

The Trump Administration has asked Congress to kill California's current clean car and truck regulations. The process is a bit circuitous. Congress wouldn't directly overturn the California regulations. Instead, Congress would overturn an EPA order that waives federal preemption of EPA's regulations.

The problem is that the statute which authorizes this kind of congressional action does not apply here. Although some previous posts have touched on the issue, it's worth taking the time for a detailed explanation. Applying the CRA here would set a precedent that could come back to haunt Republicans because it would allow future overruling of other kinds of waivers that benefit their own states. **[March 6 Note: Be sure to look at the end for an important update.]**

Q: Before we get into Congress's authority, what's the California waiver anyway?

A: The Clean Air Act gives EPA the power to regulate emissions from new cars and trucks. As a general rule, states are not allowed to create their own regulations. But there's an [exemption](#) for states that were already regulating vehicle emissions before the Clean Air Act was passed -- which only California was doing.

Q: How does the waiver work?

A: If California determines that a new regulation will be at least as strong as federal standards, EPA must waive preemption unless one of three exceptions applies, which we don't need to discuss here. Under a later amendment to the Clean Air Act, once EPA waives preemption for California, other states are allowed to copy California's regulations.

Q: That explains EPA's role. How does Congress get involved in this process?

A: Under the [Congressional Review Act \(CRA\)](#), within a specified time after a rule is issued - the word "rule" is important here - both houses of Congress together can overturn the rule by majority vote. That's an exception to the Senate's normal voting rules, which allow a filibuster. If Congress kills a rule, the agency can't adopt a future rule that is "substantially the same."

Q: You said the word "rule" is important here. Why so?

A: The CRA refers to another statute, the Administrative Procedure Act, to define "rule." The California waiver isn't a rule under the Administrative Procedure Act. That means it isn't a rule under the CRA either, so Congress can't use the CRA to overturn it.

Q: OK, then, so what does “rule” mean under the APA?

A: In a [well-researched report](#) about the CRA, the Congressional Research Service explained the APA's definition of rules (which apply generally) versus orders (which apply only to an identified, specific situation). Here's what the report says:

1. “[R]ules operate generally and prospectively: they are intended to “inform the future conduct” of an open-ended class of people who might be subject to the rules when they are applied in future agency enforcement actions.”
2. “A decision to apply existing legal standards to a particular set of facts qualifies as an order [not a rule].”
3. “[T]he inquiry into whether an action is an order or rule has often focused on whether the action has a particularized application.”

Q: We're ready for the big question, then: Is the 2024 California waiver a rule?

A: The answer is clearly no. California's regulations themselves are rules, but EPA's 2024 waiver is not:

1. The waiver does not apply to an open-ended class of entities who would be subject to later EPA enforcement. Only California can enforce its regulations, not EPA.
2. The California waiver “applies existing legal standards to a particular set of facts”: whether particular California regulations meet the requirements for the waiver.
3. The waiver has a particularized application: specific regulations for California as of the specific time when the waiver was granted. This third point is especially important.

Even if the California waiver were otherwise considered a rule, the CRA has a specific exemption for rules of “particular applicability.” Since the 2024 waiver applies only to one set of regulations in a single state, it's obviously covered by this exemption.

Q: No offense, but is that just your opinion?

A: No. The Government Accountability Office, a congressional agency that plays a role under the CRA, has agreed and explained its reasoning at some length in a formal [opinion](#).

If Congress chooses to ignore the plain language of the CRA, it will be setting a dangerous precedent. States get many kinds of waivers from the federal government. For example, many states (including quite a few Red states) have received waivers from some Medicaid

requirements. Overturning the EPA vehicle waiver would expose all future state waivers to the risk of being overturned under the CRA. And once Congress starts ignoring the limits of the CRA, Democrats could do so too — for example, by overturning orders that authorize gas pipelines or other projects.

Important March 6 Addendum: GAO has just issued a [legal opinion](#) on this issue. It makes two important new points. First, the California waiver falls within the Administrative Procedure Act's definition of a "license," which in turn automatically makes it what the Act calls an "order" rather than a "rule." Second, all but one of the EPA waiver documents that were sent to Congress were merely *notices* of prior administrative actions. Or in other words, press releases. It is not clear what legal effect, if any, a resolution disapproving a press release would have.