American Petroleum Institute

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Ms. Sarah Dunham
Director, Office of Transportation and Air Quality
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

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Re: American Petroleum Institute Comments on the State of California's Request for a Clean Air Act Waiver for the ACC II Light- and Medium-Duty Vehicle Standards (Docket ID No. EPA-HQ-OAR-2023-0292)

Dear Ms. Dunham:

The American Petroleum Institute ("API") appreciates the opportunity to submit comments in response to the notice entitled "California State Motor Vehicle Pollution Control Standards; Advanced Clean Cars II Regulations; Request for Waiver of Preemption; Opportunity for Public Hearing and Public Comment" ("Notice").[1] In the Notice, the U.S. Environmental Protection Agency ("EPA") solicits public comments on a request from the State of California for a waiver of preemption under Clean Air Act § 209(b) for recently "adopted regulations applicable to new 2026 and subsequent model year (MY) California on-road light- and medium-duty vehicles." *Id*. Those regulations are known as the Advanced Clean Cars II ("ACC II") program.

API represents all segments of America's natural gas and oil industry, which supports nearly 11 million U.S. jobs and is backed by a growing grassroots movement of millions of Americans. Our approximately 600 members produce, process and distribute the majority of the nation's energy, and participate in API Energy Excellence®, which is accelerating environmental and safety progress by fostering new technologies and transparent reporting. API was formed in 1919 as a standards-setting organization and has developed more than 800 standards to enhance operational and environmental safety, efficiency and sustainability.

API's *Climate Action Framework* reflects our policies and goals, which are incorporated in our comments below. The challenge of meeting the world's growing need for energy while simultaneously ushering in a lower-carbon future is massive, intertwined, and fundamental. It is the opportunity of our time – governments, industries, and consumers must act to solve it together. Our industry is at the center of this challenge. We share the goal of reduced emissions across the broader economy and, specifically, those from energy production, transportation, and use by society.

API supports technology-neutral policies at the federal level that drive GHG emissions reductions in the transportation sector, taking a holistic "all-of-the-above" approach to fuels, vehicles, and infrastructure systems. Such policies include: 1) federal fuel standards, 2) a full lifecycle approach to vehicle standards,

[1] 88 Fed. Reg. 88908 (Dec. 26, 2023).

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3) optimization of fuel/vehicle systems to improve efficiency, and 4) supportive infrastructure measures. We are concerned that the ACC II program would work at cross purposes to these goals and, in any event, does not qualify for a waiver of federal preemption under § 209(b) of the Clean Air Act ("CAA").

API has numerous members that will be adversely affected if EPA grants the preemption waiver requested by California. According to the California Air Resources Board ("CARB"), ACC II requires "that by the 2035 model year, all new light-duty vehicles sold in California must be zero-emission vehicles (ZEVs, which have no exhaust or evaporative emissions) or plug-in hybrid vehicles (which have a conventional engine and a battery to provide motive power, the capability for the battery to be recharged from an external source, and meet minimum requirements for all-electric range)." [2,3] The 100% ZEV mandate for new vehicles plainly will have a significantly adverse effect on the nationwide market for liquid transportation fuels produced and marketed by API members and ignores other approaches that can result in similar emissions reductions, on a faster timeline, and at a lower cost.

Our comments are organized as follow:

LEGAL ARGUMENTS

I. The ZEV component of the ACC II program is not consistent with CAA § 202(a).
   A. To satisfy CAA § 209(b)(1)(C), California must demonstrate that its regulations could permissibly have been issued under CAA § 202(a).
   B. The ZEV component of ACC II is not consistent with CAA § 202(a) because a ZEV mandate is not authorized under CAA § 202(a).

II. California has not demonstrated that the 100% ZEV mandate is "needed" to address any "compelling and extraordinary conditions" in California.
   A. CAA § 209(b)(1)(B) must be applied to the particular standards for which a preemption waiver is sought, and not to California's motor vehicle emissions control program as a whole.
   B. California has not demonstrated that it "needs" the ZEV component of the ACC II program to address its nonattainment problems.
   C. Any unique risks to California from climate change do not constitute "compelling and extraordinary" conditions warranting a preemption waiver.

III. CARB's ACC II rule sets fuel economy standards and is therefore expressly preempted by the Energy Policy and Conservation Act (EPCA).

IV. CAA § 209(b) violates the Constitutional guarantee of equal sovereignty among the states.

POLICY CONCERNS

I. Vehicle GHG regulations should be based on a technology-neutral assessment of lifecycle GHG emissions.

II. Reliable and affordable transportation options are needed, and CARB's ACC II program falls short of providing those options.

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[2] Clean Air Act § 209(b) Waiver Request Support Document Submitted by the California Air Resources Board (May 22, 2023) at 2 (internal citations omitted), EPA-HQ-OAR-2023-0292-0034 ("CARB Support Document").

[3] PHEV allowances are limited to 20% of ZEV requirements and cannot fully satisfy ACC II requirements. https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2022/accii/acciifro1962.4.pdf 13 CCR 1962.4.

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III. Infrastructure is not ready to meet the needs of the ACC II program.
IV. Consumer costs could increase while transportation tax revenue decreases.
V. Critical minerals supply chains negatively impact national energy security and transportation reliability.

LEGAL ARGUMENTS

There are at least four major legal issues with the proposal that require denying CARB's waiver request. First, EPA should not grant a preemption waiver because the ZEV component of the ACC II program is not consistent with CAA § 202(a). Second, EPA should not grant a preemption waiver because California has not demonstrated that it needs the ACC II program to address any "compelling and extraordinary conditions." Third, the ACC II program is preempted by the EPCA. Fourth, CAA § 209(b) is invalid because it violates the Constitutional guarantee of equal sovereignty among the states.

I. The ZEV component of the ACC II program is not consistent with CAA § 202(a).

CAA § 209(b)(1)(C) provides that EPA may not grant a preemption waiver to California if "such State standards and accompanying enforcement procedures are not consistent with section 7521(a) [CAA § 202(a)] of this title." CAA § 209(b)(1)(C). In its waiver petition, California argues that the inquiry under CAA § 209(b)(1)(C) should be very limited:

> The third criterion [CAA § 209(b)(1)(C)] relates in relevant part to technological feasibility and to federal certification requirements. The 'technological feasibility' component of section 202(a) obligates California to allow sufficient lead time to permit manufacturers to develop and apply the necessary technology. The federal certification component ensures that the Federal and California test procedures do not 'impose inconsistent certification requirements.' Neither the court nor the agency has ever interpreted compliance with section 202(a) to require more."[4]

Applying that interpretation, California asserts that the ZEV component of the ACC II program satisfies CAA § 209(b)(1)(C) because: (1) 178 ZEV and PHEV models are projected to be available by 2025 that meet the ACC II minimum range requirements; (2) "virtually all BEVs already meet, or can meet, the ZEV Combined Charging Standard (CCS) requirements"; (3) "[m]ost ZEVs and PHEVs currently for sale also already meet the new on-board charging requirements; and (4) "most electric vehicles on the road today are already able to" meet "the ZEV durability requirement." CARB Support Document at 52-53. CARB also generally asserts that, "[w]hile the technology exists to meet the requirements in the time provided, the ACC II Regulations provide several flexibilities to ease compliance." *Id*. at 54.

API takes no position on the factual validity of California's assessment of ZEV technology. But even assuming that California's technological feasibility assessment is correct, the ZEV component of the ACC II program cannot satisfy CAA § 209(b)(1)(C) because that component of the program "is not consistent with [CAA § 202(a)]." CAA § 209(b)(1)(C). In other words, contrary to California's assertion, consistency with CAA § 202(a) requires more than a showing that California's rules are technologically feasible. The words "consistent with [CAA § 202(a)]" plainly require a showing that California's rules are consistent in all respects with CAA § 202(a). California has failed to make such a broader showing and could not do so even if it tried.

[4] CARB Support Document at 44 (internal quotes and cites omitted).

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A. To satisfy CAA § 209(b)(1)(C), California must demonstrate that its regulations could permissibly have been issued under CAA § 202(a).

California cites two primary legal authorities for its assertion that CAA § 209(b)(1)(C) is limited to an assessment of the technological feasibility of its standards. First, California points to *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F. 3d 449 (D.C. Cir. 1998) ("*MEMA II*"), where the court asserted that, "[i]n the waiver context, section 202(a) 'relates in relevant part to technological feasibility and to federal certification requirements.'" *Id.* at 463 (quoting *Ford Motor Co. v. EPA,* 606 F.2d 1293, 1296 n. 17 (D.C.Cir.1979) ("*Ford*") and citing *Motor and Equipment Mfrs. Ass'n, Inc. v. EPA*, 627 F. 2d 1095, 1101, 1111 (D.C. Cir. 1979) ("*MEMA I*")). *MEMA II* is inapposite for two reasons.

First, its asserted interpretation of CAA § 209(b)(1)(C) is dicta and does not constitute controlling precedent because the meaning of CAA § 209(b)(1)(C) was not at issue in that case. *MEMA II* at 463 ("Petitioners do not contend that California's OBD II regulations directly violated section 202(a)."). The relevant part of that case dealt with the question of whether CAA § 202(m) was incorporated by reference into CAA § 202(a), thus requiring (according to Petitioners) California's program to be consistent with CAA § 202(m). The court rejected that contention on the grounds that California should have broad discretion to adopt alternative motor vehicle standards, CAA § 209(b) "does not require California to establish perfect compliance with the CAA to obtain a waiver," and "it would appear virtually impossible for California to exercise broad discretion if it had to comply with every subsection of section 202 that cross-referenced subsection (a)." *Id*. at 463-4. The court's reasoning did not depend on its observation that CAA § 209(b)(1)(C) has been interpreted to relate to "technological feasibility and to federal certification requirements."

Notably, in support of its observation that CAA § 209(b)(1)(C) should be limited to consideration of technological feasibility, the *MEMA II* court quoted *Ford*, 606 F. 2d at 1296 n. 17 and cited *MEMA I*, 627 F. 2d at 1111. Neither of those decisions establishes controlling precedent on the meaning of CAA § 209(b)(1)(C).

Ford dealt with "only one question: whether vehicles which conform to [California] standards but not to the applicable federal ones may be sold outside of California." 606 F.2d at 1294-95. The court's decision did not rely on the meaning of CAA § 209(b)(1)(C). In note 17, the court stated that the pre-1977 version of the CAA expressly required consideration of "technological feasibility" in the waiver provision and that that provision "was transferred in [the 1977 CAA Amendments] to [CAA § 202(a)]." *Ford*, 606 F.2d at 1296 n. 17. However, that observation was made in passing and played no part in the court's decision. Moreover, the *Ford* court does not actually conclude that, because the express "technological feasibility" provision was carried forward into CAA § 202(a), CAA § 209(b)(1)(C) should be construed as being limited to consideration of technological feasibility. And, even if note 17 were interpreted to have that meaning, the court provides no analysis or explanation as to how the generic requirement in the current CAA § 209(b)(1)(C) to consider consistency with CAA § 202(a) can or should be interpreted to be limited to consideration of technological feasibility. Thus, for multiple reasons, the *Ford* court's statement in note 17 cannot represent binding precedent as to the meaning of CAA § 209(b)(1)(C).

In relevant part, *MEMA I* involved a challenge to an EPA preemption waiver for California in-use maintenance regulations and, in particular, whether those regulations are emissions standards or enforcement procedures. Petitioners contended that the in-use maintenance regulations were emissions standards, for which EPA was required to consider all three criteria specified in CAA

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§ 209(b)(1)(A), (B), and (C). EPA contended that the regulations were enforcement procedures, for which only CAA § 209(b)(1)(C) had to be considered in granting the waiver. *MEMA I* at 1111-4. The meaning of CAA § 209(b)(1)(C) was thus not at issue in the case. Instead, the controversy centered on whether just one or all three of the CAA § 209(b)(1) criteria should have been considered by EPA. In that context, the court observed in passing that EPA shall not grant a waiver if "the standards and accompanying enforcement procedures are inconsistent with section 202(a) of the Clean Air Act, which as indicated requires the Administrator's standards to be technologically feasible." *Id*. at 1111. That statement provided context for the decision but had no bearing on the issue being litigated or on the court's decision. Moreover, the dictum is ambiguous. It does not say that 209(b)(1)(C) is limited to technological feasibility. It was also purely conclusory, in that there was no supporting legal analysis or any explanation as to how the generic obligation in CAA § 209(b)(1)(C) for an inquiry into consistency with CAA § 202(a) can or should be construed as being limited to an inquiry into technical feasibility. In short, *MEMA I* does not establish binding precedent as to the meaning of CAA § 209(b)(1)(C).

Second, and in any event, CAA § 209(b)(1)(C) cannot reasonably be interpreted to be limited to consideration of only technical feasibility. The text of CAA § 209(b)(1)(C) facially requires an inquiry into whether the proffered California standards "are not consistent with [CAA § 202(a)]." Notably, the technical feasibility requirement appears in CAA § 202(a)(2), but Congress required that California comply with all of 202(a), not just part of 202(a)(2). If Congress wanted to limit the inquiry to technical feasibility, it knew how to say that. Thus, while technological feasibility is one factor that EPA must consider when setting standards under the authority of CAA § 202(a), that section prescribes numerous additional obligations with which EPA must comply when setting standards. One obvious example is the obligation in CAA § 202(a)(1) for EPA to set standards for the full useful life of affected engines or vehicles. The phrase "not consistent with [CAA § 202(a)]" simply cannot be interpreted to encompass technological feasibility and to exclude other CAA § 202(a) requirements, such as the obligation to set standards applicable to the full useful life of vehicles/engines.

In sum, California's contention that the scope of EPA's inquiry under CAA § 209(b)(1)(C) is limited to technological feasibility is incorrect. The cases that California cites do not authoritatively interpret the scope of CAA § 209(b)(1)(C) and that provision on its face cannot reasonably be interpreted to have such a limited scope.

B. The ZEV component of ACC II is not consistent with CAA § 202(a) because a ZEV mandate is not authorized under CAA § 202(a).

The most fundamental authority afforded to EPA under CAA § 202(a) and that section's principal function is to allow the Agency, under prescribed circumstances, to set emissions standards for new motor vehicles and motor vehicle engines. EPA's obligation to ascertain whether a state rule for which California seeks a preemption waiver is "consistent with" CAA § 202(a), thus, must include an assessment as to whether the rule exceeds EPA's own general authority to set emissions standards under CAA § 202(a). If so, the California rule cannot be determined to be "consistent with" CAA § 202(a) and a preemption waiver must be denied. While it is clear under the law that California may prescribe motor vehicle emissions standards that differ from those promulgated by EPA (indeed, that is the whole purpose of authorizing preemption waivers for California rules), nothing in the law – particularly the obligation for California rules to be "consistent with" CAA § 202(a) – authorizes California to obtain a preemption waiver for motor vehicle emissions standards that would exceed EPA's own authority under CAA § 202(a).

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As a simple example, CAA § 202(a)(2) requires EPA to consider the "cost of compliance" when setting motor vehicle emissions standards. A failure by California to consider the cost of compliance when establishing a given motor vehicle emissions standard would disqualify that standard from obtaining a preemption waiver because EPA could not conclude that the standard is consistent with the express CAA § 202(a) obligation that costs must be considered.

Applying that principle to the ACC II program, EPA cannot grant the requested preemption waiver for the program because one of the two core components of the program – the ZEV mandate – is not consistent with CAA § 202(a). In its comments on EPA's recently proposed GHG emissions standards for model year 2027 and later light- and medium-duty vehicles, API provided a detailed analysis as to why a ZEV mandate is impermissible under CAA § 202(a).[5]

In summary, CAA § 202(a)(1) is the general rulemaking authority on which EPA relies in issuing GHG emissions standards for motor vehicles, including the model year 2027 and later light- and medium-duty GHG emissions standards. See, e.g., 88 Fed. Reg. 29184, 29231 (May 5, 2023) ("GHG standards for all motor vehicles and light-duty criteria pollutant standards are set under section 202(a)(1)-(2)."). Like the ZEV component of the ACC II program, EPA's proposed GHG emissions standards would effectively mandate a fundamental transformation of the light-duty vehicle fleet from internal combustion engine ("ICE") powertrain technology to electric vehicles.

Such a shift from ICE powertrains to electric powertrains would be truly transformative.[6] Battery electric vehicles ("BEVs") require fundamentally different vehicle technologies than those used in conventionally fueled vehicles – e.g., electric motors instead of internal combustion engines, batteries to store power rather than on-board fuel tanks. Moreover, BEVs rely on a wholly different infrastructure (e.g., electric power generation and distribution, charging stations, battery manufacturing) – much of which does not yet exist or exists only in limited form. Additionally, switching to BEVs will fundamentally change the way that vehicles are used, for example requiring careful scheduling of vehicle operations to accommodate the relatively long periods needed to adequately charge the vehicles. Lastly, a BEV mandate would produce widespread effects on the national economy, such as the reduced need for oil and gas production and gas processing, and changes to petroleum refining and distribution. Such changes are extraordinary and far more expansive than those required by prior light-duty vehicle standards, which could be met by properly designed ICE vehicles.

The U.S. Supreme Court has concluded that such an "extraordinary" claim of authority can be supported only when there is "clear congressional authorization." *West Virginia v. EPA*, 142 S.Ct. 2587, 2609 (2022). CAA §§ 202(a)(1) and (2) contain no such clear authorization. At their core, CAA §§ 202(a)(1) and (2) authorize EPA to establish "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." Because this provision includes no statement—clear or otherwise—that EPA may mandate a fundamental shift in propulsion technology, EPA lacks authority to impose emissions limitations that

[5] Letter from W. Hupman, Vice President – Downstream, API, to The Honorable Michael Regan, Administrator, U.S. Environmental Protection Agency, *Re: Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles (Docket ID No. EPA-HQ-OAR-2022-0829)* (July 5, 2023) ("API LDV Comments"), docketed at EPA-HQ-OAR-2022-0829-0641. See, also, Brief for Private Petitioners, *Western States Trucking Ass'n, Inc., et al. v. EPA*, No. 23-1143 (D.C. Cir.) at 28-34. We incorporate by reference those documents into these comments.

[6] Indeed, that is a driving purpose of California's efforts. See, e.g., Building the Electricity Grid of the Future: California's Clean Energy Transition Plan ("California is focused on transforming the transportation sector" by ending "sales of new gasoline-powered vehicles by 2035") https://www.gov.ca.gov/wp-content/uploads/2023/05/CAEnergyTransitionPlan.pdf.

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effectively will require the production and sale of electric vehicles. Because EPA itself lacks such authority under CAA § 202(a), EPA may not grant a preemption waiver to a California program that would accomplish the same result.

Alternatively, applying other longstanding tools of statutory construction, CAA § 202(a) does not provide authority for mandating a shift in drivetrain technology from ICE vehicles to BEVs. First, EPA may regulate a class of motor vehicles under CAA § 202(a)(1) only if emissions from that class of vehicles "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." But BEVs have zero tailpipe emissions of any regulated air pollutant, so it is beyond EPA's authority (and, by extension, California's authority) to mandate the sale of BEVs and to regulate their production and use. Moreover, it is equally beyond their authority to include BEVs in the same class of regulated vehicles that have tailpipe emissions such as greenhouse gases and to regulate them together.

Second, CAA § 202(e) – entitled "New power source or propulsion systems" – prescribes additional requirements that EPA must meet when regulating new motor vehicles employing a new power source or propulsion system. EPA first must determine whether emissions from the new power source or propulsion system cause or contribute to air pollution that endangers public health or welfare. If the answer is yes, EPA must then establish new emissions standards for the new power source or propulsion system or, alternatively, determine that appropriate standards have already been established. BEVs clearly constitute a new power source or propulsion system. But because BEVs in and of themselves do not have tailpipe greenhouse gas emissions, neither EPA nor California can reasonably conclude that greenhouse gas emissions from BEVs cause or contribute to the endangerment finding that authorizes the regulation of greenhouse gases under CAA § 202(a) in the first instance. Thus, EPA has no need or authority to impose emissions standards on BEVs prior to certifying them and cannot find that a California program that effectively mandates BEVs is consistent with CAA § 202(a).

Third, given the fundamental differences between ICE vehicles and BEVs, it would be arbitrary and capricious for EPA to conclude that those two types of vehicles belong to the same class of vehicles for purposes of establishing appropriate standards under CAA § 202(a). By extension, EPA may not approve a preemption waiver for a program that similarly and inappropriately regulates ICE vehicles and BEVs as part of the same class.

Lastly, EPA's proposed rules (as well as the ACC II program) treat BEVs as if their powertrain were an emissions control technology and then mandates the use of that purported emission control technology to control greenhouse gas emissions from ICE vehicles. That is contrary to CAA § 202(a), which authorizes EPA to set emissions standards, but does not authorize EPA to mandate the use of any particular emissions control technology in meeting those standards.

A fuller explanation of these legal principles on the limits of EPA's authority under CAA § 202(a) is included in API's comments on EPA's proposed GHG emissions standards for model year 2027 and later light- and medium-duty vehicles.[7] Those comments are incorporated by reference here and attached.

[7] API comments on "Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles," Document ID EPA-HQ-OAR-2022-0829-0641.

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II. California has not demonstrated that the 100% ZEV mandate is "needed" to address any "compelling and extraordinary conditions" in California.

CAA § 209(b)(1)(B) instructs EPA that it should not grant a preemption waiver if it determines that California "does not need such State standards to meet compelling and extraordinary conditions." CAA § 209(b)(1)(B). California presents two alternative arguments as to why it believes the ZEV component of the ACC II program is needed to meet compelling and extraordinary conditions.

First, California argues that the inquiry under CAA § 209(b)(1)(B) should assess "California's need for a separate motor vehicle emissions control program to meet compelling and extraordinary conditions, and not whether any given standard is needed to meet particular conditions." CARB Support Document at 35. Under this whole-program approach, California argues that the state determined long ago that it needs a separate motor vehicle emissions control program to help address widespread and persistent ambient air quality problems in the South Coast and San Joaquin Valley Air Basins and that EPA concurred in the State's determination. California argues that "[n]othing in these conditions has changed to warrant a change in EPA's confirmation, and therefore there can be no doubt of the continuing existence of compelling and extraordinary conditions justifying California's need for its own motor vehicle emissions control program." *Id*. at 37.

Second, and alternatively, California argues that "[e]ven if EPA applies a narrower, standard-specific inquiry, the record demonstrates that California 'needs' the ACC II Regulations to address compelling and extraordinary conditions in California." *Id*. California asserts that "light- and medium-duty vehicles are significant sources of NO_x, $PM_{2.5}$, and GHGs" and that the "ACC II regulations will significantly reduce these health- and climate-harming emissions." *Id*. at 38. As to the ZEV component of the program, California argues that it "will displace [NO_x, reactive organic gases, and $PM_{2.5}$] emissions from conventional vehicles with internal combustion engines and their associated upstream fuel production by" thousands of tons. *Id.* at 40. According to California, "[t]hese emissions reductions are needed for California to attain the NAAQS and its own state ambient air quality standards for ozone and particulate matter." *Id*.

With regard to GHG emissions and climate change, California asserts that it faces compelling and extraordinary conditions because, among other things, "California is the only U.S. state with a Mediterranean climate," "has more homes in the wildland-urban interface than any other state," "its mountain ranges make it prone to flooding from extreme precipitation events," and its "water supply relies heavily on highly vulnerable snowpack for seasonal water storage." *Id*. at 43. California predicts that the ACC II program will "reduce GHG emissions by 395.1 million metric tons between 2026 and 2040" and that the *global* "benefits from the resulting avoided climate impacts are estimated to be between $9.8 and $40.1 billion." *Id*. Lastly, California asserts that there is no "*de minimis* requirement for how much California's standards would meet its conditions, and California agrees with EPA there is no basis for such a requirement." *Id*. at 44. In other words, even if the GHG emissions reductions achieved by the ACC II program have no discernable effect on global climate change and claimed climate change impacts in California, California argues that EPA can and should approve the waiver.

California's assertion that the ZEV component of the ACC II program satisfies CAA § 209(b)(1)(B) is flawed for three reasons.

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A. CAA § 209(b)(1)(B) must be applied to the particular standards for which a preemption waiver is sought, and not to California's motor vehicle emissions control program as a whole.

California's argument that CAA § 209(b)(1)(B) should be applied to the state's motor vehicle emissions control program as a whole and not to the ACC II component of that program is not supportable under the plain terms of CAA § 209(b). To begin, CAA § 209(b)(1)(B) refers to "such State standards," which plainly is a reference to the particular standards for which California seeks a preemption waiver. Congress understood when it enacted CAA § 209(b) that California's motor vehicle emissions control program would be an evolving program that would be revised as relevant factors (such as motor vehicle technology and California's air pollution problems) change over time. The term "such State standards" thus naturally refers to the particular components of California's program that are developed over time (and for which a preemption waiver is sought) and not to the program as a whole.

Notably, CAA § 209(b)(1)'s requirement that California's standards must be "in the aggregate" at least as stringent as EPA's standards does not change that analysis. The "in the aggregate" requirement goes to the overall health and environmental protectiveness of California's program. It allows California to have standards that are different than EPA's but provides a backstop to make sure the differences are not so great as to compromise public health or welfare in California. The CAA § 209(b)(1)(B) requirement that California's standards must be needed "to meet compelling or extraordinary conditions" has nothing to do with the overall protectiveness of California's program and, thus, it makes no sense for a whole-program effectiveness requirement to somehow also apply to the determination as to whether particular standards are needed to address compelling and unique local conditions. Indeed, a whole-program application of the CAA § 209(b)(1)(B) criteria would have the irrational effect of allowing California to implement certain program requirements that are not needed to address compelling and extraordinary local conditions as long as, on balance, the program as a whole was determined to be needed to address such conditions. That blank-check approach makes no sense.

Moreover, the phrase "such State standards" also is used in CAA § 209(b)(1)(C), which provides that EPA should not grant a preemption waiver when "such State standards and accompanying enforcement procedures are not consistent with [CAA § 202(a)]." CAA § 209(b)(1)(C). As explained in Section I above, California asserts that that provision should be narrowly interpreted to require only showings that California has provided adequate lead time for compliance with its standards and that its compliance procedures are not inconsistent with EPA's. CARB Support Document at 44.

For the reasons explained in Section I, that narrow interpretation is not supportable under the plain text of CAA § 209(b)(1)(C). But accepting California's interpretation for the sake of argument, the term "such State standards" in CAA § 209(b)(1)(C) necessarily requires – even under California's interpretation – an assessment for *each* new or revised standard for which California seeks a preemption waiver of whether that new or revised standard provides adequate lead time and consistency with EPA's compliance procedures. It is not possible to apply California's suggested whole-program approach because, even if the program as a whole is at least as stringent as EPA's program, that does not guarantee that the adequate lead time or consistency required by CAA § 209(b)(1)(C) would be provided. That can be guaranteed only by scrutinizing the specific new or modified standard – i.e., "such State standards" – for which California seeks a waiver. Similarly, the term "such State standards" in CAA § 209(b)(1)(B) demands scrutiny of the particular new or modified standard for which California seeks a waiver.

In the ongoing litigation in the D.C. Circuit over the validity of EPA's preemption waiver for California's ACC I program, a coalition of industry petitioners challenges EPA's "whole-program" interpretation of

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CAA § 209(b)(1)(B). API incorporates by reference the arguments that that coalition is making in that litigation.[8]

B. California has not demonstrated that it "needs" the ZEV component of the ACC II program to address its nonattainment problems.

California contends that it "needs" the ZEV component of the ACC II program because it will produce reductions in the emissions of air pollutants to contribute to the state's ongoing nonattainment problems in the South Coast basin and other areas of the state. But the mere fact that the ZEV component of the program will produce emissions reductions is not sufficient to demonstrate that that part of the program is "needed." A program may not be "needed," for example, if there are other regulatory options that would achieve the same objective, but at lower cost.[9]

The ZEV program is a drastic regulatory action. It will ban the sale of new light-duty vehicles powered solely by fossil-derived fuels and require a fundamental shift in drivetrain technology. As California has itself said, and as explained in Section I.B., above, the program would be truly transformative in several respects. It also would be unprecedented in scope. In fact, by imposing a zero- tailpipe emissions mandate, it represents the ultimate regulatory intervention with regard to air pollutant emissions from light-duty vehicles.

But in its waiver application, California failed to identify other regulatory options to produce relevant criteria pollutant emissions reductions, nor has it attempted to weigh the advantages and disadvantages of such alternatives against the ZEV program, or provide a reasoned explanation as to why the ZEV program should be implemented instead of available alternatives. In other words, California failed to show that the ZEV component of the ACC II program is "needed" to address the state's nonattainment problems.[10]

Because the record that California prepared in support of its proposed preemption waiver does not demonstrate that the ZEV program is needed, EPA must deny the state's waiver request pursuant to CAA § 209(b)(1)(B).

C. Any unique risks to California from climate change do not constitute "compelling and extraordinary" conditions warranting a preemption waiver.

California offers a number of reasons as to why it contends that the state faces "compelling and extraordinary" conditions that cause adverse effects to public health and the environment attributable to anthropogenic climate change. California's argument rests on alleged unique characteristics of the state, such as its "Mediterranean climate" and the significant number of homes located at the "wildland-urban interface." Yet, climate change is a global phenomenon, and worldwide greenhouse gas emissions are among the causes contributing to worldwide effects, regardless of where the emissions took place.

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[8] In particular, the following excerpt from the Industry Petitioner brief is incorporated by reference here: Brief for Private Petitioners, *State of Ohio v. EPA*, No. 22-1081 (D.C. Cir.) at 45-9.

[9] "Multi-Technology Pathways To Achieve California's Greenhouse Gas Goals: Light-Duty Auto Case Study," prepared for Western States Petroleum Association by Ramboll US Consulting, Inc., May 31, 2022.

[10] We note that the lack of a comprehensive analysis of alternative regulatory approaches also renders the ACC II program arbitrary and capricious, which is a separate and independent reason that EPA should not grant a preemption waiver. CAA § 209(b)(1)(A).

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While the effects of climate change may not be identical from state to state or region to region, the effects are a product of, among other things, the well-mixed global atmospheric pool of greenhouse gas emissions.

According to the IPCC, global anthropogenic greenhouse gas emissions in 2019 were 59±6.6 Gt CO_2e, with global emissions continuing to rise on a year-to-year basis.[11] California predicts that the ACC II program in 2040 will result in 58.4 million metric tons of CO_2e emissions reductions. Even if accurate, that amount of reduction cannot reasonably be expected to translate to a proportionate reduction to the effects of climate change that California asserts it incurs as a result of global emissions. Thus, EPA must deny California's preemption waiver request because the estimated greenhouse gas emissions reductions resulting from the ACC II program are not needed to address compelling and extraordinary conditions pursuant to CAA § 209(b)(1)(B).

As noted above, California argues that there is no "*de minimis* requirement for how much California's standards would meet its conditions, and California agrees with EPA there is no basis for such a requirement." CARB Support Document at 44. However, it is implicit in the word "need" that the California standards for which the state seeks a preemption waiver would have some material effect in alleviating the claimed compelling and extraordinary conditions that the standards are designed to address. By no measure, including those set forth by California, would the ACC II program have any such an effect on global climate change or its potential impacts on the State of California.

III. CARB's ACC II rule sets fuel economy standards and is therefore expressly preempted by the Energy Policy and Conservation Act (EPCA).

EPCA expressly preempts state laws that relate to fuel economy standards, which includes state emissions regulations and electric vehicle mandates.

EPCA directed the National Highway Traffic Safety Administration (NHTSA) to set "average fuel economy standards for automobiles" at the "maximum feasible . . . level" after considering "technological feasibility, economic practicability, the effect of other motor vehicle standards . . . on fuel economy, and the [nation's need] to conserve energy." 49 U.S.C. § 32902(a), (f). NHTSA's authority to regulate automobile fuel economy is exclusive. The EPCA also simultaneously prohibits states from "adopt[ing] or enforce[ing] 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." 49 U.S.C. § 32919(a) (emphasis added). The Supreme Court has explained that a state law is "related to" a federal one if it has a "connection with, or reference to" the preempted topic. *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008) (internal quotation marks and citation omitted); *see also Morales v. Trans World Airlines*, 504 U.S. 374, 383 (1992) ("'relating to' . . . express[es] a broad pre-emptive purpose"). ACC II is more than "related to" fuel economy standards, it directly pertains to them.

And under ACC II's electric vehicle mandate, manufacturers must produce a required number of BEVs, which CARB considers to be "zero-emitting" of criteria pollutants or greenhouse gases. Emissions of the greenhouse gas carbon dioxide are directly tied to the amount of fuel combusted by a vehicle and therefore, directly tied to a vehicle's fuel economy. 75 Fed. Reg. at 25,324, 25,327 (May 7, 2010) (carbon dioxide emissions are "essentially constant per gallon combusted of a given type of fuel"). As a result,

[11] *Climate Change 2023: Synthesis Report*, United Nations Intergovernmental Panel on Climate Change, at 44.

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any rule relating to tailpipe greenhouse gas emissions is inherently tied to fuel economy. One illustration of the relationship between tailpipe greenhouse gas emissions and fuel economy is the fact that EPA and NHTSA previously jointly promulgated tailpipe greenhouse gas emissions and fuel-economy rules with their respective authorities. In this way the agencies acknowledged that these matters are two sides of the same coin. 71 Fed. Reg. 17,566, 17,659 (Apr. 6, 2006) (Noting that as one goes up the other goes down.). Another indicator of the relationship between tailpipe greenhouse gas emissions, fuel-economy, and electric vehicles is the fact that NHTSA is statutorily barred from considering electric vehicles in setting its fuel economy standards—because of how they impact fuel economy calculations. As a result, a regulation requiring sales of vehicles that "produce zero exhaust emissions of any . . . greenhouse gas," Cal. Code Regs. tit. 13, § 1962.4, is necessarily a regulation "related to" fuel economy that is therefore expressly preempted by EPCA. *See Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 157 (2d Cir. 2010) (EPCA preempts state regulations that "make fuel economy standards essential to the operation of those rules").

Further, ACC II's ZEV component is also "related to . . . average fuel economy standards," since it dictates how manufacturers must meet NHTSA's average standard: by selling a certain portion of ZEVs or purchasing an equivalent number of credits from competitors. The state mandates thus "force [a manufacturer] to adopt a certain scheme" and "restrict its choice" of compliance, and are thus preempted. *NY State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 668 (1995); *accord Ophir v. City of Boston*, 647 F. Supp. 2d 86, 94 (D. Mass. 2009).

ACC II's ZEV component is also impliedly preempted because it "stand[s] as an obstacle to the accomplishment and execution of [EPCA's] full purposes and objectives." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Congress directed NHTSA to set national fuel economy standards at the "maximum feasible" level, and to do so without taking into consideration alternative-fueled vehicles like ZEVs. *See id.* § 32902(h)(1). ACC II's ZEV component, however, undermines—indeed, renders irrelevant—NHTSA's technology-neutral average fuel economy determination by requiring manufacturers to produce and sell ZEVs.

NHTSA has previously recognized that EPCA preempts state regulations like the ACC II ZEV component. 84 Fed. Reg. 51,310, 51,311–28 (Sept. 27, 2019) ("ZEV mandates are preempted by EPCA"). And while NHTSA says it is no longer sure about this, it has never endeavored to explain why this interpretation was wrong. That's because it was right. The upshot is straightforward: Because EPCA preempts ACC II's ZEV component, California could not adopt or enforce it even if a Clean Air Act waiver were granted. As a result, California cannot "need" the ZEV program under Section 209(b)(1)(B).

To be sure, EPA has in recent years demurred on EPCA preemption, saying that it is not its job to interpret EPCA and that EPCA preemption is irrelevant to whether a waiver application satisfies the three waiver criteria of Section 209(b). *See, e.g.*, 87 Fed. Reg. at 14,368. But this is wrong on both counts. As just noted, California cannot "need" preempted standards because those standards are void ab initio and of no binding effect on anyone. Consequently, whether EPCA preempts ACC II is, at the very least, an "important aspect of the problem" that it would be arbitrary and capricious for EPA to not consider. *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (citation omitted).

Under the Supremacy Clause of the Constitution, moreover, 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

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Officers at EPA, cannot ignore their oath to "protect and defend" or to "support this Constitution," and their corresponding duty to faithfully execute "the supreme Law of the Land." U.S. Const. art II, sec. 1, art VI, cl. 2, 3. 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*, 4 Wheat. 316, 436 (1819) ("States have no power . . . to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress."). EPA cannot ignore this any more than it could countenance a state standard that violated other parts of the Constitution.

IV. CAA § 209(b) violates the Constitutional guarantee of equal sovereignty among the states.

The clear effect of CAA § 209(b) is to allow (in certain circumstances) only one state – California – to set motor vehicle standards. No other state is granted similar authority. In limited situations other states may adopt and implement motor vehicle standards that are "identical to the California standards" in lieu of otherwise applicable federal standards. CAA § 177(1). But California alone among the states has the authority to set such standards in the first instance.

The disparate treatment of California renders CAA § 209(b) unconstitutional because it violates the "fundamental principle of equal sovereignty among the States." *Shelby County, Ala. v. Holder*, 570 U.S. 529, 544 (2013) (cleaned up). Consequently, EPA has no authority to waive the otherwise comprehensive federal preemption of motor vehicle emissions standards prescribed under CAA § 209(a).

In the ongoing litigation in the D.C. Circuit over the validity of EPA's preemption waiver for California's ACC I program, a coalition of state petitioners challenges the constitutionality of CAA § 209(b) on equal sovereignty grounds. In keeping with *Shelby County*, they argue that "[w]hen the People ratified the original Constitution, they limited the States' sovereignty in some respects ... [b]ut the States retained all sovereignty not surrendered in the Constitution itself." Brief for Petitioners States of Ohio, et al., *State of Ohio v. EPA*, No. 22-1081 (D.C. Cir.) at 12. The States further assert that, "[b]ecause the original Constitution nowhere strips the States of their *equal* sovereignty, the States retained it." *Id*. Consequently, "laws passed pursuant to Congress's Article I powers violate the Constitution if they withdraw sovereign authority from some States but not others." *Id*. (citation omitted). Because CAA § 209(b) withdraws sovereignty from the 49 states not eligible for a preemption waiver, that provision violates the Constitution.

API endorses the equal sovereignty arguments presented by the State Petitioners in *State of Ohio v. EPA* and incorporate by reference their arguments in these comments.[12]

POLICY CONCERNS

In addition to the legal concerns identified in the previous section, the following policy discussion demonstrates that granting CARB's request for a preemption waiver for the ACC II program would be arbitrary and capricious because CARB has not provided full consideration of the relevant facts and the impacts of the ACC II program that requires 100 percent ZEVs by 2035.[13] As previously noted, EPA

[12] In particular, the following excerpts from the State Petitioner briefs are incorporated by reference here: (1) *Id*. at 11-13, 16-33; and (2) Reply Brief for Petitioners States of Ohio, et al., *State of Ohio v. EPA*, No. 22-1081 (D.C. Cir.) at 10-15.

[13] As explained in the prior section, EPA for several reasons does not have legal authority to approve CARB's request for a preemption waiver for the ACC II program. But assuming for the sake of argument that such authority exists, we explain in this

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cannot grant California a waiver if "the determination of the State is arbitrary and capricious."[14] Additionally, EPA has an independent obligation to ensure that its own action granting or denying the waiver considers all "important aspect[s] of the problem."[15]

API supports the use of all vehicle technologies and their associated infrastructure; however, the CARB request for a waiver for the ACC II program is flawed as it does not appropriately consider several issues, including: 1) it does not include a technology-neutral approach, 2) it limits consumer choice of vehicle powertrain options without benefit, 3) it does not appropriately consider the readiness of the vehicle charging infrastructure, 4) it inappropriately identifies consumer costs while not accounting for the transportation tax revenue decreases, and 5) it fails to account for the negative impacts to national energy security and transportation reliability and the benefits of the natural gas, oil, and biofuel resources available in the U.S.

CARB's ACC II program fails to recognize the significant role that traditional and improved fuels and vehicles have played and can continue to play in the U.S. economy. Significant emission reductions have been achieved with vehicles powered by improvements in internal combustion engines (ICE) and vehicle technologies. ICE-powered vehicles comprise more than 99 percent of all vehicles in the U.S. vehicle fleet and, according to the U.S. EPA[16], new vehicles today run about 99 percent cleaner for most tailpipe criteria pollutants than models produced in 1970. Progress achieved has helped reduce U.S. air pollution[17] by 78 percent between 1970 and 2022, even as vehicle miles traveled nearly tripled, and the economy grew by 304 percent. By approving CARB's waiver request for ACC II that focuses exclusively on an unprecedented transition of the vehicle fleet, EPA misses the opportunity to cost-effectively reduce GHG emissions from a range of technologies that can better meet the needs of the public on a faster timeline.

Although EPA is considering a waiver of preemption requested by the state of California, other states are planning to adopt ACC II regulations under Section 177 of the CAA. This will lead to a patchwork of individual state regulatory programs. API believes that this will result in inefficiencies in the fuel and vehicle market and will increase costs for the consumer.

Specifically, API's transportation policy concerns regarding CARB's ACC II program and waiver petition are as follows:

I. Vehicle GHG regulations should be based on a technology-neutral assessment of lifecycle GHG emissions.

The ACC II program does not allow all technologies to compete equally. CARB's program prevents other vehicle technologies from contributing to the overall reduction of GHG emissions from transportation. There are several vehicle technologies (e.g., efficient ICE vehicles operating with lower carbon intensity fuels, hybrid electric vehicles, hydrogen internal combustion engine vehicles), some of which are available now, that can demonstrate lower lifecycle GHG emissions and could provide more expeditious

section of our comments why the facts and analyses provided CARB would not, in any event, provide adequate support for a waiver.

[14] 42 U.S.C. § 7543(b)(a).

[15] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

[16] https://www.epa.gov/transportation-air-pollution-and-climate-change/accomplishments-and-successes-reducing-air#:~:text=New%20passenger%20vehicles%20are%2098,they%20were%20prior%20to%20regulation.

[17] https://gispub.epa.gov/air/trendsreport/2023/#growth_w_cleaner_air.

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and robust GHG emissions reductions. Further the ACC II program limits the use of plug-in electric vehicles (PHEV).[18]

CARB's program discriminates against lower-carbon intensity liquid fuels. These fuels can reduce GHG emissions based on advanced feedstock and process technologies. Lower-carbon intensity fuels such as ethanol, renewable diesel, and biodiesel are being used today in existing vehicles to reduce emissions.

CARB eliminates the use of these lower-carbon intensity fuels in the future by mandating 100 percent Zero Emission Vehicles (ZEV), and then turns a blind eye towards the lifecycle emissions that come from ZEVs. All vehicles have GHG emissions across their lifecycle from production, utilization, infrastructure, and disposal. The basis for ACC II is inappropriate because it fails to account for the total lifecycle emissions from all vehicle technologies. Simply analyzing tailpipe emissions is not a scientifically sound approach to assessing vehicle emissions. A lifecycle approach will provide the best opportunity to reduce the carbon intensity of the transportation sector. By inappropriately ignoring full lifecycle emissions, ACC II is missing an important opportunity to reduce GHG emissions from the existing fleet.

A technology-neutral, lifecycle-based program could generate GHG reductions in the time it would otherwise take for the existing fleet to transition to a different technology. To that end, various studies have highlighted the importance of allowing all technologies to be utilized to reduce emissions faster, more effectively, and at a lower cost.[19] By limiting the scope to tailpipe emissions only, the ACC II program is inherently not technology neutral and results in a limited prescribed solution set.

II. Reliable and affordable transportation options are needed, and CARB's ACC II program falls short of providing those options.

API supports policies which will improve fuel efficiency while allowing different fuel and vehicle technologies to compete equally on a technology neutral basis. Unfortunately, CARB's ACC II program eliminates the consumer's ability to choose the vehicle powertrain that best meets the consumer needs by severely limiting consumer choice in the early years and practically mandating the elimination of ICE vehicles in future years. The ACC II regulations explicitly force electrification of the light-duty vehicle fleet regardless of whether this technology and related performance criteria (e.g., vehicle range, time to refuel, maintenance, etc.) are appropriate for all consumers.

III. Infrastructure is not ready to meet the needs of the ACC II program.

There is significant uncertainty regarding the technology and infrastructure readiness needed to support the ACC II program within the stated timeframe. The Coordinating Research Council (CRC) commissioned a study[20] that assessed infrastructure requirements needed for increasing ZEV sales requirements. The CRC study, taking into account state level ZEV goals (via 22 ZEV sales curves applied to California, advanced clean car states and non-advanced clean car states), concluded that $294 billion of investment is needed to install 6.6 million depot and public electric vehicle supply equipment (EVSE) ports (i.e., EV

[18] PHEV allowances are limited to 20% of ZEV requirements and cannot fully satisfy ACC II requirements.
[19] "Multi-Technology Pathways To Achieve California's Greenhouse Gas Goals: Light-Duty Auto Case Study," prepared for Western States Petroleum Association by Ramboll US Consulting, Inc., May 31, 2022.
[20] "Costs and Timelines Required to Support Regulatory Requirements for Light-Medium-and Heavy-Duty Zero Emission Vehicles." Prepared by ICF for the Coordinating Research Council. September 2023.

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chargers) by 2033.[21] In contrast, the Bipartisan Infrastructure Law (BIL), passed in November 2021, only allocated $7.5 billion[22] to expand ZEV charging infrastructure with $5 billion specifically targeted towards installing EV chargers and the remaining $2.5B for Community and Corridor grants for charging and alternative fueling infrastructure. Getting this money into the market to install chargers has been slow as demonstrated by the fact that the first charger funded through the BIL didn't become operational until December 2023.[23] Further, the CRC study stated that, due to increased electric vehicle charging, electricity generation demand will increase 674 TWh by 2035. The increased surge in charging could increase the transportation sector to account for 14% of total electricity sales, up from 1% currently.[24] Such energy demands are already challenged in California and other states. For context, in 2022, the U.S. consumed 4,007 TWh of power.[25]

IV. Consumer costs could increase while transportation tax revenue decreases.

The ACC II program is estimated by CARB[26] to increase upfront costs of vehicle purchases which may cause consumers to spend less on other goods and services. CARB estimates that its ACC II regulations will result in incremental costs up to nearly $1,200 per vehicle and increase total costs by over $210 billion for the period from 2026 to 2040.

However, consumer cost impacts may not be adequately addressed by CARB. The United States Department of Energy Argonne National Laboratory report[27] analyzed the levelized cost of driving (LCOD)[28] for nearly identically sized vehicles that were fueled by gasoline and by electricity. The "[l]levelized cost estimates are based on financial inputs, technology parameters, and operational parameters, such as the price of energy feedstock, the capital cost of technology, process efficiency, capacity utilization, and operations and maintenance costs."[29] The study found that the LCOD on a dollar-per-mile basis is nearly identical for a conventional gasoline fueled midsize sedan or small SUV compared to a 300-mile range BEV. The midsize sedan and small SUV conventional gasoline-fueled vehicles both have a lower LCOD when compared to the 400-mile range BEV. Additionally, the conventional gasoline fueled hybrid-electric midsize sedan and small SUV both have a LCOD that is nearly identical to the conventional gasoline fueled vehicles.

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[21] "Costs and Timelines Required to Support Regulatory Requirements for Light-Medium-and Heavy-Duty Zero Emission Vehicles." Prepared by ICF for the Coordinating Research Council. September 2023.

[22] https://www.whitehouse.gov/briefing-room/blog/2023/12/11/full-charge-the-economics-of-building-a-national-ev-charging-network/.

[23] https://www.reuters.com/business/autos-transportation/first-ev-charging-station-funded-by-bidens-infrastructure-law-goes-online-2023-12-11/.

[24] "Costs and Timelines Required to Support Regulatory Requirements for Light-Medium-and Heavy-Duty Zero Emission Vehicles." Prepared by ICF for the Coordinating Research Council. September 2023.

[25] EIA, Electricity explained: Use of Electricity. https://www.eia.gov/energyexplained/electricity/use-of-electricity.php.

[26] Public Hearing to Consider the Proposed Advanced Clean Cars II Regulations CARB Staff Report: Initial Statement of Reasons Date of Release: April 12, 2022.

[27] "Cradle-to-Grave Lifecycle Analysis of U.S. Light-Duty Vehicle-Fuel Pathways: A Greenhouse Gas Emissions and Economic Assessment of Current (2020) and Future (2030-2035) Technologies." Argonne National Laboratory, June, 2022. https://publications.anl.gov/anlpubs/2022/07/176270.pdf Table D.10 Costs and GHG emissions for the Future Technology midsize sedan case and Table D.11 Costs and GHG emissions for the Future Technology small SUV case.

[28] LCOD is defined as the sum of the amortized net vehicle cost per mile and the fuel cost component. https://publications.anl.gov/anlpubs/2022/07/176270.pdf.

[29] Argonne National Laboratory report, p. xix.

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Additionally, CARB did not fully analyze the impact of increased electrification and the reduction in tax revenue resulting from a decrease in gasoline sales. Liquid transportation fuels are taxed at both the federal and state level to fund the construction and maintenance of bridges, roads, highways, and other transportation initiatives. The reduction in gasoline tax revenue for California is estimated[30] at approximately $8.4 billion over the period 2026-2040. Furthermore, CARB estimates that changes in consumer spending, induced by increased vehicle costs, and reduced fuel tax revenue will have negative impacts on employment and could also reduce government spending on important programs.

V. Critical minerals supply chains negatively impact national energy security and transportation reliability.

A significant number of BEVs will be required if the EPA approves CARB's waiver request and many other CAA Section 177 states could implement the ACC II regulations. California and the other Section 177 states could account for approximately 37% of U.S. new light-duty vehicle registrations.[31]

The increased reliance on transportation electrification is likely to reduce transportation supply chain reliability, making the sector vulnerable to unexpected disruptions. BEV battery supply chains are controlled by a small number of countries. As detailed in API's comments on both the U.S. EPA and NHTSA CAFE rules, availability of critical minerals and the limited U.S. production capacity of critical minerals is likely to be insufficient to meet the mandated ZEV requirements. The confluence of rapid increases in electrification and likely reliance on foreign sources for critical minerals could have a significant negative impact on the energy security of the United States.

The U.S. is the world's largest producer of natural gas and oil and is a major manufacturer of biofuels consumed in on-road transportation. This combined production capacity has changed the geopolitical fabric of the world to the benefit of the U.S. and its allies. Recognizing that 1) BEVs have significant lifecycle emissions, 2) lower-carbon intensity fuels teamed with existing vehicle technology can reduce GHG emissions faster and more cost efficiently, and 3) there are minimum emissions from new ICE vehicles – it is arbitrary and capricious to focus solely on BEV technology, and not to consider the benefits of existing technologies to achieve the goals of the administration.

[30] "Final Statement of Reasons for Rulemaking, Including Summary of Comments and Agency Response." Appendix F – Updated Costs and Benefits Analysis. CARB. August 25, 2022.
[31] "Section 177 States Regulation Dashboard," https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/states-have-adopted-californias-vehicle-regulations. Web site accessed 27 February 2024.

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RECOMMENDATIONS FOR EPA

EPA should not grant the 209(b) preemption waiver because: 1) the ZEV component of the ACC II program is not consistent with CAA § 202(a); 2) CARB has not demonstrated that the 100% ZEV mandate is "needed" to address any "compelling and extraordinary conditions"; 3) ACC II is preempted by the Energy Policy and Conservation Act; 4) CAA §209(b) is invalid because it violates the Constitutional guarantee of equal sovereignty among the states; and 5) CARB has not provided an adequate factual or analytical basis for the ACC II program.

Thank you for the opportunity to provide our comments. Please do not hesitate to contact the undersigned if you have questions or need more information.

Sincerely,

C: Karl Simon, Director, Transportation and Climate Division, U.S. EPA Office of Transportation and Air Quality
William Charmley, Director, Assessment and Standards Division, U.S. EPA Office of Transportation and Air Quality
David Dickinson, Transportation and Climate Division, U.S. EPA Office of Transportation and Air Quality

Attachments:

1. API comments submitted to EPA: Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles
2. API comments submitted to NHTSA: Corporate Average Fuel Economy Standards for Passenger Cars and Light Trucks for Model Years 2027– 2032 and Fuel Efficiency Standards for Heavy-Duty Pickup Trucks and Vans for Model Years 2030–2035