles or new motor vehicle engines.[7]

The Act provides an exception to this preemption in Section 209(b) of the Act.[8] EPA shall waive applying such preemption for California if,[9] "after notice and opportunity for public hearing . . . 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." But "[n]o . . . waiver shall be granted if" the Agency finds that: "(A) the determination of the State is arbitrary and capricious, (B) such State does not need such State standards to meet compelling and extraordinary conditions, or (C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title [i.e., Section 202(a) of the CAA]" (collectively the "waiver criteria").[10]

II. Clean Air Act Section 209(b) is Unconstitutional.

Section 209(b) of the CAA violates the Equal Sovereignty Doctrine by allowing California to exercise sovereign authority that Section 209(a) takes away from every other state. The statute effects an "extension of the sovereignty of [California] into a domain of political and sovereign power of the United States from which the other States have been excluded."[11]

Under the Equal Sovereignty Doctrine, federal laws that affect state sovereignty must be applied equally; a state may not be singled out for differential treatment unless it is justified by current needs and "sufficiently related to the problem that it targets."[12] Thus, while Congress may

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[6] 42 U.S.C. § 7521(a)(1).

[7] *Id.* § 7543(a).

[8] *See id.* § 7543(b)(1).

[9] *See Motor & Equip. Mfrs. Ass'n, Inc. v. EPA* (*MEMA I*), 627 F.2d 1095, 1100–01 (D.C. Cir. 1979) (discussing how the statute's text "any State which has adopted standards . . . for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966" effectively only refers to California because it was the only state which adopted such standards); *see also* S. Rep. No. 90-403, at 19,182 (1967).

[10] 42 U.S.C. § 7543(b)(1)(A)–(C).

[11] *United States v. Texas*, 339 U.S. 707, 719–20 (1950), *superseded by statute*.

enact laws that limit state sovereignty equally but affect states differently, Congress may not enact statutes that disparately impact states' sovereign authority.[13] As the Supreme Court has explained, disparate treatment is permissible only after "a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[14]

Concerns surrounding equal sovereignty arise where a statute (1) "single[s] out certain states for disparate treatment" and (2) "effect[s] a federal intrusion into a sensitive area of state or local policymaking."[15] CAA Section 209(b) does both.

First, Section 209(b)—and any waiver granted to California under it—singles out California for disparate treatment. Not only does Section 209(b) grant California an authority denied to every other state (that of designing its own motor vehicle emissions program), but because Section 177 allows other states to adopt only California's standards, it gives California authority to set rules for almost the entire nation if other states choose to adopt California's regulations.[16]

Second, environmental legislation falls under the police power historically reserved to *all* states.[17] The "Congressional findings and declaration of purpose" of the CAA recognize that "air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments."[18] This has been reiterated in numerous cases, including by the Supreme Court: "Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power."[19]

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[12] *Shelby Cnty. v. Holder*, 570 U.S. 529, 550–51 (2013) (citing *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

[13] *See Texas*, 339 U.S. at 716.

[14] *Nw. Austin*, 557 U.S. at 203.

[15] *See Mayhew v. Burwell*, 772 F.3d 80, 93 (1st Cir. 2014).

[16] *Id.* § 7507.

[17] *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("In all pre-emption cases, and particularly in those [where] Congress has legislated . . . in a field which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (internal quotations and citations omitted)).

[18] 42 U.S.C. § 7401(a)(3).

[19] *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960). While Congress has the power to regulate air pollution under the Commerce Clause, under *Shelby County*, such does not make EPA's implementation of Section 209(b) any less of an intrusion into an area traditionally regulated by states, or any less of a violation of equal sovereignty. *Shelby County* distinguishes between a law that applies to *all states* but impacts some more than others and a law that disparately applies to *some states and not others*. 570 U.S. at 542; *see also Mayhew*, 772 F.3d at 95 ("Federal laws that have differing impacts on different states are an unremarkable feature of, rather than an affront to, our federal system.").

Such disparate treatment can only be "justified by 'exceptional' and 'unique' conditions," and the conditions animating Section 209(b) do not come close to qualifying.[20] The limited instances in which the Supreme Court has permitted deviations from equal sovereignty principles involve an explicit grant of constitutional authority for disparate treatment.[21] The Constitution gives Congress no such authority in relation to environmental laws. EPA establishes *national* ambient air quality standards ("NAAQS") for all states, not just California, and California is not the only state struggling to attain these national standards, which are periodically reviewed and have been reset at progressively more stringent levels. In any event, the present waiver request proves this point because it, in large part, focuses on the relationship between GHG emissions and climate change, a "global" issue.[22] EPA or individual state authority/ability to adopt NAAQS standards cannot apply to a ubiquitous globally-mixed concentration of GHG emissions, of which more than 90 percent originate outside of the United States.[23] Nor is allowing California to set national emissions policy a "tailored . . . remedy" for local concerns.[24] It is instead an unjustified and "extraordinary departure from the traditional course of relations between the States and the Federal Government."[25]

III. ACC II Does Not Qualify for a Preemption Waiver.

EPA should deny California's waiver request because ACC II is preempted by the Energy Policy & Conservation Act (EPCA), which disallows states to "adopt or enforce" such policy. Furthermore, ACC II fails to satisfy the waiver criteria of CAA Section 209(b). First, California failed to consider numerous factors in its ACC II rulemaking, rendering the state's determination that ACC II is "at least as protective" as the federal standards arbitrary and capricious. Second, California does not "need" ACC II to address any "compelling and extraordinary condition." Third, ACC II is not consistent with CAA Section 202(a), which requires a far more robust assessment of costs and benefits.

At minimum, EPA should delay consideration of the waiver until the case in front of the U.S. Court of Appeals for the District of Columbia Circuit, *Ohio v. EPA*, No. 22-1081 (D.C. Cir. filed May 12, 2022), is resolved since several of the issues raised in these Comments appear in this litigation. The case was argued on September 15, 2023, and the D.C. Circuit should issue its decision shortly.

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[20] *Shelby Cnty.*, 570 U.S. at 555 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 334, 335 (1966)).

[21] *See, e.g., id.* at 536 (invoking Congress's authority under Section 2 of the Fifteenth Amendment).

[22] *City of New York v. Chevron Corp*., 993 F.3d 81, 88 (2d Cir. 2021). And to the extent the request addressed criteria pollutants, California's analysis has been defective for the reasons explained *infra* pages 9–11 and pages 15–19.

[23] U.S. GHG emissions of 5.59 billion metric tons (6.16 billion US tons) in 2021 were 9.7% of global GHG emissions. *See* U.N. Framework Convention on Climate Change, *Time Series - Annex I, National Emission Inventories*, "GHG total with LULUCF" for inventory year 2021 (last visited Feb. 26, 2024), https://di.unfccc.int/time_series.

[24] *Shelby Cnty.*, 570 U.S. at 550.

[25] *Id.* at 545 (quoting *Presley v. Etowah Cnty. Comm'n*, 502 U.S. 491, 500–01 (1992)).

A. Because EPCA Preempts ACC II, Granting the Waiver Request Would Be Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law.

It is foundational to administrative law that agencies must engage in reasoned decision-making. ACC II is legally invalid because EPCA preempts ACC II—California's regulation is "related to fuel economy standards" and federal "average fuel economy standards."[26] Since ACC II is *void ab initio*, there is nothing for EPA to approve in the first place. Waiving Clean Air Act preemption for a state law that is facially invalid, and thus void, under a separate federal statute would reach the height of unreasonable agency decision-making, i.e., "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[27]

EPCA expressly preempts states from "adopt[ing] or enforce[ing]" any law or regulation "related to" vehicle-fuel economy, whether or not EPA grants a Section 209 waiver for such law/regulation.[28] The Supreme Court has noted that the term "related to" has a "broad scope,"[29] is "deliberately expansive,"[30] and "conspicuous for its breadth."[31] The EPCA preemption provision's breadth derives from its plain meaning: "related" means "connected in some way; having relationship to or with something else."[32] And unlike the Clean Air Act, there is no preemption waiver authority granted to any federal agency, neither the Department of Transportation, and certainly not EPA.

EPCA preempts states laws such as ACC II, which *directly* or *substantially* affect corporate average fuel economy, since such laws lie at the preemption clause's core under any reasonable reading of "related to."[33] In a 2006 rulemaking, the National Highway Traffic Safety Administration ("NHTSA") concluded that state GHG regulations are "expressly preempted" by EPCA because they have "the direct effect of regulating fuel consumption."[34] NHTSA reached the same conclusion over a decade later in the Safer Affordable Fuel-Efficient Vehicles Rule Part

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[26] 49 U.S.C. § 32919(a).

[27] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*. (*State Farm*), 463 U.S. 29, 41 (1983).

[28] 49 U.S.C. § 32919(a) ("When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of 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 under this chapter.").

[29] *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 384 (1992).

[30] *Pilot Life Ins. Co, v. Dedeaux,* 481 U.S. 41, 46 (1987).

[31] *FMC Corp. v. Holliday,* 498 U.S. 52, 58 (1990); *accord Shaw v. Delta Air Lines, Inc.,* 463 U.S. 86, 97 (1983) (concluding that a state law "relates to" a federal law if it has a connection with or "refers to" the subject of the federal law); *Cal. Rest. Ass'n v. City of Berkeley*, 89 F.4th 1094, 1103 (9th Cir. 2024) (discussing the broad implications of EPCA's preemption language).

[32] *Related,* Black's Law Dictionary (11th ed. 2019); *see also* AFPM, Comments on California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption, at 4 (July 6, 2021), Dkt. I.D. # EPA-HQ-OAR-2021-0257-0139 [hereinafter AFPM, 2021 Waiver Comments, also provided as Attachment A].

[33] 84 Fed. Reg. 51,310, 51,313 (Sept. 27, 2019).

[34] 71 Fed. Reg. 17,566, 17,654 (Apr. 6, 2006).

One.[35] ACC II is far more connected to fuel economy than just any "greenhouse gas regulation," about which NHTSA already expressed preemption concerns. Put bluntly, there can be no more direct regulation of fuel consumption than prohibiting a vehicle from consuming *any* fuel.[36] Because EPCA preempts ACC II on its face, there is no rational basis EPA could provide for granting the waiver request.[37]

EPA cannot simply avoid this inconvenient truth by ignoring it when the Agency decides on the waiver request.[38] The Agency cannot "entirely fail[] to consider an important aspect of the problem" before it.[39] The fact that EPA could provide the imprimatur of legitimacy to, open the gates to the adoption of, and present arguable grounds for federal enforcement of facially invalid requirements is undeniably an important problem. Moreover, the obligation to ensure that ACC II is legally valid in the first place is inherent in the waiver criteria. For example, under CAA Section 209(b)(1)(A), unenforceable standards intuitively provide zero public health benefit and, thus, cannot be "at least as protective" as federal standards. In another example, California does not "need" an unlawful standard, which it can never implement; EPA's approval of such a standard would therefore violate Section 209(b)(1)(B).

B. EPA Has an Independent Duty to Separately Evaluate Each Standard Included in the Waiver Request.

CAA Section 209(b) requires EPA to consider *separately* each of the three grounds for denying a waiver request. Textually speaking, each of the three requirements, "(A) the determination of the State is arbitrary and capricious," "(B) such State does not need such State standards to meet compelling and extraordinary conditions," and "(C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title," are

[35] 84 Fed. Reg. at 51,314.

[36] *See, e.g.*, *id.* (discussing how ZEV mandates "requir[e] manufacturers to eliminate fossil fuel use in a portion of their fleet"); *cf.* 49 U.S.C. §§ 32904(a)(2), 32905 (providing for inclusion of EVs' "fuel economy" in calculating corporate average fuel economy). EPCA preempts fuel economy standards regardless of whether the standards are expressed in miles per gallon or some other metric, since Congress intended the preemption provision to apply broadly. *See* AFPM, 2021 Waiver Comments, *supra* note 32, at 5 ("State or local fuel economy standards would be preempted, regardless of whether they were in terms of miles per gallon or some other parameter such as horsepower or weight." (citing S. Rep. No. 93-526)).

[37] Moreover, under the Supremacy Clause of the Constitution, EPA cannot grant a waiver for state regulations that were void the moment they were "adopt[ed]." 42 U.S.C. § 32919(a). The President and his subordinate officers at EPA cannot ignore their responsibility to faithfully execute this constitutional provision. It is not that compliance with 49 U.S.C. § 32919(a) is a prerequisite to receiving a waiver. Rather, it is that under the Constitution's Supremacy Clause, California lacks authority to "adopt" the standards in the first place. *See McCulloch v. Maryland*, 17 U.S. 316, 436 (1819) ("States have no power . . . to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by [C]ongress.").

[38] *See, e.g.*, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2384 (2020).

[39] *State Farm*, 463 U.S. at 43.

connected with the term "or." "Or" connotes a disjunctive list—failure to comply with any one of them would be sufficient grounds in which EPA "shall" not grant any waiver request.[40]

The implication here is simple. Failure to satisfy any one of the three criteria mentioned above compels EPA to deny California's waiver request on ACC II.

Moreover, EPA has an independent duty to ensure that each of the waiver criteria as outlined in Section 209(b)(1) are met. No waiver is granted "if the Administrator finds" against California in any of the above three waiver criteria.[41] The fact that EPA must issue its own "finding" means there is no statutory presumption in favor of California's determinations.[42] In turn, and contrary to California's (and EPA's) assertion otherwise, challengers to ACC II do *not* bear the burden of showing that the waiver criteria have not been met. At best, EPA's findings must reflect typical agency rulemaking procedures, as evinced by the fact that EPA must first undergo typical "notice and opportunity for public hearing."[43] While it is true that the Agency "shall" grant a preemption waiver, that mandate is wholly conditioned on EPA's finding, and the provision that concerns EPA's finding itself reflects no thumb on the scale in favor of California.[44]

C. EPA Should Deny the Waiver Request Because California Arbitrarily and Capriciously Determined that Its Standards are "At Least as Protective" as Federal Standards.

CAA Section 209(b)(1) requires California to determine that California's "standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards."[45] And before granting any waiver request, EPA must evaluate whether California's determination on this issue was "arbitrary and capricious."[46]

Importantly, the plain text of Section 209(b)(1) mandates that California determine whether its proposed regulation is at least as protective of public health "and" welfare as applicable federal standards. "Public health" and "welfare" are distinct terms of art—they are separate, independent issues that California must analyze and did not do so. In any event, the analysis California *did* perform is wholly inadequate because it omits key assumptions and does not grapple with any facts that do not support the state's preferred conclusion. As just one of many examples—discussed in more detail *infra* pages 9–10, California never grappled with the fact that ACC II will cause all

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[40] *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018) ("'[O]r' is 'almost always disjunctive.'" (quoting *United States v. Woods*, 571 U.S. 31, 45 (2013))). *See generally* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116–25 (2012) (discussing the "Conjunctive/Disjunctive Canon").

[41] 42 U.S.C. § 7543(b)(1).

[42] *Cf. NRDC v. EPA*, 808 F.3d 556, 580 (2d Cir. 2015) ("EPA has an independent duty under the CWA to ensure compliance with state and federal water quality standards . . . .").

[43] 42 U.S.C. § 7543(b)(1).

[44] And assuming *arguendo* it does (it does not), such would be further demonstration that Section 209(b) violates the Equal Sovereignty Doctrine, as discussed *supra* pages 3–5, because it would practically abrogate any requirement to demonstrate California is differently situated than other states.

[45] 42 U.S.C. § 7543(b)(1).

[46] *Id.* § 7543(b)(1)(A).

motor vehicles to be more expensive, slowing fleet turnover and keeping older, higher-emitting (and potentially less safe) vehicles on the road longer.

Independently, ACC II is illegitimate under California law for a myriad of reasons. It would be arbitrary and capricious for EPA to greenlight an illegal regulation.

1. Public Health

California's public health analysis is flawed for at least three reasons. First, the state's "public health" determination purports to rely on nitrogen oxide ("NOx") and particulate matter concerns ("PM," the finer particles commonly referred to as "$PM_{2.5}$") but this determination is premised on flawed assumptions. Second, any analysis is set for failure given that the state never conducted a full life cycle analysis of EVs. Third, while California insists that EVs under ACC II are the silver bullet, the state never conducted a comparative analysis as to why simply a lower emission vehicle ("LEV") option would not accomplish public health goals more effectively.

First addressing NOx and PM benefits, an independent review of California's analyses was conducted (the "Trinity Report")[47] and concluded as follows:

- From a procedural standpoint, a large part of California's *supporting data* to reach its conclusions are neither included in the state's ACC II rulemaking website nor provided to EPA.[48] But even from a scientific rigor standpoint, "it should be noted that is not possible to reproduce the CARB [California Air Resources Board] analysis based on the information available."[49]

- Economics would turn the program—and thus any potential public health benefits—on its head. Both ACC II's (1) ZEV mandate and (2) more stringent vehicle tailpipe emissions requirements on internal combustion engine vehicles ("ICEVs") will increase the cost of new vehicles in California,[50] thereby incentivizing imports of older, higher-emitting, vehicles from out of state. In other words, customers are incentivized to hold on to their existing vehicles longer, and thus older, higher-emitting cars remain on the road longer. The resultant decreased "fleet turnover" (and the emissions implications thereof) could

[47] Trinity Consultants, *Critical Review of the Air Quality Basis for California's Request for a Waiver of Preemption for the Zero Emission Vehicle (ZEV) Component of the Advanced Clean Cars II (ACC II) Regulation* (2024) [hereinafter Trinity Report, provided as Attachment B].

[48] *See id.* at 2.

[49] *Id.* at 3.

[50] *See id.* at 2–3. One other reason price increases for new vehicles will worsen under ACC II is because the program's ban on ICEVs effectively removes a cross-subsidization (funding one product with the profits of another) opportunity. To illustrate, vehicle manufacturers use ICEV sales to subsidize, either internally or externally through credits, a reduction in consumer ZEV prices. With such funding redirection no longer possible (because the funding source, i.e., ICEV sales, no longer exists), manufacturers have no option but to present the full price of new vehicles. *See also* Luc Olinga, *Ford Loses Nearly $60,000 for Every Electric Vehicle Sold*, The Street (May 2, 2023), https://www.thestreet.com/technology/ford-loses-nearly-60000-for-every-electric-vehicle-sold.

effectively offset any marginal air quality improvement expected from ACC II—especially when the alternative could have been simply adopting an LEV option policy.[51]

- California inappropriately claimed benefits for reductions in "upstream" emissions, which in 2035 "account for 19% of the overall NOx and 30% of the $PM_{2.5}$ benefits claimed by CARB for the ACC II regulation."[52] The state's analysis overestimated the "upstream" emissions reduction possibilities (such as reducing oil production activity and reduced refinery emissions due to decrease in demand for liquid transportation fuels as a result of ZEV requirements) and their benefits. The data is too old (2017 model), the study does not account for the fact that petroleum and transportation fuels are international commodities (thus production will continue), and no part of ACC II sets up a mechanism to affect such an outcome, or to verify or quantify such reductions occurring in the first place.[53]

- The majority of California's claimed reductions for $PM_{2.5}$ attributable to ACC II are due to reduced exhaust PM emissions and emissions associated with brake and tire wear. But this is flawed because:

    - The state provided *no* quantitative data regarding the relative contributions of these three sources to the claimed reductions in downstream $PM_{2.5}$ emissions;

    - The additional ACC II requirements are unlikely to contribute to the overall claimed $PM_{2.5}$ ambient air quality benefits given the requirements already in effect;

    - The claim that ZEV and plug-in hybrid electric vehicle ("PHEVs") regenerative braking lower brake wear PM emissions fails to account for the substantially heavier EV weight, which is an important factor in brake and tire wear and emissions;

    - The state's assumptions regarding tire wear emissions from ZEVs are not based on ZEV data but lighter conventional vehicles; and

    - California failed to account for potential impacts of ACC II on the "resuspension" of road dust due to such heavier vehicles in the fleet.[54]

Next, California's general assertion that ACC II would reduce *tailpipe* emissions (and therefore public health benefits from such reductions would follow) never accounts for the complete life cycle of EVs and their public health implications.[55] As raised by the Western States

[51] *See* Trinity Report, *supra* note 47, at 5.

[52] *See id.* at 6.

[53] *See id.*

[54] *See id.* at 7–8.

[55] Even the heavier nature of EVs could present inherent safety concerns given the greater collision impact coming from the weight. Because such heavier vehicles would present higher acceleration and longer breaking distances, there is a greater risk of increased on-road accidents, deaths, and property damage—as evinced by EV drivers paying

Petroleum Association ("WSPA") during ACC II's rulemaking process,[56] none of California's documents ever address emissions associated with, as a non-exhaustive list: vehicle material recovery and production, vehicle component fabrication, vehicle assembly, opportunity cost arising from lower vehicle turnover, and vehicle disposal and/or recycling. Such an omission is no trivial matter. "[V]ehicle [life] cycle emissions for a model year 2026 BEV [battery electric vehicle] could be ~167% higher" than an ICEV.[57] EV batteries alone could impose significant public health implications. "Battery production, transport, and disposal or recycling present emissions and waste impacts[] as well as national security concerns."[58] This does not even account for fleet electrification at a massive scale, as envisioned by ACC II, which would force mining virgin material for such batteries.[59]

Finally, supercharging all the concerns raised above, ACC II selected EVs as the technology of choice without even attempting to conduct a comparative analysis for different kinds of vehicles and fuels. For example, low-carbon fuels (like renewable diesel, ethanol, or renewable gasoline) and vehicles that run on such fuels should be evaluated as an alternative because they are *presently* compatible with the existing infrastructure. Before selecting one technology over another, California should have at least examined the public health implications of other available technologies (let alone considered a multi-technology pathway that accounts for a combination of different approaches, which would best reflect reality). The failure to do so renders California's conclusions arbitrary and capricious, running afoul of CAA Section 209's waiver criteria.

2. Welfare

California's waiver request fails to provide any indication that California approached the issue of "welfare" seriously, let alone independently. The term "welfare" is no trivial insertion and certainly cannot be used interchangeably with "public health." As CAA Section 302(h), which applies to any section "in this chapter" including Section 209, states:

> All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and

higher insurance premiums. *See* NPR, *NTSB Head Warns of Risks Posed by Heavy Electric Vehicles Colliding with Lighter Cars* (Jan. 11, 2023), https://www.npr.org/2023/01/11/1148483758/ntsb-heavy-electric-vehicles-safety-risks; Sean McLain, *Why Repairing Your EV is So Expensive*, Wall St. J. (Dec. 3, 2023), https://www.wsj.com/business/autos/ev-repair-expensive-eecf09fd?mod=latest_headlines.

[56] WSPA, *Comments on Advanced Clean Cars II* (May 31, 2022) [hereinafter WSPA's ACC II Comments, provided as Attachment C].

[57] *Id.* at 5.

[58] *Id.* at A-8, A-9.

[59] *Id.* at A-9.

> well-being, whether caused by transformation, conversion, or combination with other air pollutants.[60]

Indeed, EPA has applied this term in many of its federal regulations and standards.[61]

California must make determinations on *both* public health and welfare. Any contrary approach—e.g., the one California took in this instance for ACC II—violates at least three bedrock statutory interpretation principles. First, "[d]efinition sections and interpretation clauses are to be carefully followed,"[62] which is the case for the term "welfare," as expressly defined with hyper-specific interpretive instructions under the "Definitions" section of the CAA.[63] Second, the term "and" is construed as a conjunctive list; all requirements must be satisfied and making a determination on one does not satisfy the other.[64] Third, "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ."[65] "We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning."[66]

California did not conduct its analysis in the above-referenced manner, omitting several of the aforementioned considerations, and thus failing to analyze whether ACC II would be "at least as protective of . . . welfare as applicable Federal standards." While this alone should end the debate, any analysis that California did do was cursory at best—to the point that the state failed to determine the protectiveness of public health or welfare.

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[60] 42 U.S.C. § 7602(h). While this alone sufficiently resolves the issue, it is also enlightening that "[a] term appearing in several places in a statutory text is generally read the same way each time it appears." *Milner v. Dep't of Navy*, 562 U.S. 562, 570 (2011) (quoting *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994)). *See generally* Scalia & Garner, *supra* note 40, at 170–73 (discussing the "Presumption of Consistent Usage," where a term "is presumed to bear the same meaning throughout a text . . . . The presumption . . . applies also when different sections of an act or code are at issue.").

[61] *See, e.g.*, 83 Fed. Reg. 17,226, 17,228 n.3 (Apr. 18, 2018) ("Review of the Primary National Ambient Air Quality Standards for Oxides of Nitrogen"); 84 Fed. Reg. 9866, 9867–68 n.3 (Mar. 18, 2019) ("Review of the Primary National Ambient Air Quality Standards for Sulfur Oxides"); *cf.* 77 Fed. Reg. 20,218, 20,232 (Apr. 3, 2012) (in "Secondary National Ambient Air Quality Standards for Oxides of Nitrogen and Sulfur," applying the definition of "welfare" as provided in CAA Section 302(h) to "categorize effects of pollutants from the cellular to the ecosystem level").

[62] *See generally* Scalia & Garner, *supra* note 40, at 225–33 (discussing the "Interpretive-Direction Canon").

[63] 42 U.S.C. § 7602 ("When used in this chapter [which CAA Section 209 is a part of]").

[64] *See, e.g.*, *United States v. Palomar-Santiago*, 593 U.S. 321, 326 (2021) ("The requirements are connected by the conjunctive 'and,' meaning defendants must meet all three."). *See generally* Scalia & Garner, *supra* note 40, at 116–25 (discussing the "Conjunctive/Disjunctive Canon," where "*and* combines items while *or* creates alternatives. Competent users of the language rarely hesitate over their meaning.").

[65] *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A N. Singer, *Statutes and Statutory Construction* § 46.06 (rev. 6th ed. 2000)); *see also Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'" (quoting *United States v. Menasche*, 348 U.S. 528, 538–539 (1955))). *See generally* Scalia & Garner, *supra* note 40, at 174–79 (discussing the "Surplusage Canon," where "[i]f possible, every word and every provision is to be given effect).

[66] *Bailey v. United States*, 516 U.S. 137, 146 (1995), *superseded by statute*.

Notwithstanding the host of effects California must thus consider when determining whether ACC II will be "at least as protective of . . . welfare as applicable Federal standards," the state's analysis is severely lacking. Just to list a few:

- **Wildfire resilience and low-income communities.** ACC II's EV sales mandate forces electrification and rapid/significant buildup of electricity infrastructure. Such forced electrification exacerbates wildfire risks and worsens wildfire impacts.[67] Low-income communities are disproportionately burdened by wildfire impacts,[68] and environmental justice communities would be most impacted by outages caused by wildfires.[69]

- **$PM_{2.5}$ emissions.** The concern goes beyond what has already been discussed *supra* pages 9–11 as to why California's PM analysis was flawed. A study by Stanford researchers, which modeled the effects of wildfires on ambient air quality, found that wildfire smoke accounts for up to half of all $PM_{2.5}$ emissions exposures in western regions of the United States.[70] By extension, ACC II could increase exposure to $PM_{2.5}$ emissions due to the increased wildfire risk stemming from forced electrification.[71]

- **Questionable emissions reductions.** By contrast, California's analysis on the emissions reduction for the NAAQS is unclear, further discussed *infra* pages 16–19. A discrepancy exists in the emissions figures California claims in the 2022 State Strategy for the State Implementation Plan (pursuant to the CAA) and emissions reductions estimated for ACC II.[72] On top, the data presented to EPA are for the entire state of California—and not specific to the South Coast and San Joaquin Valley Air Basins, despite the fact that California claims ACC II is needed in large part to reduce emissions in these areas, as they are those furthest out of compliance with NAAQS for ozone and $PM_{2.5}$.[73]

- **Other welfare impacts.** The list goes on.[74] Increased electricity demand would place inordinate pressure on an already weak grid. It will likely require constructing more gas units to make up for the intermittency of renewable energy sources (such as wind and solar), and negatively affect biological resources, and increase GHG emissions and criteria pollutants.[75] A ZEV mandate would necessitate more developed charging infrastructure, as well as accessible residential charging stations, which will drive up housing costs, and

[67] WSPA's ACC II Comments, *supra* note 56, at A-15 to A-16.

[68] *Id.* at A-16.

[69] *See id.* at A-16 to A-17.

[70] *Id.* at B-19 (citing Marshall Burke et al., Perspective, *The Changing Risk and Burden of Wildfire in the United States*, 118 Proc. Nat'l Acad. Sci. 1 (2021)).

[71] *Id.* at B-18 to B-19 (citing Burke et al., *supra* note 70).

[72] *See* Trinity Report, *supra* note 47, at 9–11.

[73] *See id.* Relatedly, these concerns further demonstrate California's failure to satisfy CAA Section 209(b)(1)(B), as further discussed *infra* pages 15–20.

[74] *See, e.g.*, WSPA's ACC II Comments, *supra* note 56, at A-19 to A-20. The economic and technological concerns expressed *infra* pages 21–23 (such as "leakage" and lower "turnover" potential) would also affect welfare.

[75] WSPA's ACC II Comments, *supra* note 56, at A-20.

could result in even more housing displacement, yet another equity issue.[76] And as discussed above, the production of batteries (especially lithium ion batteries) is no insignificant matter, with significant waste implications and increases in vehicle and insurance prices.[77]

- **Safety.** CARB's petition lacks any discussion of the safety impacts of an EV mandate. CARB should have evaluated the risks of mandating significantly heavier vehicles sharing the road with their lighter, ICEV counterparts. Moreover, the ACC II mandate will leave older vehicles with fewer safety features on the road longer. It was arbitrary and capricious for the agency to ignore these well-known safety impacts of its EV mandate.3.

3. California Law

Lastly, ACC II definitionally cannot be "at least as protective . . . as applicable Federal standards"[78] when it is invalid under California law. As raised by various commenters during ACC II's own rulemaking process, ACC II is unlawful—and thus unenforceable—for any number of reasons.

- **California administrative law.** At its core, ACC II centers around achieving 100% ZEV sales in California by model year 2035. This target necessitates the complete electrification of the transportation sector, and also forcing the phase-out of oil and gas production and refinery industries. California's attempt to unilaterally ban entire industries exceeds its delegated authority under California's Constitution. Either no such delegation ever occurred by the California legislature,[79] or the legislature never provided a "clear statement" for an executive agency to promulgate such regulation.[80]

- **Liberty interest under the California Constitution.** The California Supreme Court has held that "[t]he constitutional guaranties of liberty include the privilege of every citizen to freely select those tradesmen [he desires to patronize]."[81] ACC II intrudes on this liberty interest by stripping Californians' current right to choose ICEVs when it bans new ICEV sales and effectively bans infrastructure to support these vehicles by forcing the phase-out of related industries in California.

- **The Vested Rights Doctrine.** Perhaps unique to California common law, California courts also have found fundamental vested rights in "the right to continue operating an established business in which he has made a substantial investment."[82] Yet by intending to displace

[76] *Id.*

[77] *See, e.g.*, *id.* at A-11 to A-12.

[78] 42 U.S.C. § 7543(b)(1).

[79] *See, e.g.*, *Plastic Pipe & Fittings Ass'n v. Cal. Bldg. Standards Com.*, 124 Cal. App. 4th 1390, 1410 (2d Dist. 2004); *cf. Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (requiring "intelligible principle").

[80] *See, e.g.*, Cal. Gov't Code §§ 11342.1, 11342.2; *Garcia v. McCutchen*, 16 Cal. 4th 469, 482 (1997).

[81] *New Method Laundry Co. v. MacCann*, 174 Cal. 26, 32 (1916).

[82] *See, e.g.*, *Goat Hill Tavern v. City of Costa Mesa*, 6 Cal. App. 4th 1519, 1529 (1992).

all ICEVs, and thus by extension "fossil fuel extraction, refinement, manufacture, distribution, and combustion" (as acknowledged by the state itself),[83] California impermissibly burdens the citizens' right to continue one's business in the state.

- **Economic impacts and technological feasibility.** California Health & Safety Code and the California Administrative Procedure Act both require the rule-promulgating agency to consider the rule's economic impacts and technological feasibility.[84] Fundamentally, California failed to consider, among others, (1) the competitive impacts on the oil and gas production and refinery business in the state or the broader petroleum industry, (2) the "leakage" potentials due to greater GHG emissions outside of California, (3) the economic impacts of electrification and existing strains on California's grid, and (4) the lower fleet "turnover" due to the fact that fewer people will purchase new (and thus lower-emission) cars given that ACC II will increase fleet costs.

- **California Environmental Quality Act ("CEQA").** By (1) failing to analyze a reasonable range of regulatory alternatives (such as an LEV-only option), and (2) failing to analyze significant environmental impacts (as already expressed throughout AFPM's Comments, especially *supra* pages 10–14), ACC II violates CEQA,[85] since the California agency certified a legally deficient environmental analysis.[86]

D. EPA Should Deny the Waiver Request Because California Does Not "Need" the State Standards to Meet "Compelling and Extraordinary Conditions."

CAA Section 209(b)(1)(B) requires EPA to assess whether California truly "need[s]" such state standards to "meet compelling and extraordinary conditions."[87] In an attempt to comply with the statute, California informed in its waiver request that the state "needs" ACC II to address "compelling and extraordinary conditions" in California because the state faces impacts due to NOx, $PM_{2.5}$, and GHG emissions. California represented that "light- and medium-duty vehicles are significant sources of NOx, $PM_{2.5}$, and GHGs. The ACC II Regulations will significantly reduce these health- and climate-harming emissions."[88] California further reasoned that the state needs ACC II to address the state's "climate change conditions."[89]

As discussed by the Trinity Report *supra* pages 9–10, the "fleet turnover" problem alone would refute California's "need" for ACC II to meet any "compelling and extraordinary conditions." California customers would be less inclined to purchase new cars due to their more

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[83] CARB, *Public Hearing to Consider the Proposed Advanced Clean Cars II Regulations, Staff Report: Initial Statement of Reasons* 148 (2022).

[84] *See, e.g.*, Cal. Gov't Code §§ 11346.2(b)(4)(A), 11346.3, 11346.5(a)(7); Cal. Health & Safety Code §§ 38562, 43018.5, 43101(a).

[85] *See* Cal. Pub. Res. Code § 21000, *et seq.*

[86] *See id.* §§ 21002, 21002.1(b).

[87] 42 U.S.C. § 7543(b)(1)(B).

[88] CARB, *ACC II Waiver Request Support Document*, at 38 (May 22, 2023), Dkt. I.D. # EPA-HQ-OAR-2023-0292-0034.

[89] *Id.* at 41.

prohibitive costs. Thus, older, more fuel-intensive vehicles would stay longer in California. By extension, if ACC II in reality delays NAAQS achievement because slower fleet turnover offsets any expected emissions improvements in NOx or $PM_{2.5}$, then ACC II is not "needed" to address compelling and extraordinary conditions.[90]

And of course, none of the concerns raised by California are "compelling and extraordinary" conditions in any common-sense understanding of those terms. Indeed, in other contexts, courts have determined that this phrase does not refer to conditions that affect many Americans[91]—in which air pollution and climate change would patently fall under. Put differently, the statute demands a "unique" circumstance to California,[92] in which case here there is none.

Moreover, while not dispositive since the state's proffered analysis to support ACC II is so fundamentally flawed, AFPM also disagrees with EPA's interpretation of CAA Section 209(b)(1)(B) that EPA reviews the waiver request by reviewing the program "as a whole" (also referenced in the regulatory preamble as the "'traditional' interpretation"), *see* 88 Fed. Reg. at 88,909. ACC II consists of two separate regulatory measures, one being ZEV mandates and the other being more stringent LEV standards. And EPA's Section 209(b)(1) analysis should scrutinize these two measures separately, as opposed to in the aggregate. Otherwise, absurd results would follow; California could slap together a "Frankenstein" regulation as part of the program, even if unrelated to local air quality, so long as EPA could find any air quality issue anywhere in the state. AFPM's reading is backed by *MEMA I*, 627 F.2d at 1110, which explains the development of the statute at issue.

1. Criteria Pollutant Emissions

In its waiver request, California represented concerns about the state's non-attainment with NAAQS for ozone and $PM_{2.5}$. ACC II will not abate these issues and California failed to adequately analyze the impact of the regulations on air quality.

As a starter, California's analysis has inflated the purported reductions of criteria pollutant emissions uniquely attributable to ACC II. Beginning with the most generic, EPA's own Air Trends Report has shown continued air quality improvements, with some air pollutants decreasing as much as 90% since 1990.[93] And intuitively speaking, a multi-technology approach already occurring in the status quo would provide greater criteria pollutant emissions reductions. After all, the status quo developments consist of private-sector ZEV developments *plus* other emission-reduction measures across industries and sectors.

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[90] AFPM also seriously questions the "need" prong given that federal programs that address similar concerns are on the way, such as the proposed light-duty vehicle emission standards. *See, e.g.*, Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, 88 Fed. Reg. 29,184 (May 5, 2023).

[91] *See, e.g.*, *United States v. Jackson*, 26 F.4th 994, 1002 (D.C. Cir. 2022) (finding obesity not an extraordinary circumstance given that the nation "suffers from an epidemic of obesity").

[92] The importance of demonstrating the "unique" circumstance to California is further elaborated in the briefs provided in the ongoing litigation, *Ohio v. EPA*, No. 22-1081 (D.C. Cir. filed May 12, 2022), in which the state petitioners' opening brief and reply brief have been included in these Comments as Attachment D.

[93] *See* EPA, *Our Nation's Air: Air Quality Improves as America Grows* (one page summary) (last visited Feb. 14, 2022), https://gispub.epa.gov/air/trendsreport/2023/documentation/AirTrends_Flyer.pdf.

Such a conclusion is hardly remarkable given the motor vehicle industry's development over time. Historically, liquid fuels and ICEVs have delivered increased fuel efficiency and reduced emissions. As EPA itself has reported, from model year 2004 to model year 2016, the average vehicle delivered improved fuel economy of 5.4 MPG while also increasing horsepower by 9.2%.[94] Potentially more remarkable, only 0.1 MPG of this benefit came from alternative fuel vehicles,[95] which includes EVs, plug-in hybrids, fuel cell vehicles, and compressed natural gas vehicles.

But even assuming a deeper inquiry to address its merits head-on, California's emissions analysis in justifying "compelling and extraordinary conditions" is questionable at best. Discussed *supra* pages 9–10, the Trinity Report has outlined why California's conclusion on criteria pollutant emissions reductions is suspect: (1) the state's upstream emissions analysis relied on outdated data, (2) the state's assumption on decreased fuel production/transportation in California ignores international market dynamics, and (3) ACC II simply lacks verification measures in this realm. The third point—lack of verifiable metrics in reducing upstream PM/NOx emissions—warrants more attention. As an illustrative example: "reductions are likely to result from an action such as a refinery closure that would undoubtedly generate emission reduction credits that could in turn be used as emissions offsets in order to permit new stationary emissions sources in California rather than creating permanent emission reductions."[96]

These issues are particularly problematic from a CAA Section 209(b)(1)(B) analysis perspective because in no way did California justify that ACC II is "needed" for the state's local air quality problems—nor could they. For example, "CARB failed to . . . put these reductions into perspective relative to total emissions in California."[97] Pulling from California's own emissions inventory data, the Trinity Report compared ACC II's projected NOx emissions reduction potential to reductions writ large in the state. The Trinity Report concluded:

> ACC II regulation differentials represent only a small percentage of total mobile source emissions in each area and an even smaller percentage of total anthropogenic emissions. Again, these values would likely be much smaller or even negative (showing an emissions increase) if CARB had properly accounted for the potential impact of higher ZEV prices and increased importation of used vehicles. Given this, it follows that they would also lead to very small impacts on ozone and $PM_{2.5}$ concentrations.[98]

California even admitted during its own ACC II rulemaking process that some of the emissions benefits are based on rather ambitious assumptions. At least two of them warrant flagging. First, during the ACC II public workshops, California identified the adoption of ACC II

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[94] EPA, *Light-Duty Automotive Technology, Carbon Dioxide Emissions, and Fuel Economy Trends: 1975 Through 2017*, at 9, Table 2-2 (Jan. 2018), https://fueleconomy.gov/feg/pdfs/420r16010.pdf.

[95] *Id.* at 53.

[96] Trinity Report, *supra* note 47, at 6.

[97] *Id.* at 9.

[98] *Id.*

by other states as part of the "pathway to success" for ACC II.[99] The agency discussed that ACC II will achieve significant emissions reductions "not just in California but in the growing number of geographically diverse states across the country [with the presentation slides showing California and "Section 177 ZEV States"]."[100]

Second, ACC II allows vehicle manufactures to comply with ACC II's emissions requirements through "pooling": demonstrating compliance based on the total number of vehicles "delivered for sale in California and any states or the District of Columbia that have adopted California's criteria pollutant emission standards . . . for that model year pursuant to section 177 of the federal Clean Air Act."[101] The fact that California's ZEV mandate hinges on at least two *out-of-state* emissions reductions measures intrinsically demonstrates that ACC II is disconnected from local California air quality, let alone any purported "compelling and extraordinary conditions" in California.

After all, real-world data raise fundamental questions about the nature/implications of EV ownership. Data reveal that households that own EVs (battery EVs and plug-in hybrid EVs) tend to have more vehicles per household (owning 2.7 vehicles compared to the household average of 2.1).[102] These vehicles owned and operated in California may be used about 50% less than other vehicles in terms of annual mileage per vehicle.[103] Putting these two facts together, California has been ignoring this real-world data by assuming that ICEVs and EVs drive the same distance. This error alone directs California's cost estimates to be roughly doubled and California's benefits estimates halved.

Indeed, in its 2012 waiver request for its earlier Advanced Clean Cars program, California conceded that "[t]here is no criteria emissions benefit from including the ZEV proposal in terms of vehicle (tank-to-wheel or TTW) emissions."[104] Instead, it was criteria pollutant fleet standards for LEVs that were responsible for emissions reductions. Explained differently, criteria pollutant emissions from fleets decrease regardless of the ZEV regulation because manufacturers would adjust their compliance response to the standard by making conventional vehicles that emit less criteria pollutant emissions. And because the same criteria-pollutant reductions will be achieved with or without the ZEV mandate, the ZEV mandate will not reduce vehicle emissions or criteria pollutants—far from ever being "needed."

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[99] CARB, Presentation, *Advanced Clean Cars II Regulation Adoption*, at 14 (Aug. 25, 2022), https://ww2.arb.ca.gov/sites/default/files/barcu/board/books/2022/082522/22-10-1pres.pdf.

[100] *See* CARB, Public Workshop on Advanced Clean Cars II – 10/13/21, at 1:56:43 to 1:56:57 (last visited Feb. 25, 2024), https://www.youtube.com/watch?v=bjh9DdttWBQ.

[101] *See* Cal Code Regs. tit. 13, § 1961.2 (2022) ("Pooling Provision.").

[102] Davis, Lucas, *Electric Vehicles in Multi-Vehicle Households*, 30 APPLIED ECONOMIC LETTERS 1909, 1909–10 (2023), https://faculty.haas.berkeley.edu/ldavis/Davis%20AEL%202023.pdf.

[103] Fiona Burlig et al., *Low Energy: Estimating Electric Vehicle Electricity Use* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28451, 2021), https://www.nber.org/system/files/working_papers/w28451/w28451.pdf?utm_source=PANTHEON_STRIPPED&amp%3Butm_medium=PANTHEON_STRIPPED&amp%3Butm_campaign=PANTHEON_STRIPPED&amp%3Bstream=top.

[104] 86 Fed. Reg. 22421, 22425 n.33 (Apr. 28, 2021) (quoting California's 2012 waiver application for Advanced Clean Cars I).

In sum, ACC II is far from "needed" to achieve the attainment of the criteria pollutant NAAQS. California's analysis contains several critical flaws, and California failed to adequately analyze the cost impacts of abating criteria pollutant emissions through ACC II—particularly when compared with traditional fuel and ICEV controls.

2. Greenhouse Gas Emissions

California has also asserted that "compelling and extraordinary conditions" exist in the state due to impacts of climate change. Specifically, California has listed: increased ground-level ozone, sea-level rise and coastal erosion, damaging variability in precipitation and reductions in water supply, increased droughts and land subsidence, lower agricultural crop yields, increased susceptibility of forests to wildfires, increased mortality due to extreme heat events, and flooding of California's coastal transportation infrastructure.[105] But each of these listed conditions stem not from anything unique to California, but to claimed impacts from increased *global* concentrations of GHG. As EPA itself has put it, "[i]n contrast to local or regional air pollution problems, the atmospheric concentrations of these greenhouse gases are substantially uniform across the globe, based on their long atmospheric life and the resulting mixing in the atmosphere."[106]

Because California's claimed climate-related effects "are not sufficiently different from the conditions in the nation as a whole to justify separate State standards under . . . Section 209(b)(1)(B)," California does not face extraordinary conditions with respect to climate change compared to the rest of the nation.[107] Courts have held that emissions from sources within a single state cannot alleviate any harms from global GHG emissions.[108] In denying standing to an environmental group alleging harm from Washington state agencies' failure to regulate GHG emissions from in-state petroleum refineries, *Washington Environmental Council v. Bellon* discussed the following:

> While Plaintiffs need not connect each molecule [of carbon dioxide] to their injuries, simply saying that the Agencies have failed to curb emission of greenhouse gases, which contribute (in some undefined way to some undefined degree) to their injuries, relies on an attenuated chain of conjecture insufficient to support standing. . . . This is so because there is a natural disjunction between Plaintiffs' localized injuries and the greenhouse effect. Greenhouse gases, once emitted from a specific source, quickly mix and disperse in the global atmosphere and have a long atmospheric lifetime. . . . [T]here is limited scientific capability in assessing, detecting, or measuring the relationship between a certain GHG emission source and localized climate impacts in a given region. As the U.S. Geological Survey observed, [i]t is currently beyond the scope of existing science to identify a specific

[105] CARB, *ACC II Waiver Request Support Document*, *supra* note 88, at 42.

[106] 84 Fed. Reg. at 51,346.

[107] *See id.* at 51,344; *see also Ford Motor Co. v. EPA*, 606 F.2d 1293, 1303 (D.C. Cir. 1979) ("[T]he intent of the Act . . . [was to] focus on local air quality problems that may differ substantially from those in other parts of the nation.").

[108] *See generally Wash. Envtl. Council v. Bellon,* 732 F.3d 1131 (9th Cir. 2013); *Barnes v. Dept. of Transp,* 655 F.3d 1124 (9th Cir. 2011).

> source of CO2 emissions and designate it as the cause of specific climate impacts at an exact location.[109]

But even if California did face "compelling and extraordinary" local air quality conditions due to climate change because of GHG emissions, it does not "need" the GHG standards and ZEV mandates to address these conditions because these programs would not meaningfully address California's alleged harms from climate change. First off, all the reasons California inaccurately analyzed its criteria pollutant emissions potential (including the Trinity Report's analysis on these matters, and California's failure to address core metrics) apply here too.

Even assuming the GHG standards were focused on local air quality concerns, the ZEV mandate is not constructed to address them and therefore cannot be needed. The ZEV mandate allows for pooling of ZEV sales across the states that have adopted the ZEV regulations under Section 177 of the Clean Air Act.[110] While pooling is only allowed for up to 25% of a manufacturer's obligation in model year 2026 and is to be phased out after model year 2030, this compliance mechanism allows emissions reductions in other states to satisfy California's ACC II requirements. However, emissions reductions in other states do not alleviate harm, emissions, or improve local air quality in California. Because California accepts out-of-state emissions reductions as ACC II compliance, ACC II is disconnected from local California air quality and any purported "compelling and extraordinary conditions" in California.

E. EPA Should Deny the Waiver Request Because California's Enforcement Standards and Enforcement Procedures are Not Consistent with Clean Air Act Section 202(a).

Finally, CAA Section 209(b)(1)(C) requires EPA to assess whether ACC II "State standards and accompanying enforcement procedures" are "consistent with" Section 202(a) of the CAA.[111] Of note, the text and structure of Section 202(a), especially read in harmony with the overall Title II of the CAA, make plain that the focus is only on "emission" and pollutant-emitting vehicles. In determining whether California's standards and enforcement procedures are consistent with Section 202(a), EPA considers, among others, the "rule's impact on the other states' ability to follow or to decline to follow California's lead[, and also] . . . consideration of the costs associated with the California rule,"[112] whether "California's standards are technologically feasible within the lead time provided, giving due consideration to costs,"[113] and the "economic costs" of California's proposed emissions standards, including the costs resulting from "the timing of a particular emission control regulation."[114]

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[109] *Bellon,* 732 F.3d at 1142–43 (internal quotations and citations omitted).

[110] *See, e.g.*, CARB, *ACC II Waiver Request Support Document*, *supra* note 88, at 18.

[111] 42 U.S.C. § 7543(b)(1)(C).

[112] *Am. Trucking Ass'ns v. EPA*, 600 F.3d 624, 628 (D.C. Cir. 2010).

[113] 88 Fed. Reg. 20,688, 20,690 (April 6, 2023).

[114] *MEMA I*, 627 F.2d at 1118.

By any one of these metrics, ACC II is inconsistent with Section 202(a) of the CAA, thereby failing to satisfy CAA Section 209(b)(1)(C). AFPM's Comments focus on two of ACC II's inconsistencies— (1) technology mandates, and (2) California's narrow cost consideration.

1. Technology Mandates are Not Consistent with Section 202(a).

ACC II's ZEV mandate contradicts EPA's emissions standards program by requiring a particular technology rather than enforcing an emissions standard. EPA, under Section 202(a) of the CAA, has authority to prescribe vehicle emissions standards for any class or classes of new motor vehicles and new motor vehicle engines.[115] Nothing in this section gives EPA authority to mandate a particular vehicle technology (such as forcing production of EVs) or waive EPCA preemption.

Section 202(a) authorizes EPA to set "standards" for "emission[s]" from "any class or classes of new motor vehicles or new motor vehicle engines, which . . . cause, or contribute to," potentially harmful air pollution. Section 202(a) 's emission standards must "reflect the greatest degree of *emission* reduction achievable through the application of technology which the Administrator determines will be available for the model year to which such standards apply, giving appropriate consideration to cost, energy, and safety factors associated with the application of such technology."[116] The standard also "shall not become effective until the introduction of the model year for which it would be feasible to implement such standards, taking into consideration the restraints of an adequate leadtime for design and production."[117] The subsequent provisions applicable to heavy-duty vehicles likewise reaffirm that the object of Section 202(a) is to regulate "emission . . . which in [EPA's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[118]

EPA is thus required to set emission standards for each of new vehicle class or engine, rather than forbid or mandate any type of new vehicle or engine. Standards must "reflect" technology—not mandate it—as standards allow regulated parties to select the mix of technologies they will use to comply with the standard.[119] And finally, since Section 209 only allows California to seek a waiver for vehicle *emission* standards, and a ZEV by EPA's own assertions does not *emit* regulated pollutants and is not a "standard in any event," EPA cannot grant California's waiver request for ACC II's ZEV mandate.

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[115] 42 U.S.C. § 7521(a).

[116] *Id.* § 7521(a)(3)(A)(i) (emphasis added).

[117] *Id.* § 7521(a)(5)(B).

[118] *See id.* § 7521(a)(1).

[119] California's analysis is not sufficient to support a conclusion that ACC II "reflects" the current available technology because the state failed to evaluate whether manufacturing capabilities are adequate to allow the required lead time for compliance.

2. Section 202(a) Requires a Broader Consideration of Costs.

California has not "given appropriate consideration" to the costs of ACC II.[120] California must perform a complete and sufficient assessment of economic impacts to be "consistent" with CAA Section 202(a).[121] Such analysis requires including a variety of issues already raised throughout AFPM's Comments;[122] and thus to avoid redundancy, this Section presents many of those core issues in a bullet-point summary.

- **Electric grid and charging infrastructure.** Referenced *supra* pages 12–14, ACC II's ZEV mandate forces electrification and a rapid buildup of electricity infrastructure (such as charging stations or critical mineral procurement). California in no part addresses the capital costs and environmental impacts of building a whole new electricity infrastructure from scratch in such short notice.

- **Low-income and disadvantaged communities.** As discussed *supra* pages 12–13, the increased wildfire risk stemming from ACC II, and the wildfire's disproportionate effect on certain communities, requires a more careful distributional analysis. Additionally, multi-unit homes may not have access to EV-charging stations, and the increased cost of vehicles and electric utility bills would affect many low-income families that depend on vehicles for their livelihood.

- **In-state fossil fuel industry and leakage.** Articulated *supra* pages 13–14, reducing California's internal oil and gas industry (from upstream to downstream) is no insignificant matter. Additionally, California's waiver request fails to address any "leakage" impacts, i.e., the risk that industries moving out-of-state may lead to even greater emissions (incurring greater costs for abatement).

- **Fleet turnover.** Discussed in greater detail in the Trinity Report, *supra* pages 9–10, the potential increased costs of new vehicles—stemming from both a ZEV mandate and a more stringent tailpipe criteria pollutant standard for ICEVs, combined—means California consumers may be more inclined to purchase and continue operating and maintaining older vehicles. Of course, the increased cost of California new vehicles alone would directly burden the state and national economy.

- **Regulatory taking and just compensation thereof.** As elaborated *infra* pages 23–24, ACC II's plan to phase out ICEVs will upset at least some investment-backed expectations (e.g., oil facilities or reserves, or fueling stations), in which case just compensation is due. But this also means that California must consider in its cost analysis how exactly the state government plans to compensate for such losses in which the state's citizens deserve just compensation. Put differently, California should have accounted for the estimated costs of

[120] 42 U.S.C. § 7521(a)(2).

[121] *See id.* § 7543(b)(1)(C).

[122] AFPM has raised similar concerns over EV's costs in another set of comments as well. *See generally* AFPM, Comments on Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles (July 5, 2023), Dkt. I.D. # EPA-HQ-OAR-2022-0829-0714 [hereinafter AFPM, LDV Comments, also provided as Attachment E].

just compensation for the loss of property use and investment-backed expectations that would inevitably result from ACC II.

- **Comparative analysis (or lack thereof) with LEV alternatives.** Cost-benefit analysis is inherently comparative since an alternative foregone imposes opportunity costs. The fact that California never once considered lower-emission fleet options when conducting its cost analysis supercharges all the concerns raised above.

- **Analysis of impact on vehicle prices**. ACC II requirements and ZEV credits impact vehicle prices nationwide. While requiring increased sales of EVs into California, California has not considered the impact of these mandated sales on the cost of ICE vehicles. Faced with the ZEV mandate in ACC II, vehicle manufacturers will not be able to cross-subsidize EVs by artificially deflating EV prices while increasing ICEV prices to move EVs off the lot.[123]

IV. Additional Comments

AFPM provides below additional comments concerning ACC II and the waiver request thereof.

- **Major Questions Doctrine.** Approving California's waiver request would raise major questions under the landmark decision *West Virginia v. EPA*.[124] Make no mistake, ACC II is a shocking regulatory initiative. Its aim to functionally wipe out ICEVs as a vehicle category at least should raise eyebrows as to whether the CAA ever intended such measures to materialize.[125] Given that Congress does not "hide elephants in mouseholes,"[126] EPA must look closely as to what "clear statement" by the legislature would ever permit a state regulation—one that could mature into a nationwide standard—that could fundamentally alter America's energy landscape. "At their strongest, clear statement rules treat all statutes as maintaining the status quo unless Congress clearly states its contrary intention in the text

[123] *See* Brent Bennett & Jason Isaac, Tex. Pub. Pol'y Found., *Overcharged Expectations: Unmasking the True Costs of Electric Vehicles* 10 (Oct. 2023) (discussing how the cost of ZEV mandates is "not limited to states that impose them but spread out over the entire fleet of each automaker trying to meet them," and how any EV subsidies would "accrue[] nationally since those vehicles are not just sold in the states with ZEV mandates, effectively allowing California and other Section 177 states to impose hidden fees on gasoline vehicles nationwide"), https://www.texaspolicy.com/wp-content/uploads/2023/10/2023-10-TrueCostofEVs-BennettIsaac.pdf.

[124] 597 U.S. 697 (2022).

[125] As one example, to approve California's waiver request as consistent with CAA § 202(a) and thus within the scope of § 209(b)(1)(C), EPA would have to construct Title II of the CAA to authorize fuel-switching and an "outside the fence line" regulation similar to what the Supreme Court rejected as to Title I of the CAA in *West Virginia*. *Cf.* 597 U.S. at 701 ("EPA had always set Section 111 emissions limits based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly, . . . never by looking to a 'system' that would reduce pollution simply by 'shifting' polluting activity 'from dirtier to cleaner sources.'"). California's efforts here—not to make vehicles' internal combustion engines cleaner and more efficient, but to replace them altogether with electric drivetrains—would similarly be a novel effort "to substantially restructure the American [car] market." *See id.* at 724.

[126] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

of the statute."[127] The fact that multiple administrations have flip-flopped on the propriety of waiver is proof of the absence of a clear statement.[128]

- **Regulatory taking.** ACC II's plan to phase out all ICEVs, and by extension EPA's decision to grant the waiver request, constitute a regulatory taking, both under the U.S. Constitution and the California Constitution.[129] A regulatory taking occurs when a policy "substantially interferes with the ability of a property owner to make economically viable use of, derive income from, or satisfy reasonable, investment-backed profit expectations with respect to the property."[130] AFPM members have invested substantial amounts of money in making their facilities safe and productive, and have significant investment-backed expectations with respect to their properties—at least some of which may be forced to close as a result of ACC II's electric vehicle mandate. California landowners also would be harmed. They receive royalties from renting their land to companies, and policies that shut down facilities would prevent realizing these investment-backed expectations. California and the U.S. government would be obligated to provide just compensation for companies' and landowners' losses.

* * *

AFPM appreciates EPA's consideration of its comments opposing the waiver request. Should EPA have questions concerning these comments, please contact Leslie B. Bellas, via email at lbellas@afpm.org, or via phone at 202.457.0480.

Respectfully submitted,

Leslie Bellas

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Attachments:

- Attachment A – AFPM's 2021 Waiver Comments.
- Attachment B – Trinity Report.

[127] *Cf.* John C. Nagle, *Waiving Sovereign Immunity in the Age of Clear Statement Rules*, 1995 Wis. L. Rev. 771, 772 (1995).

[128] *See, e.g.*, 73 Fed. Reg. 12,156 (Mar. 6, 2008) (no waiver); 74 Fed. Reg. 32, 744 (July 8, 2009) (yes waiver); 78 Fed. Reg. 2,112 (Jan. 9, 2013) (yes waiver); 84 Fed. Reg. 51,319 (Sep. 27, 2019) (withdrawing waiver); 87 Fed. Reg. 14,332 (Mar. 14, 2022) (rescinding withdrawal of waiver).

[129] Cal. Const. art. I, § 19; U.S. Const. amend. V.

[130] *Jefferson St. Ventures, LLC v. City of Indio,* 236 Cal. App. 4th 1175, 1193–94 (2015).

- Attachment C – WSPA's ACC II Comments.

- Attachment D – The state petitioners' Opening Brief and Reply Brief in *Ohio v. EPA*, No. 22-1081 (D.C. Cir. filed May 12, 2022).

- Attachment E – AFPM's LDV Comments.