

U.S. Court of Appeals, D.C. Circuit Courthouse (credit: U.S. Courts)

This week California and the Biden Administration's Environmental Protection Agency won a critically-important environmental lawsuit in the U.S. Court of Appeals for the District of Columbia. The case involves a constitutional challenge brought by a coalition of conservative ("red") states to E.P.A.'s delegation of federal Clean Air Act (CAA) authority for California to adopt regulations limiting greenhouse gas (GHG) emissions from motor vehicles and mandating the state's steady transition from sales of conventional cars and light trucks to electric vehicles.

The D.C. Circuit's long-awaited decision is *State of Ohio v. Environmental Protection Agency*. That ruling upholds EPA's delegation of authority to impose regulatory caps on GHG emissions from conventional vehicles, and to lead California's policy to steadily-increase its reliance on zero-emission vehicles.

A bit of CAA history is needed to understand this litigation and its profound legal and policy implications. When Congress passed and President Richard Nixon signed into law the CAA in 1970, that legislation contained a unique provision: while Congress in the CAA for the first time required the federal government to regulate air pollution from cars and light trucks, it recognized that the State of California had already been setting and enforcing limits on vehicular air emissions since the mid-1960's. So Congress decided in the CAA to preserve California's ability to

adopt and enforce its own, more aggressive motor vehicle pollution limits. In CAA section 209(a), Congress adopted a general ban on states' ability to regulate auto emissions in favor of federal regulation. However, section 209**(b)** expressly allows California–and only California–to adopt more stringent and innovative solutions to motor vehicle-based air pollution than the pollution standards applied nationally by EPA. That delegated authority is subject to certain statutory conditions: first, section 209(b) requires California to determine that its state emission control limits are at least as protective of public health and welfare as the national air pollution standards set by EPA. And second, California must first seek and obtain from EPA a "waiver" of the otherwise applicable *federal* air pollution limits for new motor vehicles. Section 209(b) goes on to provide that EPA can only deny California a waiver if it finds that: 1) the state's determination is arbitrary and capricious; 2) California does not need its own, more ambitious pollution limits to meet "compelling and extraordinary conditions"; or 3) the California emission standards are not "consistent " with CAA section 209(a). That is, federal regulation continue to act as a "floor" for air pollution standards, but California can seek to enact its own, more stringent regulatory program).

For the first 38 years of the CAA, both Republican and Democratic Administrations routinely granted California its requested section 209(b) waivers to cap conventional air pollutants–doing so on over 50 separate occasions. But that changed dramatically in 2006, after the California Air Resources Board adopted the world's first regulatory limits on GHG emissions from motor vehicles. In 2006, President George W. Bush's EPA for the first time denied California its requested section 209(b) waiver for those limits, based on EPA's view that GHG emissions were not "air pollutants" subject to regulation under the CAA. (The U.S. Supreme Court disagreed with the Bush Administration a year later in its very first climate change case, the landmark *Massachusetts v. EPA* decision.)

Since then, the issue of CAA section 209(b) waivers has become a game of political football between successive Democratic and Republican presidential administrations. Early in its first term, the Obama administration in 2009 reversed the Bush administration's unprecedented waiver denial, approving California's regulations regulating GHG emissions for cars and light trucks. In 2013, the Obama EPA granted another section 209(b) waiver, this time allowing California to implement a new, more stringent set of GHG emission standards for motor vehicles known as the "Advanced Clean Car Program." Those new regulations tightened California's GHG emission standards, but also mandated a "ZEV Program" requiring

that by model year 2025 approximately 15% of new cars sold in California be electric vehicles. Then, after the Trump administration took office, President Trump's EPA withdrew California's 2013 waiver for multiple reasons, including its position that California's GHG emission limits were preempted by the federal Energy Policy and Conservation Act of 1976 (EPCA). EPCA expressly prohibits states from enacting their own *fuel economy* standards. But when the Biden administration took office in 2021, it quickly nullified the Trump administration's waiver denial and reinstated California's 2013 waiver for its Advanced Clean Car Program. And so it goes…

In 2022, 17 conservative states led by Ohio filed suit in the D.C. Circuit Court of Appeals, seeking to invalidate the Biden EPA's decision to reinstate California's 2013 waiver. The lawsuit also sought to permanently eliminate California's ability to obtain future section 209(b) waivers in order to pursue and reach its GHG reduction goals. The Court of Appeals consolidated that case with several others raising similar challenges to California's waiver authority brought by conventional fuel manufacturers and industry trade groups. Critically, California led a coalition of 20 blue states, the District of Columbia and the cities of New York and Los Angeles, along with environmental groups and–somewhat remarkably–domestic and foreign auto manufacturers who promptly intervened in the lawsuit in support of President Biden's EPA.

The Ohio-led states and fuel manufacturers asserted three legal arguments in support of their claims: 1) that the 2022 EPA decision reinstating California's 2013 waiver was "arbitrary and capricious" because climate change allegedly is not a "compelling and extraordinary condition" within the meaning of CAA section 209(b); 2) the former Trump administration position that EPA's grant of the 2013 waiver to California is preempted by EPCA, because of that statute's express preemption of state fuel economy standards; and 3) that Congress' decision to grant waiver authority to California but no other states violates their right under the Constitution to "equal sovereignty" among the states.

The D.C. Circuit in its long-awaited April 9th decision concluded that it was not necessary to address the first two arguments on their merits, because neither the states nor the fuel manufacturers could demonstrate that they had legal standing to bring those claims. Specifically, the D.C. Circuit held that neither set of petitioners could demonstrate that they would suffer any economic injury, or that any such claimed injury is redressable by the court. Instead, the court's opinion concludes, any such claimed injury depends on the actions of third parties, especially

automobile manufacturers whose businesses are subject to the California waiver and its consequences.

However, the Court of Appeals did conclude that the petitioner states did have standing to pursue their "equal sovereignty" claim on its merits. Nevertheless, the court concluded that this constitutional theory was itself meritless.

The gist of the states' constitutional argument was that CAA section 209(b), by granting EPA authority to grant waivers to California but no other states, leaves the latter with less regulatory authority over motor vehicle emissions than California possesses. As California and EPA argued, however, the red states were not asking the court to increase their own sovereign authority over motor vehicle emissions; rather, they were seeking to *reduce* California's authority to do so. Citing and relying on two previous opinions of other U.S. Courts of Appeals exploring the scope of the equal sovereignty doctrine, the D.C. Circuit opinion rejected the red state petitioners' "request to extend the equal sovereignty principle in this fashion." Specifically, the court concluded that "State Petitioners point us to no meaningful support for their novel request to apply the equal sovereignty principle as a categorical limit on Congress's [unquestionably broad] power to regulate interstate commerce."

The Court of Appeal's decision in *Ohio v. EPA* is probably the single most important case interpreting the scope of California's section 209(b) waiver auth*ority*. It represents a sweeping and critically important legal victory for the EPA and Biden Administration. But in many ways it is even more consequential for the State of California by preserving California's 60-year tradition of and authority to lead the nation in reducing air pollution under both the Clean Air Act and California state law. (The ruling is also very good news for the other 17 states who have chosen to "opt in" to California's more stringent air pollution emission limits for both conventional air pollutants and GHGs, as is allowed under section 177 of the CAA; together, those 18 states account for approximately 40% of all new motor vehicles sold in the U.S.)

Two quick postscripts: first, the California Attorney General's Office played a critically important role in defending EPA's and its own waiver authority under the CAA, most ably sharing oral argument time before the Court of Appeals with their U.S. Department of Justice co-counsel.

Second, this week's decision could also have important political implications: it's

been widely reported that the Heritage Foundation, a conservative think tank, has drafted a voluminous, 900-page "political playbook" for the Trump presidential campaign. That opus, entitled "Project 2025," is, according to a recent Associated Press article, designed to "plan to dismantle the U.S. government and replace it with Trump's vision" if he is elected to a second presidential term in November. The Heritage Foundation document is exceedingly detailed and wide-ranging in scope, and includes numerous "reforms" to federal environmental laws–including section 209(b) of the CAA. One 209(b) strategy advanced by the Foundation report is for a future, conservative presidential administration to simply decline to grant *any* future waivers to the State of California, based on the report's hostility towards that statutory provision. But the D.C. Circuit's newly-issued decision in *Ohio v. EPA* is wholly inconsistent in its interpretation and application of the CAA's section 209(b) waiver provision, thus rendering the Heritage Foundation report DOA regarding that particular policy "reform." But the Trump campaign need not fear: the report's back-up recommendation is that a second Trump administration convince a future Republican-controlled Congress to amend the CAA to repeal section 209(b) altogether.

But for the time being at least, EPA and the State of California can celebrate the D.C. Circuit's powerful decision in *Ohio v. EPA*. That decision reflects a remarkably successful example of cooperative federalism, and will permit California to maintains its role as a national and international leader in devising and implementing GHG emission reduction policies.