

Although Congress vetoed California's most recent vehicle regulations, the state can pass new regulations so long as there are significant differences from the ones Congress overturned. The Trump Administration has been arguing all along that California lacks the power to regulate greenhouse gases from vehicles. Those regulations are a crucial part of the state's climate policy. Sooner or later, courts will need to decide the extent of California's legal authority over vehicle emissions.

The issues are complex, involving an unusual statutory scheme. Here's what you need to know, and why I think California should win this fight.

### The Legal Background

The Clean Air Act directs EPA to issue federal standards for tailpipe emissions from vehicles. When the statute was under consideration, the automobile industry was alarmed at the risk that it would have to produce multiple models of cars to meet emissions standards in different states. Section 209 responds to that concern. Subsection (a) of section 209 prohibits states and their subdivisions from adopting or enforcing standards relating to emissions controls from new vehicles.

Taken alone, section 209(a) would seem to completely preempt state regulation. But section 209(b) creates an important exception from its preemption rule. Although it does not mention California by name, section 209(b) is drafted in a way that allows only California to qualify. It allows California to obtain a preemption waiver for stricter standards based on "compelling and extraordinary" circumstances. The rationale was that Southern California's severe air pollution problems were likely to be unsolvable unless the state can vigorously regulate pollution from cars and trucks. In addition, California was the only state that regulated car emissions even before federal law.

California has applied for a series of waivers to enable it to regulate greenhouse gas emissions by vehicles. The most notable is for California's Clean Car program, which has rapidly stricter limits on emissions from conventional vehicles and mandates an increasing number of zero-emission vehicles (primarily EVs).

By itself, section 209(b) would allow only California to impose such regulations. But given that manufacturers would have to set up production runs to supply the California market, it was relatively feasible for them to supply similar vehicles to other states. For that reason, Congress later decided to allow other states to piggyback on the California standards. Under section 177, other states have the

option of adopting standard's identical to California's, with no deviations allowed. The upshot is that car manufacturers can produce a "national car" complying only with the federal standards and a "California car" meeting that state's higher standards.

### Legal Arguments Against the California Waiver

The first Trump Administration argued that the waiver was illegal. There are basically three legal arguments against the waiver.

The constitutional issue. The first argument is constitutional. In recent litigation, Republican states have argued that allowing California, but not other states, to set its own standards violates the constitutional principle of equal state sovereignty. The D.C. Circuit convincingly rejected that argument in *Ohio v. EPA*. To begin with, the court said, that principle had never been applied to limit Congress's powers under the Commerce Clause or any other power under Article I of the Constitution.

Moreover, if it applied at all, that principle would not be an absolute bar but would require only that Congress have some justification for distinguishing between states – and the D.C. Circuit considered even that doubtful because the only case supporting that view involved an extraordinary intrusion into state sovereignty under a different portion of the Constitution. There are many statutes that treat specific states differently based on their special needs or history. It's very hard to make a convincing case that those laws are all constitutional or that for some reason this one is unique.

Legal standards for the waiver. A second argument is that California does not qualify for a waiver because, given that climate change impacts every state, California does not face "compelling and extraordinary conditions" in terms of greenhouse gases. California has a strong counterargument here. Moving away from diesel and gas vehicles would not only help reduce greenhouse gas emissions but also emissions of conventional pollutants. As the *Ohio* court observed, "In recent decades, California has continued to face significant pollution and climate challenges," including over half of the worst ten areas in the country for ozone and particulate pollution. It also faces major risks from climate change, and the court noted that "pollution and climate change have particularly harmful impacts on California due to its large agriculture and ocean-based economies, dependence on an over-stressed water supply, long coastlines, and susceptibility to wildfires." It would be helpful if California were to frame its electric vehicle requirements as a

way to reduce all pollutants, not just greenhouse gases.

CAFE preemption. The final argument is that requirements to use electric vehicle are effectively fuel efficiency standards and are therefore preempted by the federal statute establishing federal fuel efficiency ("CAFÉ") standards for vehicles. The argument seems a bit contrived. It is meaningless to ask how efficiently a car uses fuel when it does not use fuel at all, like asking the GPA of someone who has never gone to school. In any event, the argument that greenhouse gas standards essentially required vehicles to use less fuel, and were therefore the same as fuel efficiency standards, was rejected by the Supreme Court in *Massachusetts v. EPA* and seems no more viable in the preemption context.

### Conclusion

Sooner or later, the legality of California's vehicle regulations will probably need to be faced. If Trump succeeds in getting Congress to block California's current regulations, that will make future regulations harder but not impossible. And California will have strong reasons to try again.

The legal issues remain unsettled. Apart from the recent *Ohio v. EPA* ruling on the constitutional issue, the only precedents are at the district court level. They have upheld the waiver. . The state has what I think are solid arguments in favor of the legality of the waiver. Given the conservative bent of the Supreme Court, there's no guarantee that the Court will accept these arguments, strong thought they may be. California should win but will undoubtedly be exploring fallback strategies in case the Court has one of its bouts of conservative activism.