

COMMENTS OF STATES AND CITIES IN SUPPORT OF THE CALIFORNIA AIR  
RESOURCES BOARD'S REQUEST FOR WAIVER PURSUANT TO CLEAN AIR ACT  
SECTION 209(B) FOR ADVANCED CLEAN CARS II REGULATIONS

February 27, 2024

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*via regulations.gov*

**I. INTRODUCTION**

Our States and Cities<sup>1</sup> respectfully submit these comments to the Environmental Protection Agency (EPA) in support of the California Air Resources Board's (CARB) request for waiver of preemption for the addition of the Advanced Clean Cars II Regulations (ACC II Regulations) to the State's program.<sup>2</sup> For the reasons explained in CARB's Waiver Request<sup>3</sup> and herein, EPA has no basis for denying California's request and California and its residents urgently need the emission reductions and accompanying public health protections that the ACC II Regulations will provide. Further, states that adopt the ACC II Regulations will accrue important benefits. Therefore, we strongly urge EPA to grant California's waiver request as expeditiously as possible.

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<sup>1</sup> The States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Minnesota, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington, and Wisconsin; the People of the State of Michigan; the Commonwealths of Massachusetts and Pennsylvania; the Cities of Chicago, New York, Oakland, and San Jose; and the District of Columbia.

<sup>2</sup> 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) ("Notice"); Request for Waiver Action Pursuant to Clean Air Act Section 209(b) for California's Advanced Clean Cars II Regulation, California Air Resources Board (May 22, 2023) (EPA-HQ-OAR-2023-0292-0023).

<sup>3</sup> Clean Air Act § 209(b) Waiver Request Support Document Submitted by the California Air Resources Board, California Air Resources Board (May 22, 2023) (EPA-HQ-OAR-2023-0292-0034) ("Waiver Request").

## II. BACKGROUND

Motor vehicle emissions are the primary cause of air pollution in many parts of California.<sup>4</sup> Motor vehicles produce and emit criteria pollutants, that include fine particulate matter (PM<sub>2.5</sub>) and precursors of ground-level ozone such as oxides of nitrogen (NOx) and hydrocarbons (HC), climate-changing greenhouse gases (GHGs), and mobile source air toxics.<sup>5</sup> These pollutants increase premature mortalities, cause cardiovascular and respiratory diseases, increase the risk of cancer, and threaten the stability of the climate,<sup>6</sup> with wide-ranging harms to California’s economic well-being, public health, natural resources, and environment.

The ACC II Regulations are the latest step in CARB’s more than half-century of incremental progress towards protecting the public health and the environment for all Californians by promulgating increasingly stringent emission standards. They include two sets of requirements for light- and medium-duty vehicles, beginning with model year 2026: one set aimed at reducing exhaust and evaporative emissions from conventional vehicles, and one set aimed at steadily increasing the number of zero-emission vehicles (ZEVs) in the State, until eventually requiring, by model year 2035, that 100 percent of new light- and medium-duty vehicles sold in California meet zero-emission standards.<sup>7</sup> Collectively, these requirements are necessary steps towards attaining the State and National Ambient Air Quality Standards (NAAQS) for criteria pollutants in California, reducing the burden of air pollution throughout the State, and responding to the urgent need for action regarding climate change.<sup>8</sup>

### A. Short History of Waiver Grants

California has regulated emissions from motor vehicles since the 1950s—years before Congress started its own federal vehicle-emission program in 1965.<sup>9</sup> In 1967, Congress passed the first version of Section 209(b) of the Clean Air Act, which has allowed California to continue its new motor vehicle-emission program by applying for preemption waivers from EPA. As described in more detail in Section III below, EPA must grant California a waiver of preemption

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<sup>4</sup> Waiver Request at 1 (citing Cal. Health & Safety Code § 43000(a)).

<sup>5</sup> Waiver Request at 1.

<sup>6</sup> *Id.*

<sup>7</sup> Waiver Request at 2.

<sup>8</sup> *Id.* at 2–3.

<sup>9</sup> *See Motor & Equip. Mfrs. Ass’n, Inc. v. EPA* (“*MEMA I*”), 627 F.2d 1095, 1108–09 & n.26 (D.C. Cir. 1979).

unless one of three specific bases for denying a waiver are met.<sup>10</sup> Over the course of the last 50-plus years, EPA has granted California more than 75 waivers.<sup>11</sup>

EPA has a long history of granting waivers to California for the State’s new motor vehicle emission program, which has allowed California to regulate light- and medium-duty engines and vehicles, among others, and to address an expanding suite of pollutants.<sup>12</sup> The specific standards amended by ACC II date back to 1990, when CARB first adopted its low-emission vehicle (LEV) regulation. That initial LEV regulation, LEV I, required vehicle manufacturers to introduce progressively cleaner light- and medium-duty vehicles with more durable emission controls for model years 1994 through 2003. EPA granted waivers to California authorizing enforcement of the LEV I emission standards as to passenger cars and light-duty trucks in 1993<sup>13</sup> and as to medium-duty trucks in 1998.<sup>14</sup>

Since 1991, CARB has repeatedly amended the LEV standards to establish progressively more stringent emission requirements for light- and medium-duty vehicles, and EPA has granted California waivers for the State’s LEV program after each of those amendments. In 2003, EPA granted California a waiver authorizing enforcement of the LEV II emission standards covering model years 2004 through 2010.<sup>15</sup> And, in 2005, EPA confirmed that CARB’s subsequent amendments to the LEV II standards fell within the scope of that 2003 LEV II waiver.<sup>16</sup>

California’s ZEV standards began as a component of its LEV I regulation,<sup>17</sup> and have subsequently been amended and extended several times.<sup>18</sup> EPA determined that several of those

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<sup>10</sup> Section 209(b) provides that the EPA Administrator “shall . . . waive application of [Section 209(a)’s preemption] to 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, if 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.” 42 U.S.C. § 7543(b)(1). It further provides that “[n]o such waiver shall be granted if the Administrator 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.” *Id.*

<sup>11</sup> See U.S. Environmental Protection Agency, *Vehicle Emissions California Waivers and Authorizations* (last updated Feb. 21, 2024), <https://www.epa.gov/state-and-local-transportation/vehicle-emissions-california-waivers-and-authorizations>.

<sup>12</sup> See, e.g., 43 Fed. Reg. 25,729, 25,736 (June 14, 1978) (regulating ozone-generating pollutants, like nitrogen oxides); 49 Fed. Reg. 18,887, 18,887 (May 3, 1984) (adding standards for additional pollutants, like particulate matter).

<sup>13</sup> 58 Fed. Reg. 4166, 4166 (Jan. 13, 1993).

<sup>14</sup> 63 Fed. Reg. 18,403, 18,403 (Apr. 15, 1998).

<sup>15</sup> 68 Fed. Reg. 19,811, 19,811 (Apr. 22, 2003).

<sup>16</sup> 70 Fed. Reg. 22,034, 22,035 (Apr. 28, 2005).

<sup>17</sup> 58 Fed. Reg. at 4166 (granting LEV I waiver).

<sup>18</sup> A detailed account of these amendments and their associated waivers is set forth in 71 Fed. Reg. 78,190, 78,191–92 (Dec. 28, 2006), 76 Fed. Reg. 61,095, 61,096 (Oct. 3, 2011), and 78 Fed. Reg. 2112, 2112–15 (Jan. 9, 2013).

amendments were within the scope of the original 1993 waiver for LEV I, including the 1996 ZEV amendments<sup>19</sup> and the 1999-2003 ZEV amendments, as they applied to 2007 and prior model year passenger cars and light-duty trucks equal to or less than 3,750 pounds.<sup>20</sup> In 2006, EPA granted California a new waiver authorizing enforcement of ZEV standards for model years 2007 through 2011 for passenger cars and light-duty trucks, including light-duty trucks with a loaded vehicle weight greater than 3,750 pounds.<sup>21</sup> In 2011, EPA determined that the ZEV amendments adopted in 2008 and affecting 2011 and prior model year vehicles were within the scope of previous waivers, or in the alternative, granted California's program a new waiver.<sup>22</sup> EPA also granted a waiver allowing California to enforce the 2008 ZEV amendments as they affected 2012 and later model year vehicles.<sup>23</sup>

In August 2012, CARB adopted the initial Advanced Clean Cars (ACC) regulation to address both criteria pollutants and GHGs emitted from light- and medium-duty motor vehicles in a coordinated approach.<sup>24</sup> The first two components of the ACC program created a pair of LEV III regulations by amending both the LEV II criteria emissions standards and CARB's GHG emissions standards,<sup>25</sup> creating a coordinated package of requirements for 2015 through 2025 model year vehicles.<sup>26</sup> The third component consisted of amendments to California's ZEV standards. CARB adopted subsequent minor amendments to the ACC regulation in November 2012, and EPA granted California a waiver for its program, including the ACC regulation as

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<sup>19</sup> 66 Fed. Reg. 7751, 7751 (Jan. 25, 2001).

<sup>20</sup> 71 Fed. Reg. at 78,190. In the alternative, EPA found the amendments affecting these vehicles met the requirements for a full waiver. California State Motor Vehicle Pollution Control Standard; Waiver of Federal Preemption, Decision of the Administrator (2005 and Subsequent Model Year Zero-Emission Vehicles (ZEV)) (Dec. 21, 2006) (EPA-HQ-OAR-2004-0437-0173), at 61.

<sup>21</sup> *Id.*

<sup>22</sup> 76 Fed. Reg. at 61,095–96.

<sup>23</sup> *Id.* at 61,097.

<sup>24</sup> See 13 Cal. Code Regs. §§ 1961.3, 1962.2 (2012).

<sup>25</sup> CARB's original GHG standards, commonly referred to as the Pavley Regulations, were adopted in 2004 in response to the increasing threat of climate change to the well-being of California's residents and the environment. The Pavley Regulations fulfilled CARB's mandate, under Assembly Bill 1493 (2002), Stats 2002, ch. 200, Pavley, to adopt standards requiring maximum feasible and cost-effective reductions in GHG emissions from light-duty vehicles. The regulations covered 2009 to 2016 and later model years and called for a 17 percent overall reduction in climate-changing emissions from the light-duty fleet by 2020 and a 25 percent overall reduction by 2030. Waiver Request at 4–5; CARB, Economic Impact Statement and Attachments (EPA-HQ-OAR-2023-0292-0014), Form 399 Attachment, at 1. EPA granted CARB's associated waiver request in 2009. 74 Fed. Reg. 32,744, 32,744 (Jul. 8, 2009).

<sup>26</sup> The ACC II Regulations do not amend—other than where necessary for conformity, as described below—the ACC GHG regulations for passenger cars, light-duty trucks, and medium-duty vehicles for model years through 2025 and beyond, in section 1961.3 of Title 13 of the California Code of Regulations.

modified, in January 2013.<sup>27</sup> That waiver authorized enforcement of the LEV III standards as well as ZEV standards applicable through model year 2025.<sup>28</sup> EPA further determined that the 2012 ZEV Amendments, as they affect 2017 and prior model year vehicles, were within the scope of previous waivers, and it alternatively granted California a waiver authorizing enforcement of the 2012 ZEV Amendments for all model year vehicles.<sup>29</sup>

## **B. ACC II Regulations**

On August 25, 2022, CARB adopted the ACC II Regulations, which became effective under state law on November 30, 2022.<sup>30</sup> The ACC II Regulations include LEV IV regulations, which build on existing LEV III requirements; ZEV regulations, which increase the stringency of preexisting ZEV requirements; and updated testing procedures to ensure compliance with the new LEV IV and ZEV regulations.

### **1. LEV IV Regulations**

The LEV IV regulations are designed to mitigate the air quality impacts of internal combustion engine vehicles in California. Specifically, the regulations build on California's existing regulatory program to include increasingly stringent standards for gasoline cars and passenger trucks beginning with model year 2026 to further reduce criteria-pollutant and toxic emissions beyond current requirements. First, they establish tighter emission standards applicable to each vehicle, while retaining the existing fleet-average standards, reducing emissions across the fleet.<sup>31</sup> Second, they require that fleet-average emissions be calculated without consideration of ZEVs starting in model year 2029, ensuring that conventional vehicles specifically reduce their emissions.<sup>32</sup> Third, they apply to a broader range of in-use driving conditions, including when a vehicle is started after it has been shut off for a period of time, reducing cold-start emissions.<sup>33</sup> The LEV IV regulations also seek to further reduce emissions from medium-duty vehicles by requiring improved emission controls over a broader range of in-use driving conditions under the moving average in-use standard for towing capable vehicles,

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<sup>27</sup> 78 Fed. Reg. at 2112.

<sup>28</sup> *Id.* In an unprecedented action, EPA withdrew portions of that waiver in 2019, 84 Fed. Reg. 51,310, 51,310 (Sept. 27, 2019), but the waiver was fully restored in 2022, 87 Fed. Reg. 14,332, 14,332 (Mar. 14, 2022).

<sup>29</sup> 78 Fed. Reg. at 2145.

<sup>30</sup> Advanced Clean Cars II Regulations, Resolution 22-12 (“CARB Resolution”) (2022) (EPA-HQ-OAR-2023-0292-0026), at 1; Waiver Request at 8.

<sup>31</sup> CARB, Public Hearing to Consider the Proposed Advanced Clean Cars II Regulations, Staff Report: Initial Statement of Reasons (Apr. 12, 2022) (“ACC II ISOR”) (EPA-HQ-OAR-2023-0292-0009), at Executive Summary 12.

<sup>32</sup> *Id.* at 104.

<sup>33</sup> *Id.* at Executive Summary 12.

lowering the current fleet average standard, and lowering the maximum emission rate from these vehicles.<sup>34</sup>

## 2. The ZEV Regulations

The ZEV regulations will require manufacturers of new light- and medium-duty vehicles to sell increasing percentages of ZEVs, beginning with 35 percent in model year 2026 and steadily increasing to 100 percent in model year 2035.<sup>35</sup> The regulations require CARB to certify as ZEVs passenger cars and light-trucks that produce zero exhaust emissions of any criteria pollutant (or precursor pollutant) or greenhouse gas, excluding emissions from air conditioning systems.<sup>36</sup>

Manufacturers may use plug-in hybrid electric vehicles (PHEVs) that meet specified requirements to meet up to 20 percent of their ZEV sales requirements.<sup>37</sup> Additionally, manufacturers may bank or trade excess ZEV values associated with production beyond minimum compliance requirements to meet future compliance obligations, and manufacturers may carry forward a deficit for up to three years.<sup>38</sup>

The ZEV regulations also require manufacturers to report on their compliance and to submit an application to CARB to obtain certification for all new ZEVs and PHEVs.<sup>39</sup> Each manufacturer is required to report its ZEV performance for the model year and the resulting surplus or shortfall in values for the model year<sup>40</sup> and to submit a projected ZEV and PHEV sales report by April 1 of each calendar year.<sup>41</sup>

## 3. Test Procedures

The ACC II Regulations amend existing test procedures and adopt new test procedures to implement the new emission standards under the LEV IV and ZEV regulations.<sup>42</sup>

Specifically, the ACC II Regulations adopt new exhaust emission test procedures that apply to 2026 and subsequent model year light- and medium-duty vehicles certified to the new LEV IV exhaust criteria pollutant emission standards.<sup>43</sup> The ACC II Regulations also adopt new evaporative emission test procedures that apply to 2026 and subsequent model year light-, medium-, and heavy-duty vehicles to reflect the new requirements and greater stringency of the California evaporative standards for running losses and minimum canister sizes.<sup>44</sup> To account for

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<sup>34</sup> *Id.*

<sup>35</sup> Waiver Request at 17; Cal. Code Regs., tit. 13, § 1962.4(c)(1)(B).

<sup>36</sup> Cal. Code Regs., tit. 13, § 1962.4(b).

<sup>37</sup> *Id.* § 1962.4(e)(1).

<sup>38</sup> Waiver Request at 18; Cal. Code Regs., tit. 13, § 1962.4(f)(3)(A)–(B), (h)(2).

<sup>39</sup> Cal. Code Regs., tit. 13, § 1962.4(i), (j).

<sup>40</sup> *Id.* § 1962.4(h)(1).

<sup>41</sup> *Id.* § 1962.4(j)(1).

<sup>42</sup> Waiver Request at 23–25.

<sup>43</sup> *Id.* at 23.

<sup>44</sup> *Id.* at 23–24.

the adoption of these new test procedures, the ACC II Regulations amend the preexisting test procedures for criteria pollutant exhaust emissions and the preexisting evaporative emission test procedures to make clear that the applicable preexisting procedures apply only through the 2025 model year, and to incorporate the most recent version of federal test procedures.<sup>45</sup>

The ACC II Regulations also adopt new test procedures that apply to 2026 and subsequent model year light- and medium-duty ZEVs and PHEVs.<sup>46</sup> To account for the adoption of these new test procedures, the preexisting exhaust emission test procedures for ZEV and hybrid electric vehicles were amended to make clear that those preexisting test procedures would apply only through the 2025 model year and to include aligning reporting requirements where a manufacturer is using provisions of the new ACC II ZEV requirements to earn early ZEV values prior to the 2026 model year requirements.<sup>47</sup> These modifications do not alter any of the test procedures or require testing for vehicles that are subject to the preexisting procedures through the 2025 model year.<sup>48</sup> The newly adopted test procedures that apply to ZEV and PHEVs largely incorporate federal test procedures or SAE International recommended practices or test procedures and reflect the greater stringency of the California standards.<sup>49</sup>

### C. Section 177

Recognizing that other states might wish to adopt California's new-vehicle-emission regulations, Congress amended the Clean Air Act in 1977 to allow states with approved plan provisions under the NAAQS program to adopt California new-vehicle-emission standards.<sup>50</sup> While EPA can approve the inclusion of those standards in future state implementation plans to attain or maintain the NAAQS,<sup>51</sup> EPA has no role in a state's choice to adopt those standards in the first place.<sup>52</sup>

As of the date of this submission, thirteen other jurisdictions have adopted the ACC II Regulations pursuant to Section 177: Colorado, Delaware, Maryland, Massachusetts, New

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<sup>45</sup> *Id.* Additional conforming amendments were made to the regulations for preexisting test procedures. These changes do not alter the existing test procedures used to demonstrate compliance with the applicable standards and continue to allow vehicle manufacturers to demonstrate compliance with both California and federal standards with one test vehicle. *Id.* at 24; *see also* ACC II ISOR at 93–94, 132–133.

<sup>46</sup> Waiver Request at 25.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> H.R. Conf. Rep. 95-564, at 1570 (1977); 42 U.S.C. § 7507.

<sup>51</sup> *See* 42 U.S.C. § 7410(a)(1), (k).

<sup>52</sup> *See id.* § 7507.

Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia.<sup>53</sup>

These jurisdictions have a strong interest in EPA’s approval of California’s request. Historically, Section 177 states have benefited by adopting California’s standards. These jurisdictions additionally benefit from the adoption of the ACC II Regulations, including the public health benefits of reduced vehicle emissions and air pollution. Furthermore, by adopting these standards, the jurisdictions take necessary steps towards attaining the NAAQS for criteria pollutants in their jurisdictions and towards responding to the urgent need for action regarding climate change.

### **III. EPA MUST GRANT THE WAIVER FOR THE ACC II REGULATIONS BECAUSE NONE OF THE THREE FINDINGS THAT COULD SUPPORT DENIAL CAN BE MADE**

When Congress first created a program for federal vehicle emissions regulation in 1965 it recognized that California had a preexisting program that was already serving as a “laboratory for innovation” for the nation.<sup>54</sup> Congress chose to permit California to continue to develop this program, subject to the approval of federal regulators. Thus, while states are generally preempted from adopting their own emissions standards for new motor vehicles,<sup>55</sup> the EPA Administrator “shall ... waive application” of the preemption section to California, “if 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.”<sup>56</sup> A waiver may be denied only “if the Administrator 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.”<sup>57</sup>

This provision—Section 209(b)(1)—creates a presumption that EPA will grant a requested waiver.<sup>58</sup> EPA is not required to make affirmative findings in order to grant a waiver; rather, findings, based on the record evidence, are required to deny California’s request.<sup>59</sup>

#### **A. CARB’s Protectiveness Determinations Are Not Arbitrary and Capricious**

Under Section 209(b)(1)(A), EPA may deny a waiver if it finds that California’s determination “that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards” is arbitrary and capricious.<sup>60</sup> The text is

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<sup>53</sup> CARB, Section 177 States Regulation Dashboard, <https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/states-have-adopted-californias-vehicle-regulations> (last accessed February 23, 2024).

<sup>54</sup> *MEMA I*, 627 F.2d at 1109–11.

<sup>55</sup> 42 U.S.C. § 7543(a).

<sup>56</sup> *Id.* § 7543(b)(1).

<sup>57</sup> *Id.*

<sup>58</sup> *MEMA I*, 627 F.2d at 1120–22.

<sup>59</sup> *Id.* at 1121–22.

<sup>60</sup> 42 U.S.C. § 7543(b)(1), (b)(1)(A).



explicit that California evaluates the protectiveness of its new motor vehicle emission standards “in the aggregate,” assessing whether California’s standards, as a whole regulatory program, are at least as protective as EPA’s standards. This assessment occurs against the backdrop of prior waiver grants in which California determined, and EPA affirmed, that California’s existing new motor vehicle emissions program is at least as protective as EPA’s.<sup>61</sup>

Thus, California’s protectiveness determination focuses on whether the new or amended standards triggering the waiver request would alter the relative protectiveness of the State’s program—in other words, whether the new or amended standards would cause the State’s standards “in the aggregate” to become less protective than EPA’s.<sup>62</sup> The statute provides two paths to make this determination, under Section 209(b)(2) and Section 209(b)(1).

Under Section 209(b)(2), “[i]f each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for purposes of paragraph [209(b)](1).”<sup>63</sup> Thus, if each of the new or amended standards is at least as stringent as the comparable EPA standard, the new or amended standards cannot cause California’s program—its standards “in the aggregate”—to become less protective than EPA’s, and EPA cannot find that California’s protectiveness determination is arbitrary and capricious.

Under Section 209(b)(1), the protectiveness inquiry considers California’s standards “in the aggregate.” Even where Section 209(b)(2) does not resolve the protectiveness inquiry, the fundamental question remains whether the new or amended standards would cause California’s new motor vehicle emissions program as a whole to become less protective than EPA’s program. California’s program can still be at least as protective as EPA’s even if some (or all) of the new or amended standards in a waiver request are less stringent than comparable EPA standards.

The LEV IV standards for light-duty vehicles and medium-duty vehicles and the ZEV standards are each at least as stringent as, and in some respects more stringent than, any corresponding federal standards.<sup>64</sup> As described in more detail below, the standards are more stringent than their federal counterparts; are more stringent because there is no corresponding federal standard; or are at least as stringent as the equivalent federal standard in number or in practice.

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<sup>61</sup> *E.g.*, 74 Fed. Reg. at 32,749; 77 Fed. Reg. 9239, 9243–44 (Feb. 16, 2012); 78 Fed. Reg. at 2121–22.

<sup>62</sup> *E.g.*, 44 Fed. Reg. 38,660, 38,661 (July 2, 1979) (“[T]he public record did not contain any evidence that this regulation would cause the California standards, in the aggregate, to be less protective of public health and welfare than the applicable Federal standards.”); 70 Fed. Reg. 50,322, 50,323 (Aug. 26, 2005) (reviewing determination that “2007 California Heavy Duty Diesel Engine Standards do not cause California’s standards, in the aggregate, to be less protective of public health and welfare than the applicable Federal standards”).

<sup>63</sup> 42 U.S.C. § 7543(b)(2).

<sup>64</sup> Waiver Request at 28–35.

The LEV IV standards increase the stringency of emissions standards for certain new vehicles beyond the comparable federal standards. For example, the LEV IV regulations reduce the particulate matter emissions standard for light-duty vehicles to 3 mg/mile, which is more stringent than the federal standard of 6 mg/mile.<sup>65</sup> For medium-duty vehicles, the LEV IV standards set the exhaust emissions fleet average standard for non-methane organic gas (NMOG) and oxides of nitrogen (NOx) (NMOG+NOx) as measured over the FTP test cycle at 0.150 g/mile for class 2b vehicles and 0.175 g/mile for class 3 vehicles, both more stringent than the federal standards of 0.178 g/mile and 0.247 g/mile, respectively.<sup>66</sup> The LEV IV regulations also lower the loss emission standard to reduce evaporative emissions generated while a vehicle is operating to 0.01 grams per mile of hydrocarbons, while the federal running loss standard remains at a less stringent 0.05 grams per mile.<sup>67</sup>

Another set of the LEV IV standards and the ZEV standards satisfy the protectiveness criterion under Section 209(b)(2) because there are no equivalent federal standards.<sup>68</sup> EPA has found California's protectiveness determinations in the absence of federal standards reasonable because "California standards may be most clearly 'at least as protective' when they are compared to the absence of Federal emission standards."<sup>69</sup> There are no federal standards equivalent to the LEV IV medium-duty vehicle 50° F emission standards for NMOG+NOx, formaldehyde, and CO,<sup>70</sup> or to the new moving average window in-use standard for vehicles capable of towing.<sup>71</sup> The ACC II Regulations also amend on-board diagnostic (OBD) system regulations to ensure that OBD systems in LEV IV-compliant vehicles will properly monitor and timely detect malfunctions in emission control systems.<sup>72</sup> These aspects of the ACC II Regulations are thus at least as stringent as the (non-existent) federal standards and do not cause California's program to be less protective than the federal program.<sup>73</sup>

The remaining LEV IV standards are at least as stringent as their federal counterparts, even where the emission standard is numerically the same. The LEV IV regulations phase out preexisting provisions that allow ZEVs to be included in the calculation of manufacturers' vehicle fleet-averages and provisions that allow PHEVs to generate NMOG+NOx emission credits.<sup>74</sup> The LEV IV regulations also disaggregate the composite average certification emission standards allowed by the federal Supplemental Federal Test Procedures, thereby making the

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<sup>65</sup> *Id.* at 31.

<sup>66</sup> *Id.* at 32.

<sup>67</sup> *Id.* at 13–14, 34–35.

<sup>68</sup> *Id.* at 18, 34–35.

<sup>69</sup> 74 Fed. Reg. at 32,755; *see also* 78 Fed. Reg. at 2122.

<sup>70</sup> Waiver Request at 32; Cal. Code Regs., tit. 13, § 1961.4(d)(2)(D), (E).

<sup>71</sup> Waiver Request at 13, 34; ACC II ISOR at 121–122; Cal. Code Regs., tit. 13, § 1961.4(d)(2)(D), (E).

<sup>72</sup> Waiver Request at 14–15, 34; Cal. Code Regs., tit. 13, §§ 1968.2, 1968.5.

<sup>73</sup> *Id.* at 33–34.

<sup>74</sup> *Id.* at 30; Cal. Code Regs., tit. 13, § 1961.4(d)(1), (2)(A).

emission standards effectively more stringent.<sup>75</sup> Further, the LEV IV regulations establish new emission standards for conventional and PHEVs as measured during cold start conditions,<sup>76</sup> for which there are not comparable federal standards, and clarify that existing federal requirements apply to auxiliary fuel systems for fuel-fired heaters.<sup>77</sup>

Sections 209(b)(1) and (b)(1)(A) provide an additional path to finding that California’s program is at least as protective as EPA’s. The LEV IV and ZEV standards increase the protectiveness of California’s program, by building on California’s existing regulatory program, which EPA has previously determined to be at least as protective as EPA’s program.<sup>78</sup> California’s program requires increasing deployment of the best emission control technologies of which CARB is aware—namely, vehicles that have *zero* tailpipe emissions. The Advanced Clean Trucks and Zero-Emission Airport Shuttle regulations, which are covered by a waiver granted in April 2023, do so for medium- and heavy-duty vehicles.<sup>79</sup> Earlier ZEV standards did so for light-duty vehicles, and the ACC II Regulations extend and strengthen those requirements. California reasonably determined that the ACC II Regulations will not cause California’s new motor vehicle emission standards, in the aggregate, to be less protective of public health and welfare than applicable federal standards.<sup>80</sup> Particularly given that CARB’s program requires increases in the use of these technologies, and does so across vehicle classes and categories, EPA cannot find California’s protectiveness determination arbitrary and capricious.

### **B. California Needs Its Separate Program, and the ACC II Standards, to Meet Compelling and Extraordinary Conditions**

Turning to Section 209(b)(1)(B), EPA may deny California a waiver if it determines that “such State does not need such State standards to meet compelling and extraordinary conditions.”<sup>81</sup> There is no basis for EPA to make such a determination here. California has the only extreme nonattainment regions for ozone in the country (the South Coast and San Joaquin Valley air basins), and those areas suffer some of the worst levels of PM<sub>2.5</sub> pollution in the country.<sup>82</sup> In addition, three areas in California remain the only areas of the country found to be in “serious nonattainment” for the fine particulate matter pollution (PM<sub>2.5</sub>) NAAQS set in

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<sup>75</sup> Cal. Code Regs., tit. 13, § 1961.4(d)(3), (4); Waiver Request at 31 [sic]; ACC II ISOR at 105–110.

<sup>76</sup> Cal. Code Regs., tit. 13, §§ 1961.4(d)(2)(B), (C), 1961.4(d)(3)(B); Waiver Request at 31.

<sup>77</sup> Waiver Request at 15, 34; Cal. Code Regs., tit. 13, § 1961.4.

<sup>78</sup> *E.g.*, 74 Fed. Reg. at 32,754; 70 Fed. Reg. at 50,323; 77 Fed. Reg. at 9244; 78 Fed. Reg. at 2124–25 (granting California’s waiver request to enforce its Advanced Clean Car regulations, including revisions to California’s low emission vehicle and ZEV programs).

<sup>79</sup> 88 Fed. Reg. 20,688 (Apr. 6, 2023).

<sup>80</sup> CARB Resolution, *supra* note 30, at 20.

<sup>81</sup> 42 U.S.C. § 7543(b)(1)(B).

<sup>82</sup> EPA, *PM-2.5 (2012) Designated Area/State Information with Design Values* (last updated Jan. 31, 2024), <https://www3.epa.gov/airquality/greenbook/kbtcw.html>; EPA, *PM-2.5 Nonattainment Areas (2012 Standard)* (last updated Jan. 31, 2024), [https://www3.epa.gov/airquality/greenbook/mappm25\\_2012.html](https://www3.epa.gov/airquality/greenbook/mappm25_2012.html).

2012.<sup>83</sup> The impact of these air quality problems is pervasive, with nearly 21 million Californians residing in communities where pollution levels violate NAAQS limits.<sup>84</sup> Indeed, of the 52 counties in the country projected *not* to meet the 2024 PM<sub>2.5</sub> standard, almost half—23—are in California.<sup>85</sup> EPA has never questioned that California’s criteria pollution “conditions” are “extraordinary and compelling” or that California needs to reduce emissions of these pollutants by every fraction of a metric ton it can achieve. Similarly, California needs its motor vehicle program to lower the emissions causing extraordinary climate change impacts in the State. Thus, as explained below, under EPA’s traditional interpretation, there is no basis to deny the waiver under this criterion; nor is there a basis for denial under an alternative interpretation, because the ACC II standards viewed alone provide significant criteria and GHG emission reductions.

**1. EPA correctly intends to use its traditional “whole program” interpretation in evaluating California’s need**

**a. The text and Congressional intent support EPA’s “whole program” inquiry**

With only two short-lived exceptions, EPA has for more than fifty years interpreted Section 209(b)(1)(B) as asking whether California “needs to have its own separate new motor vehicle program” as a whole, rather than “whether the state needs the specific standards under consideration,” in order to address compelling and extraordinary conditions in the State.<sup>86</sup> EPA has repeatedly concluded that this “traditional interpretation” is “the most straightforward reading of the text and legislative history.”<sup>87</sup>

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<sup>83</sup> *Id.*

<sup>84</sup> CARB Resolution, *supra* note 30, at 4.

<sup>85</sup> EPA, *EPA Projects 52 Counties would not Meet the Strengthened Standard in 2032*, <https://www.epa.gov/system/files/documents/2024-02/projected-county-list-2032-for-web.pdf> (list); EPA, *EPA Projects More than 99% of Counties would Meet the Revised Fine Particle Pollution Standard*, <https://www.epa.gov/system/files/documents/2024-02/2024-pm-naaqs-final-2032-projections-map.pdf> (map).

<sup>86</sup> *See* 84 Fed. Reg. at 51,346; 87 Fed. Reg. at 14,358. As EPA has stated, it had consistently approached this “need” inquiry as a program-level one until 2008, when it for the first time determined it would consider whether California needed the particular standards subject to the waiver request in isolation “to meet compelling and extraordinary conditions.” 84 Fed. Reg. at 51,346. However, EPA reversed itself in 2009 by returning to “the traditional interpretation of CAA section 209(b)(1)(B), under which it would only consider whether California had a need for its new motor vehicle emissions program as a whole.” *Id.* at 51,330–31 (internal quotation marks omitted), 51,346. EPA continued to apply its traditional, program-level approach (*see* 79 Fed. Reg. 46,256, 46,261 (Aug. 7, 2014)), until in 2019 it withdrew a portion of a waiver it had granted six years prior, applying the “particular standards” approach to standards that reduce greenhouse gas emissions. 84 Fed. Reg. at 51,340. This limited interpretation lasted only until 2022, when EPA again returned to its traditional approach. 87 Fed. Reg. at 14,358.

<sup>87</sup> 74 Fed. Reg. at 32,761; *see also* 87 Fed. Reg. at 14,358.

EPA states in the Notice that it “intends to use this traditional interpretation” in evaluating California’s need under section 209(b)(1)(B).<sup>88</sup> That approach is both faithful to a plain reading of the statutory language and consistent with an interpretation that harmonizes the subparts of the statute.

First, this interpretation comports with the text and structure of Section 209(b).<sup>89</sup> The finding contemplated by Section 209(b)(1)(B) pertains to California’s need for “such State standards,” which is properly understood to refer back to the standards described just prior in Section 209(b)(1).<sup>90</sup> As discussed above, Section 209(b)(1)(A) requires EPA to review California’s “determin[ation] that the State standards . . . in the aggregate,” will be “at least as protective of public health and welfare as applicable Federal standards.”<sup>91</sup> Because Section 209(b)(1) describes standards (plural) “in the aggregate,” the reference back to “such State standards” in Section 209(b)(1)(B) necessarily encompasses this “whole program” approach.<sup>92</sup> As EPA has explained:

[I]f Congress had intended a review of the need for each individual standard under (b)(1)(B), it is unlikely that it would have used the phrase “. . . does not need such state standards” . . . which apparently refers back to the phrase “State standards . . . in the aggregate,” as used in the first sentence of section 209(b)(1), rather than to the particular standard being considered. The use of the plural, i.e. “standards,” further confirms that Congress did not intend EPA to review the need for each individual standard in isolation.<sup>93</sup>

Second, it makes sense to read these subparts together, as the “need” assessment is “logically tied”<sup>94</sup> to the requirement that California determine its standards are “in the aggregate, at least as protective” as EPA’s standards. As to protectiveness, Congress designed the inquiry to focus on California’s standards collectively so that the State could have flexibility to “promulgate individual standards that are not as stringent as comparable federal standards” as long as, on balance, California’s whole program is equally or more protective.<sup>95</sup> To effectuate this flexibility, Congress allowed California “to promulgate individual standards that, in and of

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<sup>88</sup> 88 Fed. Reg. at 88,909–10.

<sup>89</sup> 42 U.S.C. § 7543(b).

<sup>90</sup> See *Culbertson v. Berryhill*, 139 S. Ct. 517, 522 (2019) (explaining that “such” typically means “[o]f the kind or degree already described or implied”); see also “such,” Black’s Law Dictionary (4th ed., revised 1968) (“Of that kind, having particular quality or character specified . . . Identical with, being the same as what has been mentioned.”).

<sup>91</sup> 42 U.S.C. § 7543(b)(1).

<sup>92</sup> See *N. Broward Hosp. Dist. v. Shalala*, 172 F.3d 90, 95 (D.C. Cir. 1999) (explaining that the word “such” can play either a “particularizing” or “non-particularizing” role, meaning it can refer either to the “object[s] as already particularized” in the antecedent use or to those kind of objects more broadly).

<sup>93</sup> 49 Fed. Reg. at 18,890.

<sup>94</sup> *MEMA I*, 627 F.2d at 1113.

<sup>95</sup> 74 Fed. Reg. at 32,761.

themselves, might not be considered needed to meet compelling and extraordinary circumstances.”<sup>96</sup> A contrary, individual standards-based approach to Section 209(b)(1)(B) would convert the “need” inquiry into a referendum on the effectiveness of each standard, undercutting the flexibility Congress built into 209(b)(1),<sup>97</sup> and creating conflict. Such an approach would create a scenario in which standards that are sufficiently protective to pass muster under the aggregate analysis of Section 209(b)(1)(A) would nevertheless fail under the Section 209(b)(1)(B) analysis if not effective enough in isolation. Congress cannot have intended Section 209(b)(1)(B) to render the analysis in Section 209(b)(1)(A) effectively meaningless. That Congress intended these subparts to do distinct work is underscored by the text: whereas the examination in Section 209(b)(1)(A) looks to whether California’s *standards* themselves are sufficiently protective, the examination in Section 209(b)(1)(B) looks to whether the *State* has need for “such” standards.<sup>98</sup>

EPA’s traditional approach avoids the conflict described above, giving all three criteria in Section 209(b)(1) distinct functions: Section 209(b)(1)(A) safeguards public health and welfare by requiring a minimum level of protection, while granting California discretion in deciding what suite of standards are appropriate; Section 209(b)(1)(B) allows for the withholding of additional waivers if California’s conditions no longer warrant further changes to its program; and Section 209(b)(1)(C) protects manufacturers against an infeasible program. EPA’s traditional interpretation ensures that the benefit to the nation that Congress saw in having California serve as a “laboratory for innovation” for vehicle policy and technology<sup>99</sup> is not outweighed by the administrative burden manufacturers claimed they would face by having to design separate “federal cars” and “California cars.”<sup>100</sup> A “two car” system remains appropriate as long as a minimum level of protection is maintained, a “California” program is still needed, and that program is not infeasible.<sup>101</sup> As EPA has noted, “the ‘need’ issue [] went to the question of standards in general, not the particular standards for which California sought a waiver in a given instance.”<sup>102</sup>

Moreover, EPA’s “traditional interpretation” is consistent with Congressional intent that California “adopt a complete program of motor vehicle emissions control,” not just “a portion.”<sup>103</sup> While Congress identified California’s challenges with smog as one basis for enacting Section 209, it did not constrain California’s program to smog-causing pollutants; rather, it explicitly gave California the “broadest possible discretion” to regulate vehicle

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<sup>96</sup> *Id.*

<sup>97</sup> H.R. Rep. No. 95-294 at 301–02 (explaining intent “to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare”).

<sup>98</sup> Compare 42 U.S.C. § 7543(b)(1) with *id.* § 7543(b)(1)(B).

<sup>99</sup> *MEMA I*, 627 F.2d at 1109–11.

<sup>100</sup> *Engine Mfrs. Ass’n v. U.S. E.P.A.*, 88 F.3d 1075, 1080 (D.C. Cir. 1996).

<sup>101</sup> See S. Rep. No. 90-403, at 33 (1967).

<sup>102</sup> 49 Fed. Reg. at 18,890 (cleaned up).

<sup>103</sup> *MEMA I*, 627 F.2d at 1110 & n.31.

emissions.<sup>104</sup> This is underscored by Section 209(b)(3), under which EPA is required to accept compliance with California’s standards as compliance with federal standards,<sup>105</sup> reflecting that California independently operates its own regulatory program and is solely responsible for certifying vehicles sold in California as compliant with California’s program (i.e., “California” vehicles). In exercise of this broad discretion, California has steadily expanded the pollutants addressed by its standards, ensuring a “comprehensive program” that protects the public. For example, recognizing that carbon monoxide is a dangerous air pollutant that poses severe risks for human health,<sup>106</sup> California started regulating the emissions of carbon monoxide as part of its light-duty vehicle program in 1975.<sup>107</sup> Under a “standards-based” interpretation of Section 209(b)(1)(B) that reads into statutory language a “uniqueness” or other limiting requirement, carbon monoxide could arguably fall outside the scope of the program because neither Congress nor EPA has ever found California to have uniquely severe challenges with carbon monoxide.<sup>108</sup> The exclusion of this pollutant could leave a gap in California’s regulatory program, even though EPA and CARB agree that carbon monoxide is harmful and should be controlled.<sup>109</sup> The Clean Air Act cannot plausibly be understood to have enabled California to operate an independent program while it simultaneously limited California to controlling only a subset of harmful pollutants emitted by motor vehicles.

The fact that Congress has “amended various parts of [the Clean Air Act] over the years, including the specific provision at issue here,” without disturbing EPA’s longstanding “whole

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<sup>104</sup> H.R. Rep. No. 95-294, at 301–02; *see also MEMA I*, 627 F.2d at 1112 (Congress permitted California to evaluate “the relative risks of various pollutants”); 43 Fed. Reg. at 25,735 (describing EPA’s “practice to leave the decisions on controversial matters of public policy, such as whether to regulate methane emissions, to California”).

<sup>105</sup> 42 U.S.C. § 7543(b)(3).

<sup>106</sup> CARB, *Proposed Regulations for Low-Emission Vehicles and Clean Fuels Staff Report*, at 3 (Aug. 13, 1990); CARB, *2023 Revision to the California State Implementation Plan for Carbon Monoxide*, at 3 (Feb. 9, 2024), <https://ww2.arb.ca.gov/sites/default/files/2024-02/2023%20Revision%20to%20the%20California%20State%20Implementation%20Plan%20for%20Carbon%20Monoxide%20Final.pdf> (explaining risk to human health from carbon monoxide exposure); *see generally* EPA, *Integrated Science Assessment for Carbon Monoxide*, EPA/600/R-09/019F (Jan. 2010).

<sup>107</sup> Cal. Code Regs. tit. 13, § 1955.1.

<sup>108</sup> CARB, *2023 Revision to the California State Implementation Plan for Carbon Monoxide*, *supra* note 106, at 1 (explaining California’s history of attaining CO standards); EPA, *Carbon Monoxide (1971) Designated Area Design Values*, <https://www3.epa.gov/airquality/greenbook/cdctc.html>; *see generally* 56 Fed. Reg. 56,694 (Nov. 6, 1991) (finding areas outside of California in “severe” nonattainment).

<sup>109</sup> 76 Fed. Reg. 54,294, 54,295, 54,298 (Aug. 31, 2011) (“EPA initially established NAAQS for CO . . . to protect against the occurrence of carboxyhemoglobin levels in human blood associated with health effects of concern.”); *see generally* National Academies Press, *Managing Carbon Monoxide Pollution in Meteorological and Topographical Problem Areas* (2003); EPA, *Integrated Science Assessment for Carbon Monoxide*, *supra* note 106.

program” interpretation is telling.<sup>110</sup> Indeed, Congress added the “in the aggregate” language in Section 209(b)(1) *at the same time* it enacted the “such State standards” language of Section 209(b)(1)(B),<sup>111</sup> with the stated intent of expanding California’s discretion “in selecting the best means to protect the health of its citizens and the public welfare.”<sup>112</sup> In the years preceding those 1977 amendments, EPA had consistently employed a program-level interpretation of the “need” inquiry and had, on at least one occasion, expressly defended that approach while rejecting arguments for a narrower, single-standard approach.<sup>113</sup> The legislative history from 1977 reflects Congress’s approval of EPA’s practice of “liberally constru[ing] the waiver provision.”<sup>114</sup> Congress’s “awareness of and familiarity with” EPA’s program-level approach to the need inquiry “is particularly strong evidence” of congressional affirmation.<sup>115</sup>

Congress’s incorporation of the language in Section 209(b)(1)(B) to Section 209(e)(2) further affirms that Congress intended EPA to apply the traditional interpretation. In 1990, Congress enacted language nearly identical to Section 209(b)(1)(B) in Section 209(e)(2)(A)(ii), a subpart which authorizes EPA to waive preemption for California emission standards for many “nonroad vehicles or engines.”<sup>116</sup> By the time of that 1990 re-enactment, EPA had not only maintained its approach to Section 209(b)(1)(B) as a program-level inquiry for decades, it had also explicitly defended that interpretation for the second time.<sup>117</sup> When Congress “re-enacts a statute without change,” as it did in Section 209(e)(2)(A)(ii), it is “presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation.”<sup>118</sup> Indeed, had Congress disapproved of EPA’s then-decades-old approach, it could have revised Section 209(b)(1)(B) in 1990. The choice to, instead, re-use its language is a clear indication of Congressional approval.

Thus, EPA should apply its traditional “whole program” approach as proposed.

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<sup>110</sup> *Jackson v. Modly*, 949 F.3d 763, 773 (D.C. Cir. 2020).

<sup>111</sup> Act to amend the Clean Air Act, Pub. L. No. 95-95, § 209(b)(1), 91 Stat. 685, 755 (1977).

<sup>112</sup> H.R. Rep. No. 95-294, at 301, 302 (1977).

<sup>113</sup> *See, e.g.*, 38 Fed. Reg. 30,136, 30,136 (Nov. 1, 1973); 40 Fed. Reg. 23,102, 23,104 (May 28, 1975); 41 Fed. Reg. 44,209, 44,210, 44,213 (Oct. 7, 1976) (rejecting an approach by which it would determine “whether *these particular standards* are actually required by California”).

<sup>114</sup> H.R. Rep. No. 95-294, at 301 (1977).

<sup>115</sup> *See Jackson*, 949 F.3d at 773 (“indication [of congressional affirmation] is particularly strong if evidence exists of the Congress’s awareness of and familiarity with [the] interpretation”).

<sup>116</sup> 42 U.S.C. § 7543(e)(2)(A).

<sup>117</sup> 49 Fed. Reg. at 18,889–90.

<sup>118</sup> *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982); *see also George v. McDonough*, 596 U.S. 740, 746 (2022) (holding Congress codified agency interpretation when “[i]t enacted” phrase with “a long regulatory history in this very context” and added “no new “definition or other provision indicating any departure from the same meaning that the [agency] had long applied”) (internal quotation marks omitted).



**b. California continues to have “compelling and extraordinary” conditions**

Applying the traditional inquiry, there is no basis for EPA to deny this waiver under Section 209(b)(1)(B). There can be no genuine dispute that the kind of compelling and extraordinary conditions that led Congress initially to conclude the State needs its own vehicular emissions control program continue to exist in the State. California’s residents experience some of the worst air quality in the nation.<sup>119</sup> As stated above, the two most “extreme nonattainment” areas for the 2008 and 2015 eight-hour federal ozone standard in the country are located in California—impacting over half of the state’s population.<sup>120</sup> Moreover, California currently has 37 counties in nonattainment with the 2015 eight-hour ozone NAAQS, and 14 counties in nonattainment with the 2012 PM<sub>2.5</sub> NAAQS.<sup>121</sup> And 23 counties in California are projected to fall short of the revised fine particle pollution standard in 2032.<sup>122</sup> EPA has consistently found that these challenges, and the conditions that give rise to them, are “compelling and extraordinary,” and thus that California “need[s]” its separate motor vehicle emissions program to address them.<sup>123</sup>

And notably, while California can show that its air pollution challenges are “caused by conditions specific to California and/or effects unique to California,”<sup>124</sup> the plain text of Section 209(b)(1)(B) does not *require* such a showing. The term “extraordinary” as used in the statute does not require that conditions in California be unique or one of a kind; rather, the plain meaning of the term requires only that conditions “exceed[] the usual, average, or normal measure or degree.”<sup>125</sup> Congress has elsewhere expressly defined “unusual and compelling” interests to mean interests that are “substantially different in nature or magnitude” than “those prevailing in the United States generally”;<sup>126</sup> Congress’s decision not to define “compelling and extraordinary” in the same way here is telling. Inserting such a meaning into Section 209(b), when Congress did not, could also artificially constrain California’s discretion in crafting its

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<sup>119</sup> ACC II ISOR, at Executive Summary 4.

<sup>120</sup> See *supra* notes 82–85 and accompanying text; see also EPA, *8-Hour Ozone (2008) Nonattainment Areas* (last updated Jan. 31, 2024), <https://www3.epa.gov/airquality/greenbook/hnc.html>; EPA, *8-Hour Ozone (2015) Designated Area/State Information* (last updated Jan. 31, 2024), <https://www3.epa.gov/airquality/greenbook/jbtc.html>; ACC II ISOR, at Executive Summary 4.

<sup>121</sup> See EPA, *Current Nonattainment Counties for All Criteria Pollutants* (last updated Jan. 31, 2024), <https://www3.epa.gov/airquality/greenbook/ancl.html#CA>.

<sup>122</sup> See *supra* note 85 and accompanying text.

<sup>123</sup> 53 Fed. Reg. 7022, 7022 (Mar. 4, 1988); 55 Fed. Reg. 43,028, 43,031 (Oct. 25, 1990); 69 Fed. Reg. 60,995, 60,995 (Oct. 14, 2004); 79 Fed. Reg. 46,256, 46,261 (Aug. 7, 2014); 81 Fed. Reg. 95,982, 95,986 (Dec. 29, 2016).

<sup>124</sup> See 88 Fed. Reg. at 88,909.

<sup>125</sup> *Extraordinary*, Black’s Law Dictionary (4th ed. 1951).

<sup>126</sup> 42 U.S.C. § 6297(d)(1)(C)(i).

program, in direct conflict with Congress’s stated goal of “expand[ing] California’s flexibility to adopt a complete program of motor vehicle emissions control.”<sup>127</sup>

Congress’s passage of Section 177 further supports a plain meaning interpretation. Permitting other states to adopt California’s standards under Section 177 would make little sense if the term “extraordinary” required a showing of complete uniqueness as compared to other states.<sup>128</sup> Section 177 demonstrates that Congress both understood that California’s pollution challenges need neither be nor remain unique, and intended that other states could use the “California car” to address their pollution problems.<sup>129</sup>

For these reasons, EPA has no basis to deny California’s waiver request under Section 209(b)(1)(B).

**2. California has, in any event, shown that it needs the ACC II Regulations to address its compelling and extraordinary conditions**

Even under a narrower standards-specific inquiry, the record demonstrates that the ACC II Regulations will meet California’s compelling and extraordinary conditions by reducing both criteria emissions and GHG emissions in California. As discussed below, such a showing is sufficient to establish that California “need[s]” these regulations under Section 209(b)(1)(B).

**a. California needs the ACC II Regulations to reduce criteria pollution**

California must significantly reduce emissions of ozone and particulate matter to abate its pollution to levels necessary to protect public health as established by EPA’s NAAQS and CARB’s California Ambient Air Quality Standards. The most recent federal ozone NAAQS is 70 parts per billion, with a required attainment date in the South Coast Air Basin by 2037.<sup>130</sup> The 2012 federal PM<sub>2.5</sub> NAAQS requirements also require action in California for attainment, with a deadline of 2024 for the 35 ug/m<sup>3</sup> 24-hour standard and 2025 for the 12 ug/m<sup>3</sup> annual standard.<sup>131</sup> NO<sub>x</sub> is a critical precursor to ozone and secondary PM formation. Exposure to ozone and PM<sub>2.5</sub> is associated with increases in premature death, hospitalizations, visits to

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<sup>127</sup> *MEMA I*, 627 F.2d at 1110.

<sup>128</sup> 42 U.S.C. § 7507.

<sup>129</sup> 87 Fed. Reg. at 14,357, 14,359.

<sup>130</sup> ACC II ISOR, at Executive Summary 4–5.

<sup>131</sup> *Id.* at 4. On February 7, 2024, the EPA further strengthened the annual PM<sub>2.5</sub> standard, lowering it from 12.0 ug/m<sup>3</sup> to 9.0 ug/m<sup>3</sup>. EPA, *Final Reconsideration of the National Ambient Air Quality Standards for Particulate Matter (PM)* (last updated on Feb. 7, 2024), <https://www.epa.gov/pm-pollution/final-reconsideration-national-ambient-air-quality-standards-particulate-matter-pm>; see also EPA, *Reconsideration of the National Ambient Air Quality Standards for Particulate Matter* (Feb. 5, 2024), <https://www.epa.gov/system/files/documents/2024-02/pm-naaqs-final-frn-pre-publication.pdf> (prepublication version of notice to be published in the *Federal Register*).

doctors, use of medication, and emergency room visits due to exacerbation of chronic heart and lung diseases and other adverse health conditions.<sup>132</sup>

Mobile sources are the largest contributors in California to the formation of ozone, PM<sub>2.5</sub>, and toxic diesel particulate matter.<sup>133</sup> By reducing emissions from internal combustion engine vehicles (ICEVs), and replacing ICEVs with ZEVs, the ACC II Regulations are expected to result in significant NOx and PM<sub>2.5</sub> emission reductions.<sup>134</sup> Indeed, CARB estimates that by 2040, the ACC II Regulations will reduce NOx emissions by 30.1 tons per day and PM<sub>2.5</sub> emissions by 2.0 tons per day.<sup>135</sup> Thus, these regulations will contribute to achieving the State’s criteria pollutant reduction needs, to attaining the national and State ambient air quality standards for ozone and particulate matter, and to protecting human health and the environment.<sup>136</sup> They will further serve to improve conditions for near-roadway and other frontline communities disproportionately exposed and vulnerable to vehicular and other pollution, which tend to be historically disadvantaged and low-income communities.<sup>137</sup> Accordingly, EPA has no basis to find that the regulations do not satisfy the “compelling and extraordinary” criterion, even under a standards-specific inquiry. Indeed, at a minimum, California “need[s]” these standards because it needs any and all reductions in criteria pollutant emissions, especially in areas of extreme non-attainment and other areas overburdened by unhealthy air quality.<sup>138</sup>

**b. California needs the ACC II Regulations to reduce greenhouse gas emissions**

California’s climate change conditions are also “compelling and extraordinary” under Section 209(b)(1)(B).

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<sup>132</sup> ACC II ISOR at 4.

<sup>133</sup> Waiver Request at 1 (citing Cal. Health & Safety Code § 43000(a).)

<sup>134</sup> ZEVs produce no tailpipe emissions and reduce brake wear PM emissions. ACC II ISOR at 12. Moreover, Congress has recognized that ZEVs reduce criteria-pollutant emissions. 42 U.S.C. § 7586(f)(4) (authorizing credits for ZEVs as part of state plans to attain criteria-pollution standards). And EPA has recognized these benefits by not only granting multiple waivers for California’s ZEV standards, but also approving their inclusion in State Implementation Plans (SIPs).

<sup>135</sup> ACC II ISOR at 15.

<sup>136</sup> *Id.* (ACC II regulations “will lead to an estimated 1,272 fewer cardiopulmonary deaths; 208 fewer hospital admissions for cardiovascular illness; 249 fewer hospital admissions for respiratory illness; and 639 fewer emergency room visits for asthma.”).

<sup>137</sup> *Id.* at 152; *see also* Waiver Request at 37.

<sup>138</sup> Even if the emissions reductions from the ACC II Regulations were marginal, which they are not, this would not be grounds for denying the waiver request. *See, e.g.*, 41 Fed. Reg. 44,209, 44,210 (Oct. 7, 1976) (rejecting claims of “only marginal improvements in air quality” as grounds to deny waiver); *see also* 36 Fed. Reg. 17,458, 17,458 (Aug. 31, 1971) (granting waiver where California standards “may result in some further reduction in air pollution in California” and finding it “not legally pertinent” that the improvement might be “only marginal”).

As a preliminary point, there is no reason to think Congress excluded the regulation of GHGs from Section 209(b)(1) waivers. To the contrary, Congress has over the years endorsed both California’s ZEV and GHG standards. For example, in 1990, Congress instructed EPA to incorporate elements of California’s ZEV standards into federal regulations;<sup>139</sup> in 2007, it directed EPA to look to California’s GHG standards when setting federal procurement requirements;<sup>140</sup> and in 2022, it provided for EPA to support States in adopting and implementing GHG and ZEV standards.<sup>141</sup>

As a factual matter, it is clear that California faces severe threats from climate change. As expressed by the California legislature in the California Global Warming Solutions Act of 2006 (AB 32):

Global warming poses a serious threat to the economic well-being, public health, natural resources, and the environment of California. The potential adverse impacts of global warming include the exacerbation of air quality problems, a reduction in the quality and supply of water to the state from the Sierra snowpack, a rise in sea levels resulting in the displacement of thousands of coastal businesses and residences, damage to marine ecosystems and the natural environment, and an increase in the incidences of infectious diseases, asthma, and other human health-related problems.<sup>142</sup>

This is far from a comprehensive list of the issues California faces as a result of climate change.<sup>143</sup> More recently, California’s Fourth Climate Change Assessment has identified other significant impacts of climate change specifically occurring and expected in California, including increases in already-severe ground-level ozone, coastal erosion, increased frequency of extreme droughts and land subsidence, lower agricultural crop yields, increased susceptibility to massive

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<sup>139</sup> Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 246(f)(4), 104 Stat. 2399, 2520 (1990) (codified at 42 U.S.C. § 7586(f)(4)) (instructing EPA to establish standards for issuing “clean-fuel vehicle[.]” credits for certain vehicles that “conform as closely as possible to standards which are established by the State of California for [Ultra-Low Emission Vehicles] and [Zero-Emissions Vehicles] in the same class”).

<sup>140</sup> Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 141(f)(3)(B), 121 Stat. 1492, 1518 (2007) (codified at 42 U.S.C. § 13212(f)(3)(B)) (requiring EPA’s guidance for minimum federal fleet standards to account for “the most stringent standards for vehicle greenhouse gas emissions applicable to and enforceable against motor vehicle manufacturers for vehicles sold anywhere in the United States”).

<sup>141</sup> Inflation Reduction Act, Pub. L. No. 117-169, tit. VI, Subtitle A, § 60105(g), 136 Stat. 1818, 2068–69 (2022).

<sup>142</sup> California Global Warming Solutions Act of 2006, § 38501(a), 2006 Cal. Stat. 3419, 3419–20 (codified at Cal. Health & Safety Code § 38501(a)).

<sup>143</sup> See generally Brief of Amici Curiae California Climate Scientists in Support of Respondents U.S. Environmental Protection Agency and Michael S. Regan, *Ohio v. EPA*, No. 22-1081 (D.C. Cir. Jan. 18, 2023), ECF No. 1981964.

wildfires, and flooding of significant coastal infrastructure.<sup>144</sup> California consistently loses more acres and more property value to wildfires than any other state.<sup>145</sup> Additionally, California’s water supply relies heavily on highly vulnerable snowpack for seasonal water storage.<sup>146</sup> California’s agricultural and seafood industries, some of the most productive in the nation, are heavily impacted by rising temperatures on land and sea.<sup>147</sup> These and other climate change impacts disproportionately affect socially and economically disadvantaged populations.<sup>148</sup> These impacts constitute “compelling and extraordinary conditions” under any reasonable interpretation of Section 209(b)(1)(B). Indeed, climate change conditions in California—from wildfires to droughts—are already “compelling and extraordinary,” and they are only anticipated to get worse.<sup>149</sup>

Mobile sources in the transportation sector alone account for 50 percent of total statewide GHG emissions when upstream emissions from fuel are included.<sup>150</sup> Thus, the ACC II Regulations will impact GHG emission levels in the State—reductions that California needs to mitigate the climate change impacts threatening the State. California has concluded it needs to reduce its GHG emissions by 85 percent below 1990 levels by 2045,<sup>151</sup> and the scientific evidence underscores that need. The ACC II Regulations are essential to addressing that need for GHG reductions. In fact, the ACC II Regulations are projected to reduce GHG emissions by a cumulative 374 million metric tons (MMT) carbon dioxide equivalent (CO<sub>2</sub>e) from 2026 to

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<sup>144</sup> CALIFORNIA’S FOURTH CLIMATE CHANGE ASSESSMENT, A SUMMARY OF KEY FINDINGS, at 5–7, 14, 18 (2018); CALIFORNIA’S FOURTH CLIMATE CHANGE ASSESSMENT, STATEWIDE SUMMARY REPORT, at 24, 40, 54–55 (2018); *see also* ACC II ISOR at 6–7.

<sup>145</sup> *See, e.g.*, NAT’L INTERAGENCY COORDINATION CTR., WILDLAND FIRE SUMMARY AND STATISTICS ANNUAL REPORT 37–38 (2021), [https://www.nifc.gov/sites/default/files/NICC/2-Predictive%20Services/Intelligence/Annual%20Reports/2021/annual\\_report\\_0.pdf](https://www.nifc.gov/sites/default/files/NICC/2-Predictive%20Services/Intelligence/Annual%20Reports/2021/annual_report_0.pdf); Lindsay Bishop, *Wildfire Statistics: Damage, Fatalities and Insurance Rates*, VALUEPENGUIN (Jan. 23, 2024), <https://www.valuepenguin.com/homeowners-insurance/wildfire-statistics> (citing data from National Centers for Environmental Information).

<sup>146</sup> CALIFORNIA’S FOURTH CLIMATE CHANGE ASSESSMENT, STATEWIDE SUMMARY REPORT, *supra* note 144, at 56–57, 65.

<sup>147</sup> *Id.* at 59.

<sup>148</sup> EPA, *EPA Report Shows Disproportionate Impacts of Climate Change on Socially Vulnerable Populations in the United States* (Sept. 2, 2021), <https://www.epa.gov/newsreleases/epa-report-shows-disproportionate-impacts-climate-change-socially-vulnerable>.

<sup>149</sup> Moreover, many of these climate change impacts are felt locally—for instance, elevated concentrations of carbon dioxide measured in the Monterey Bay from nearby California cities and agricultural areas. *See* Devon Northcott et al., *Impacts of Urban Carbon Dioxide Emissions on Sea-Air Flux and Ocean Acidification in Nearshore Waters*, PLOS ONE (Mar. 27, 2019), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0214403#sec009>.

<sup>150</sup> ACC II ISOR at Executive Summary 4.

<sup>151</sup> California Climate Crisis Act, § 38562.2(c)(2), 2022 Cal. Stat. 4960, 4961 (codified at Cal. Health & Safety Code § 38562.2(c)(2)).

2040.<sup>152</sup> And the ACC II Regulations are projected to reduce GHG emissions by 57.4 MMT per year of CO<sub>2</sub>e by 2040.<sup>153</sup> These regulations are also needed to ensure the development and commercialization of technology required for reductions of climate and criteria pollution in the future.

Thus, California needs the ACC II Regulations to meet the compelling and extraordinary conditions the State faces as a result of climate change.

**C. The Addition of the ACC II Regulations to California’s Program are Feasible and Will Not Render CA’s Program Inconsistent with Section 202(a)**

Under Section 209(b)(1)(C), EPA must grant California’s request unless EPA finds that California’s “standards and accompanying enforcement procedures are not consistent” with section 202(a) of the Clean Air Act.<sup>154</sup> “EPA’s longstanding approach to this third waiver criterion is limited to reviewing California’s feasibility assessment and evaluating whether the opponents of the waiver have met their burden of establishing: (1) [t]hat California’s standards are technologically infeasible, or (2) that California’s test procedures are inconsistent with the Federal test procedures.”<sup>155</sup>

EPA’s review is narrow and deferential to California.<sup>156</sup> EPA considers the consistency prong in the context of the “discretion given to California in dealing with its mobile source pollution problems.”<sup>157</sup> Further, EPA has long acknowledged that the feasibility analysis “in the context of a California waiver” differs from the feasibility analysis for the federal standards promulgated under Section 202(a).<sup>158</sup>

As explained below, the ACC II Regulations are feasible and their addition to California’s program does not render the program inconsistent with Section 202(a).

**1. ACC II is technologically feasible within the lead time provided**

In assessing whether ACC II is technologically feasible, “the question for the Administrator is . . . whether the manufacturers’ current and projected capabilities permit them to meet the [standards].”<sup>159</sup> EPA determines technological feasibility “in the context of the entire regulatory program for the particular industry category,” and EPA has rejected the argument that its analysis should focus on “whether each of CARB’s [] regulatory components, in isolation, is

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<sup>152</sup> ACC II ISOR at 152.

<sup>153</sup> *Id.* at 15.

<sup>154</sup> 42 U.S.C. § 7543(b)(1)(C); 88 Fed. Reg. at 20,704.

<sup>155</sup> 88 Fed. Reg. at 20,704; 78 Fed. Reg. at 2132 (explaining EPA’s longstanding analysis of this third waiver criterion).

<sup>156</sup> 88 Fed. Reg. at 20,704; 78 Fed. Reg. at 2115, 2132.

<sup>157</sup> 49 Fed. Reg. at 18,892; *see also* 78 Fed. Reg. at 2133.

<sup>158</sup> 49 Fed. Reg. at 18,892 (recognizing that a feasibility test applicable to EPA under Section 202(a) either would not apply to California or “would not be applicable to its fullest stringency”).

<sup>159</sup> *MEMA I*, 627 F.2d at 1126.

consistent with section 202(a).”<sup>160</sup> California must allow “sufficient lead time to permit manufacturers to develop and apply the necessary technology,” giving appropriate consideration to costs of compliance within the lead-time period.<sup>161</sup> The requisite technology need not already be developed; rather, the lead time should “appear to be sufficient” to permit the development and application of the technology in California.<sup>162</sup> And EPA “evaluate[s] costs in the waiver context by looking at the actual cost of compliance [for manufacturers] in the time provided by the regulation, not the regulation’s cost effectiveness.”<sup>163</sup> “[F]or the cost of compliance to be found excessive[,] it would need to be ‘very high’ such that the cost to customers who purchased a complying vehicle would be doubled or tripled.”<sup>164</sup>

**a. The technologies needed to meet the LEV IV and ZEV standards already exist**

Since the technologies necessary to meet both the LEV IV and ZEV standards have already been developed, EPA only needs to find that there is sufficient lead time for manufacturers to apply those technologies at reasonable costs.

“Many vehicles in production already meet the LEV IV regulations’ [light-duty vehicle] standards,” and “[m]anufacturers have adequate time . . . to adjust vehicles that do not – often with no more than changes to software and engine calibrations . . . .”<sup>165</sup> Manufacturers are also already well on their way to meeting the ACC II ZEV standards.<sup>166</sup> In 2023, 25 percent of all new vehicles sold in California were ZEVs.<sup>167</sup> This represents more than a 30 percent increase from the prior year, when ZEV market share was just under 19 percent in California.<sup>168</sup> Growth in electric vehicles is expected to continue not only in California, but nationwide.<sup>169</sup> Indeed, nationwide forecasts estimate ZEV market share will climb to 40-50 percent in 2030<sup>170</sup> given

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<sup>160</sup> 78 Fed. Reg. at 2117.

<sup>161</sup> *Motor & Equip. Mfrs. Ass’n v. Nichols* (“*MEMA IP*”), 142 F.3d 449, 463 (D.C. Cir. 1998); 78 Fed. Reg. at 2132.

<sup>162</sup> 43 Fed. Reg. at 25,731.

<sup>163</sup> 78 Fed. Reg. at 2134; *see also id.* at 2,115 (“The issue of whether a proposed California requirement is likely to result in only marginal improvement in air quality not commensurate with its cost or is otherwise an arguably unwise exercise of regulatory power is not legally pertinent to [EPA’s] decision under section 209 . . . .”); *MEMA I*, 627 F.2d at 1118.

<sup>164</sup> 78 Fed. Reg. at 2133; *see also MEMA I*, 627 F.2d at 1118.

<sup>165</sup> Waiver Request at 45.

<sup>166</sup> Waiver Request at 51 (“[Manufacturers] are planning to meet the requirements of the ACC II Regulations.”).

<sup>167</sup> California Energy Commission, *New ZEV Sales in California*, <https://www.energy.ca.gov/data-reports/energy-almanac/zero-emission-vehicle-and-infrastructure-statistics/new-zev-sales> (filtered for 2023).

<sup>168</sup> *Id.* (filtered for 2022).

<sup>169</sup> ACC II ISOR at 18–21.

<sup>170</sup> Javier Colato & Lindsey Ice, U.S. Bureau of Labor Statistics, *Charging into the Future: the Transition to Electric Vehicles* (Feb. 2023), <https://www.bls.gov/opub/btn/volume-12/charging->

government policies, manufacturer plans, and growing consumer demand. And California's market share has long been far higher than the national average.<sup>171</sup>

The market growth of ZEVs reflects that the technologies necessary to meet the ZEV standards are widely in use today at reasonable and continually-declining costs. Technology improvements are also contributing to ZEV market growth.<sup>172</sup> These improvements include the use of dedicated electric vehicle platforms that “allow[] for a higher level of optimization specifically for the electric vehicle technology.”<sup>173</sup> Dedicated electric vehicle platforms enable the “integration of the battery pack entirely within the vehicle floor structure, reduc[tions in] vehicle weight, reduc[tions in] manufacturing costs, increase[d] available passenger and cargo volume, and . . . battery pack integrat[ion] as part of the vehicle's crash mitigation structure.”<sup>174</sup> “[M]ost manufacturers have shifted to dedicated electric vehicle platforms as they electrify their fleets.”<sup>175</sup>

Moreover, every light-duty vehicle manufacturer has made commitments to electrify part or all of their product lines.<sup>176</sup> Whereas ACC II requires that 68 percent of manufacturers' light-duty vehicle sales in California be ZEVs by 2030 and 100 percent by 2035,<sup>177</sup> certain manufacturers are already planning to meet the 2035 target on a national scale within the same time period or shortly thereafter. For example:

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into-the-future-the-transition-to-electric-vehicles.htm; Sean Tucker, *Study: More Than Half of Car Sales Could Be Electric by 2030*, Kelley Blue Book (Oct. 4, 2022), <https://www.kbb.com/car-news/study-more-than-half-of-car-sales-could-be-electric-by-2030/>.

<sup>171</sup> EVAdoption, *EV Market Share by State*, <https://evadoption.com/ev-market-share/ev-market-share-state/> (stating that, in 2019, electric vehicle market share across the United States was about 2% (including California) while electric vehicle market share in California was about 7.5%).

<sup>172</sup> ACC II ISOR at 13-17.

<sup>173</sup> *Id.* at 15.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*; see, e.g., Eric Waltz, *Stellantis Unveils Vehicle Platform for Full-Size EVs*, Automotive Dive (Jan. 23, 2024), <https://www.automotivedive.com/news/stellantis-stla-large-electric-vehicle-platform/705203/> (Stellantis recently unveiled a new global EV platform and touted its “flexibility and agility” as “a driving force for our success in the shift to electrification in North America”); GM, *Electrification*, <https://www.gm.com/commitments/electrification> (GM's Ultium EV platform).

<sup>176</sup> Waiver Request at 50; see, e.g., *id.* (explaining that General Motors announced that it will shift its light-duty vehicles entirely to zero-emissions by 2035, that Volvo plans to make only electric vehicles by 2030, and that Volkswagen expects half of its U.S. vehicle sales will be all-electric by 2030).

<sup>177</sup> Cal. Code Regs., tit. 13, § 1962.4(c)(1)(B).



- General Motors plans to sell only electric vehicles by 2035,<sup>178</sup> and its subsidiaries Buick and Cadillac plan to fully electrify their lineups by 2030<sup>179</sup>
- Honda aims to have 40 percent of its U.S. sales be BEVs by 2030, 80 percent by 2035, and 100 percent by 2040<sup>180</sup>
- Toyota plans to have an electrified option available for every Toyota model by 2025<sup>181</sup> and it plans to fully electrify its subsidiary Lexus's lineup by 2030<sup>182</sup>
- Jaguar plans for its entire vehicle lineup to be all-electric by 2025<sup>183</sup>

Other manufacturers also already have plans to electrify part or all of their light-duty vehicle fleets on scales and timelines similar to those required by ACC II:

- Stellantis aims to have 50 percent of its U.S. sales be BEVs by 2030,<sup>184</sup> and its subsidiary Chrysler plans for its lineup to be all-electric by 2028<sup>185</sup>
- Ford projects that EVs will constitute 50 percent of its global sales volume by 2030<sup>186</sup>

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<sup>178</sup> David Shepardson, *GM Still Planning to End Gas-Powered Vehicles Sales by 2035 -- CEO*, Reuters (Dec. 13, 2023), <https://www.reuters.com/business/autos-transportation/gm-still-planning-end-gas-powered-vehicle-sales-by-2035-ceo-2023-12-13/>; Neal E. Boudette & Coral Davenport, *GM Will Sell Only Zero-Emission Vehicles by 2035*, New York Times (Jan. 28, 2021), <https://www.nytimes.com/2021/01/28/business/gm-zero-emission-vehicles.html>.

<sup>179</sup> Tyler Duffy, *When Every Car Brand Plans to Go Electric*, Gear Patrol (Oct. 10, 2023), <https://www.gearpatrol.com/cars/g38986745/car-brands-going-electric/>.

<sup>180</sup> Jeff S. Bartlett & Ben Preston, *Automakers Are Adding Electric Vehicles to Their Lineups. Here's What's Coming*, Consumer Reports (Mar. 10, 2023), <https://www.consumerreports.org/cars/hybrids-evs/why-electric-cars-may-soon-flood-the-us-market-a9006292675/>; Honda Corporate News, *Honda to Debut All-New Global EV Series at CES 2024* (Dec. 6, 2023), <https://hondanews.com/en-US/honda-corporate/releases/release-ce25b2bdc6167d48c9de61f4f90a775a-honda-to-debut-all-new-global-ev-series-at-ces-2024#:~:text=In%20North%20America%2C%20Honda%20has,fuel%20cell%20electric%20powered%20models>.

<sup>181</sup> Toyota Newsroom, *Toyota Ramps Up Commitment to Electrification with U.S. BEV Production and Additional Battery Plant Investment* (May 31, 2023), <https://pressroom.toyota.com/toyota-ramps-up-commitment-to-electrification-with-u-s-bev-production-and-additional-battery-plant-investment/>.

<sup>182</sup> Duffy, *supra* note 179.

<sup>183</sup> *Id.*

<sup>184</sup> Eric Waltz, *Stellantis Unveils Global EV Platform with Driving Ranges of up to 435 Miles*, Automotive Dive (July 7, 2023), <https://www.automotivedive.com/news/stellantis-STLA-medium-EV-unveils-new-platform-BEV/685504/>.

<sup>185</sup> Duffy, *supra* note 179; Peter Johnson, *Electric Chrysler 300 Successor Shown to Dealers as new EV Sedan*, Electrek (Apr. 25, 2023), <https://electrek.co/2023/04/25/electric-chrysler-300-successor-shown-to-dealers-as-new-ev-sedan/>.

<sup>186</sup> Bartlett & Preston, *supra* note 180.

- Volkswagen is targeting 55 percent of U.S. sales volume to be fully electric by 2030<sup>187</sup>

The combination of the substantial increase in ZEV market penetration with manufacturers' stated plans to significantly ramp up production of ZEVs within the ACC II timeline demonstrate that manufacturers' "current and projected capabilities permit them to meet [ACC II's standards]." <sup>188</sup> There is sufficient lead-time for manufacturers to apply the requisite technologies to their vehicle fleets, and thus the addition of the ACC II Regulations do not render California's whole program inconsistent with section 202(a).

**b. The costs of compliance with the LEV IV and ZEV standards are reasonable**

CARB assessed the "compliance costs for manufacturers in developing and applying the technology"<sup>189</sup> necessary to comply with the ACC II standards<sup>190</sup> and concluded that the costs are "reasonable and can be accommodated in the time provided."<sup>191</sup>

To comply with the ACC II Regulations, the average annual incremental per-vehicle cost to manufacturers for model years 2026 to 2035 is approximately \$947.<sup>192</sup> CARB estimates the average annual incremental per-vehicle cost to be \$440 in model year 2026, increasing to a high of \$1,199 in model year 2033, and declining to \$1,119 in model year 2035.<sup>193</sup> "These costs are well under 5% of the average price of a new vehicle and provide net savings to consumers."<sup>194</sup> These costs will thus not result in a "doubl[ing] or tripl[ing]" of purchase prices for consumers,<sup>195</sup> and increased costs to consumers will be more than offset by lifetime fuel savings, among other cost savings.<sup>196</sup> These estimated compliance costs are also in line with or lower than costs that EPA and CARB have deemed reasonable for light-duty vehicle emissions standards in prior model years.<sup>197</sup> Moreover, the cost of batteries—the most expensive component of BEVs

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<sup>187</sup> Volkswagen US Media, *Volkswagen Unveils \$7.1 Billion Commitment to Boost Product Line-Up, R&D, Manufacturing in North America* (Mar. 21, 2022), <https://media.vw.com/en-us/releases/1668>.

<sup>188</sup> *MEMA I*, 627 F.2d at 1126.

<sup>189</sup> 78 Fed. Reg. at 2134.

<sup>190</sup> See Waiver Request at 55–56.

<sup>191</sup> *Id.* at 56.

<sup>192</sup> ACC II ISOR at 167–68.

<sup>193</sup> *Id.*; see also Waiver Request at 56; CARB, ACC II Final Statement of Reasons, Appendix F at 14 (Aug. 25, 2022) (EPA-HQ-OAR-2023-0292-0019).

<sup>194</sup> Waiver Request at 56.

<sup>195</sup> See 78 Fed. Reg. at 2133; *MEMA I*, 627 F.2d at 1118.

<sup>196</sup> See CARB, ACC II Final Statement of Reasons, Appendix A at 22–23 (Aug. 25, 2022), <https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2022/accii/fsorappa.pdf> (estimating BEV owners will save between \$3,216 and \$8,835 over 10 years accounting for various cost factors, including vehicle price, loan fees, sales taxes and registration fees, fuel costs, maintenance costs, and a home charger capital investment).

<sup>197</sup> See 75 Fed. Reg. 25,324, 25,463 (May 7, 2010) (Table III.D.6-4) (\$948 for EPA's model year 2016 standards); 77 Fed. Reg. 62,624, 62,865 (Oct. 15, 2012) (Table III-34) (\$1,836 for EPA's

and PHEVs—continues to decline.<sup>198</sup> As the ACC II standards are technologically feasible and the compliance costs are reasonable within the lead time provided, they do not render California’s whole program inconsistent with section 202(a). Thus, EPA cannot make the finding necessary to deny the waiver under Section 209(b)(1)(C).

## **2. California’s certification requirements are consistent with federal requirements**

In addition to technological feasibility, Section 209(b)(1)(C) also ensures “that the Federal and California test procedures do not impose inconsistent certification requirements.”<sup>199</sup> California’s test procedures need not be identical to the federal procedures to satisfy this criterion.<sup>200</sup> Where no inconsistencies between California and the federal test procedures exist that would preclude a manufacturer from conducting one set of tests to demonstrate compliance with the California and federal certification requirements, EPA cannot deny a waiver based on Section 209(b)(1)(C).<sup>201</sup>

The ACC II Regulations update or adopt new test procedures to implement the new emission standards and to incorporate the most recent version of federal test procedures to ensure better alignment and consistency between the California and federal test procedures.<sup>202</sup> To the extent differences exist between the California and federal test procedures, the differences reflect the greater stringency of the California standards, and in all instances the test procedures allow manufacturers to demonstrate compliance with both California and federal requirements with one test vehicle.<sup>203</sup> For example, the LEV IV regulations make the running loss evaporative emission standard more stringent, but the test procedures to demonstrate compliance are the same as those existing under the ACC Regulations, and new standards adopted for conditions not previously subject to direct standards rely predominantly on existing test procedures and cycles.<sup>204</sup> CARB is not aware of any instances in which a manufacturer is precluded from conducting one set of tests to determine compliance with both California and federal

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model year 2025 standards); 78 Fed. Reg. at 2138 (between \$1,340 and \$1,840 for CARB’s model year 2025 standards); 86 Fed. Reg. 74,434, 74,483 (Dec. 30, 2021) (Table 30) (\$1,000 for EPA’s model year 2026 standards).

<sup>198</sup> CARB, Comment Letter in support of CARB’s Waiver Request at 4–5 (Feb. 27, 2024) (submitted to Docket No. EPA-HQ-OAR-2023-0292); CARB, ACC II Initial Statement of Reasons, Appendix G, section IV, Battery Assumptions and Costs at 46–54 (April 12, 2022) (EPA-HQ-OAR-2023-0292-0012).

<sup>199</sup> *MEMA II*, 142 F.3d at 463 (cleaned up).

<sup>200</sup> *Id.* at 463. Indeed, EPA has granted California a waiver even where California’s certification requirements impose reasonable additional testing requirements over the federal certification procedures. 43 Fed. Reg. 1829, 1830 (Jan. 12, 1978).

<sup>201</sup> *See* 78 Fed. Reg. at 2145.

<sup>202</sup> Waiver Request at 23–25.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 34, 56–57; *cf.* 78 Fed. Reg. at 2145.

requirements.<sup>205</sup> Under similar circumstances, EPA has determined California's certification procedures are consistent.<sup>206</sup> EPA cannot deny California's waiver request on the basis of inconsistency under Section 209(b)(1)(C).

#### IV. CONCLUSION

For the foregoing reasons, there is no basis for denying California's requested waiver of preemption for its ACC II Regulations. Therefore, EPA should grant California's request.

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<sup>205</sup> Waiver Request at 57.

<sup>206</sup> 88 Fed. Reg. at 20,708; see also 43 Fed. Reg. 32,182, 32,183 (July 25, 1978) ("Because the California limitations on maintenance during certification are more restrictive than the corresponding Federal procedures [. . .] I cannot find a conflict between the respective certification procedures.")

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