SHELBY COUNTY TO CLEAN AIR ACT: EVALUATING THE CONSTITUTIONALITY OF CALIFORNIA'S CLEAN AIR ACT WAIVER UNDER THE EQUAL SOVEREIGNTY PRINCIPLE

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ABSTRACT

In August 2022, California promulgated the Advanced Clean Cars II regulation, banning all sales of new gasoline-powered cars in the state by 2035. Transportation is the largest source of air pollution in California, responsible for nearly 40% of greenhouse gas ("GHG") emissions; thus, the regulation is a crucial step towards meeting the state's carbon neutrality and climate goals. California has the unique authority to regulate motor vehicle emissions due to a waiver exemption in the Clean Air Act. Congress recognized California's expertise and unique air pollution challenges early on by authorizing just two standards: the national and California standards. Over the last five decades, California has received over one hundred waivers for its motor vehicle emission standards. However, in May 2022, seventeen states challenged the constitutionality of the waiver provision in Ohio v. EPA *(pending in the D.C. Circuit Court of Appeals as of the publication of this Note), alleging,* inter alia*, that it violates the equal sovereignty principle—the idea that states must have equal political authority—by allowing only California to set new vehicle emission standards. These states further argue that California cannot regulate GHGs because climate change*

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is a global problem not unique to California. To date, no court has addressed the constitutionality of the Clean Air Act under the equal sovereignty principle. Thus, this Note takes the principle seriously and analyzes how courts historically have applied it. In 2013, the Supreme Court developed the equal sovereignty principle as a meaningful concept for the first (and last) time in Shelby County v. Holder *to invalidate section 4 of the Voting Rights Act. This Note applies the test established in* Shelby County *to the Clean Air Act waiver at issue, arguing that the equal sovereignty principle does not apply to the Clean Air Act, and even if it were to apply, the Clean Air Act waiver provision remains constitutional because Congress's reasons for granting California an exemption remain relevant. California's pioneering role in early air pollution control, its large economy, and its characteristic geographic and climate conditions put the state in a unique position to protect public health by regulating automobile emissions, while the state faces increasingly formidable threats from climate change that have exacerbated the local air pollution problems that initially compelled its motor vehicle regulations. Thus, even as California's motor vehicle regulations have shifted from reducing local smog to reducing GHG emissions, California's current needs continue to justify its differential treatment—maintaining, and perhaps even strengthening, the Clean Air Act waiver's relevance in the twenty-first century.*

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INTRODUCTION

In August 2022, the California Air Resources Board ("CARB"), California's chief air pollution regulator, promulgated the Advanced Clean Cars II regulation, which bans the sale of new gasoline-powered cars in California by 2035.[1] Transportation is the largest source of air pollution in the state, responsible for nearly 40% of greenhouse gas ("GHG") emissions, 80% of nitrogen oxide pollution, and 90% of diesel particulate matter pollution.[2] CARB estimates that the new rule will result in significant climate, economic, and public health benefits. By 2040, the regulation is projected to result in a 50% reduction in GHG emissions from cars, pickup

1. *Advanced Clean Cars II Regulations: All New Passenger Vehicles Sold in California to be Zero Emissions by 2035*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/advanced-clean-cars-ii [https://perma.cc/A9WT-T2BP]; CAL. CODE REGS. tit. 13, § 1962.4 (2022).

2. *Current California GHG Emission Inventory Data*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/ghg-inventory-data [https://perma.cc/L9KM-VCG3]; *Transforming Transportation*, CAL. ENERGY COMM'N, https://www.energy.ca.gov/about/core-responsibility-fact-sheets/transforming-transportation [http://perma.cc/LAS2-MAYL].

trucks, and SUVs.[3] Taking gas cars off the road would eliminate the equivalent of 395 million metric tons of carbon dioxide emissions, which is analogous to avoiding the combustion of 915 million barrels of petroleum or shutting down more than one hundred coal plants for a year.[4] From 2026 to 2040, the decrease in pollution should lead to 1,290 fewer cardiopulmonary deaths, 460 fewer hospital admissions for cardiovascular or respiratory illness, and 650 fewer emergency room visits for asthma.[5] Thus, the regulation is a crucial step towards meeting the state's carbon neutrality and climate goals.[6]

The regulations that California enacts are hugely influential; thus, the implications of California's ability to implement motor vehicle regulations are extensive. If California were a country, it would be the tenth largest auto market in the world.[7] As of May 13, 2022, seventeen states and the District of Columbia have adopted California's Low-Emission Vehicle ("LEV") and Zero-Emission Vehicle ("ZEV") regulations under section 177 of the Clean Air Act, which allows other states to adopt California's approved standards instead of the federal standards.[8] California alone makes up 11% of U.S. new light-duty vehicle sales, or 40.1% when combined with the states that have already adopted its rules.[9] New York was the second state to ban sales of gas-powered cars by 2035 as part of its plan to increase EV adoption.[10] In February 2021, New York passed a law requiring all new passenger cars and trucks sold in the state to produce zero emissions by 2035,[11] and in September 2022, after California finalized its own ban, New York followed California in requiring all new vehicles sold by 2035 to be zero-emissions,

3. *California Moves to Accelerate to 100% New Zero-Emission Vehicle Sales by 2035*, CAL. AIR RES. BD. (Aug. 25, 2022), https://ww2.arb.ca.gov/news/california-moves-accelerate-100-new-zero-emission-vehicle-sales-2035 [https://perma.cc/5GRX-9NXR].

4. *Id.*

5. *Id.*

6. *Id.* ("The ACC II regulation is a major tool in the effort to reach the SB 32 target of reducing greenhouse gases an additional 40% below 1990 levels by 2030 . . . . Ending sales of vehicles powered by fossil fuels is a critical element in the state's efforts to achieve carbon neutrality by 2045 or sooner.").

7. Naveena Sadasivam, *It's Official: California is Phasing Out Gas-Powered Cars by 2035*, GRIST (Aug. 25, 2022), https://grist.org/transportation/california-gas-car-ban-electric-vehicles [https://perma.cc/2XPY-J5HH].

8. *States That Have Adopted California's Vehicle Standards Under Section 177 of the Federal Clean Air Act*, CAL. AIR RES. BD. (May 13, 2022), https://ww2.arb.ca.gov/sites/default/files/2022-05/%C2%A7177_states_05132022_NADA_sales_r2_ac.pdf [https://perma.cc/EM9D-QLM9].

9. *Id.*

10. Kira Bindrim, *NY Implements 2035 All-EV Plan After California Clears the Way*, BLOOMBERG (Sept. 29, 2022, 1:57 PM), https://www.bloomberg.com/news/articles/2022-09-29/new-york-follows-california-in-banning-sale-of-gas-cars-by-2035 [https://perma.cc/N7N6-LUSS].

11. Assemb. B. 4302, 2021–2022 Leg. Reg. Sess. (N.Y. 2021).

setting in motion the regulatory process to implement the law.[12] In August 2022, Massachusetts Governor Charlie Baker also signed climate change legislation to end new sales of gas-powered cars in the state by 2035.[13]

California has the unique ability to implement motor vehicle emissions regulations because of an exception in the Clean Air Act.[14] While the Clean Air Act generally prohibits states from setting vehicle emission standards,[15] it provides a waiver exemption under section 209(b)(1) that allows California to set more stringent vehicle emission standards than the federal government.[16] Given California's pioneering role in motor vehicle regulations and unique air pollution problems, Congress recognized California's expertise early on in the history of federal air pollution regulation.[17] However, in May 2022, seventeen Republican-led states filed a lawsuit, *Ohio v. EPA*, challenging California's ability to set its own pollution rules and demanding that the U.S. Environmental Protection Agency ("EPA") revoke the waiver.[18] The petitioner states claimed that the waiver provision is unconstitutional because it violates the so-called equal sovereignty principle—the idea that states must have equal political authority—by only empowering California to set new vehicle emission standards.[19] The petitioners additionally argued that Congress cannot allow California alone to regulate climate change, which is a global problem not unique to California.[20] Because California has shifted from regulations to reduce smog and local air pollution to GHG regulations to address global climate change, the petitioners essentially argued that circumstances have

12. Press Release, Kathy Hochul, Governor of the State of New York, *Governor Hochul Drives Forward New York's Transition to Clean Transportation* (Sept. 29, 2022), https://www.governor.ny.gov/news/governor-hochul-drives-forward-new-yorks-transition-clean-transportation [https://perma.cc/8EJ3-NPTG].

13. Keith Goldberg, *Calif. Sews Up Regs to End Gas Car Sales by 2035*, LAW360 (Aug. 25, 2022, 6:52 PM), https://www.law360.com/articles/1524638/calif-sews-up-regs-to-end-gas-car-sales-by-2035 [https://perma.cc/RQK3-HTU3].

14. 42 U.S.C. § 7543(b)(1).

15. 42 U.S.C. § 7543(a).

16. 42 U.S.C. § 7543(b)(1). While the waiver does not reference California by name, it was clearly intended for California because California was the only state that met the requirement of adopting motor vehicle emission standards prior to March 30, 1966. H.R. REP. NO. 90-728, at 49 (1967).

17. *See* Air Quality Act of 1967, S. REP. NO. 90-403, at 33 ("California's unique problems and pioneering efforts justified a waiver . . . . [I]n the 15 years that auto emission standards have been debated and discussed, only the State of California has demonstrated compelling and extraordinary circumstances sufficiently different from the Nation as a whole . . . .").

18. Petition for Review, Ohio v. EPA, No. 22-1081 (D.C. Cir. May 12, 2022).

19. *See* Brief for Petitioners at 28, Ohio v. EPA, No. 22-1081 (D.C. Cir. Nov. 11, 2022).

20. *Id.* at 13.

changed enough since Congress enacted the waiver provision in 1967 that California's special treatment is no longer justified.[21]

This Note takes the equal sovereignty claim seriously and argues that the Clean Air Act waiver provision remains constitutional under the equal sovereignty principle. Part I provides relevant background on the waiver provision and history of California's waiver requests. It then summarizes the equal sovereignty principle arguments made in the pending *Ohio v. EPA* lawsuit and provides relevant history on how courts have applied the principle leading up to *Shelby County v. Holder*,[22] the first time the Supreme Court held a statute unconstitutional based on the equal sovereignty principle. Part II argues that the equal sovereignty principle does not apply to the Clean Air Act, but even if it were to apply, the test from *Shelby County* does not invalidate the Clean Air Act waiver provision. This Note concludes by offering final thoughts on the equal sovereignty claim and underscoring the implications of *Ohio v. EPA* in California's ability to continue to lead the nation in addressing GHG emissions.

I. BACKGROUND

A. THE CLEAN AIR ACT AND EPA WAIVER PROVISION

California's ability to implement its own motor vehicle standards stems from the Clean Air Act. Congress passed the Clean Air Act in response to air pollution crises in the mid-20th century resulting from industrialization.[23] "Killer fog" events, where a deadly mix of pollution and fog covered cities in the United States and around the world, spurred federal regulation of air pollution.[24] In 1955, Congress enacted the Air Pollution Control Act, the first national air pollution legislation.[25] Continuing "killer fog" incidents in the United States then prompted Congress to pass the 1963 Clean Air Act, which

21. *See id.* at 13, 30–33.

22. Shelby County v. Holder, 570 U.S. 529, 540 (2013).

23. *Clean Air Act Requirements and History*, EPA, https://www.epa.gov/clean-air-act-overview/clean-air-act-requirements-and-history [https://perma.cc/HL9S-DUXJ].

24. The 1948 Donora, Pennsylvania killer fog killed at least 20 people and left 5,900 ill. Lorraine Boissoneault, *The Deadly Donora Smog of 1948 Spurred Environmental Protection—But Have We Forgotten the Lesson?*, SMITHSONIAN (Oct. 26, 2018), https://www.smithsonianmag.com/history/deadly-donora-smog-1948-spurred-environmental-protection-have-we-forgotten-lesson-180970533 [https://perma.cc/QXH6-BJ4N]; Elizabeth T. Jacobs, Jefferey L. Burgess & Mark B. Abbott, *The Donora Smog Revisited: 70 Years After the Event That Inspired the Clean Air Act*, 108 AM. J. PUB. HEALTH S2, S85–S88 (2018). The 1952 London Killer Fog killed between 8,000 and 12,000 people. Christopher Klein, *When the Great Smog Smothered London*, HISTORY (Dec. 6, 2012), https://www.history.com/news/the-killer-fog-that-blanketed-london-60-years-ago [https://perma.cc/BS36-3M7Z].

25. Air Pollution Control Act of 1955, Pub. L. No. 84-159, 69 Stat. 322, 322.

established grant and research programs to support states in their air pollution control efforts but left air pollution regulation primarily to the states.[26]

California was the first state to regulate emissions from cars.[27] The first recognized episodes of smog occurred in Los Angeles in 1943, and in the 1950s, a California researcher determined that the automobile was the main cause of the smog.[28] In 1966, California established the first tailpipe emissions standards in the nation.[29]

Congress continued to enact new statutes in response to California's regulations.[30] The 1967 Air Quality Act amended the 1963 Clean Air Act, moving towards a uniform federal policy by requiring national air quality criteria, which states would then implement.[31] It was also the first statute to give preemptive power to the federal government to adopt and enforce standards relating to the control of emissions from new motor vehicles.[32] However, Congress added a waiver provision exempting California from the preemption provision when California could demonstrate a need for more stringent standards than those the EPA established.[33] While the waiver does not reference California by name, it was clearly intended for California because California was the only state that met the requirement of adopting motor vehicle emission standards prior to March 30, 1966.[34] Thus, Congress acknowledged California's expertise early on in the history of federal air pollution regulation.

In fact, the Clean Air Act is a paradigmatic example of cooperative federalism, under which "States and the Federal Government [are] partners

26. Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392, 393.

27. *History*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/about/history [https://perma.cc/BA4F-FJXN].

28. *Id.*; *Timeline of Major Accomplishments in Transportation, Air Pollution, and Climate Change*, EPA, https://www.epa.gov/transportation-air-pollution-and-climate-change/timeline-major-accomplishments-transportation-air [https://perma.cc/ZS88-ZEXJ].

29. CAL. AIR RES. BD., *supra* note 27.

30. The 1967 Air Quality Act regulations for controlling motor vehicle emissions "were patterned after those . . . in effect in California." 113 CONG. REC. S32478 (daily ed. Nov. 14, 1967) (remarks by Sen. George Murphy of California).

31. Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485, 485–86.

32. *Id.* at 501.

33. "The Secretary shall . . . waive application of [federal 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, unless he finds that such State does not require standards more stringent than applicable Federal standards to meet compelling and extraordinary conditions . . . ." Air Quality Act of 1967, Pub. L. No. 90-148, § 208(b), 81 Stat. 485, 501.

34. H.R. REP. NO. 90-728, at 49 (1967).

in the struggle against air pollution."[35] The federal preemption provision reflects Congress's interest in allowing automobile manufacturers to produce uniform automobiles for a national market and benefit from the economies of large-scale production without having to accommodate multiple state standards.[36] Congress acknowledged the complex nature of automobile manufacturing and noted the importance of ensuring that automobile manufacturers obtain "clear and consistent answers" concerning emission standards.[37] Courts have also interpreted that Congress preempted the field of vehicle emission regulation "to ensure uniformity throughout the nation, and to avoid the undue burden on motor vehicle manufacturers which would result from different state standards."[38] However, given California's lead in early motor vehicle regulations and Congress's additional interest in having California as a "laboratory for innovation,"[39] Congress intentionally struck a balance between having one national standard and fifty different state standards by authorizing just two standards, the national and California standards.[40] This balance allowed California to continue to innovate and improve its air quality without creating a practical nightmare for automakers and interstate commerce.[41]

The 1970 Clean Air Act Amendments, which form the basis of the contemporary federal Clean Air Act, authorized the development of federal and state regulations to limit emissions from stationary (industrial) and

35. Gen. Motors Corp. v. United States, 496 U.S. 530, 532 (1990).

36. H.R. REP. NO. 90-728, at 21 (1967); *see also id.* at 50.

37. *Id.* at 21.

38. Motor Vehicle Mfrs. Ass'n v. New York State Dep't. of Env't. Conservation, 810 F. Supp. 1331, 1337 (N.D.N.Y. 1993), *aff'd in part, rev'd in part*, 17 F.3d 521 (2d Cir. 1994).

39. Motor & Equip. Mfrs. Ass'n v. EPA (*MEMA I*), 627 F.2d 1095, 1111 (D.C. Cir. 1979).

40. *See* S. REP. NO. 90-403, at 33 (1967) ("California's unique problems and pioneering efforts justified a waiver . . . .[I]n the 15 years that auto emission standards have been debated and discussed, only the State of California has demonstrated compelling and extraordinary circumstances sufficiently different from the Nation as a whole . . . ."); 113 CONG. REC. H30975 (daily ed. Nov. 2, 1967) (remarks by Rep. John Moss) ("[The California waiver] permits California to continue a role of leadership which it has occupied among the States of this Union for at least the last two decades . . . . [I]t offers a unique laboratory, with all of the resources necessary, to develop effective control devices which can become a part of the resources of this Nation and contribute significantly to the lessening of the growing problems of air pollution throughout the Nation."); *see also* Engine Mfrs. Ass'n v. EPA, 88 F.3d 1075, 1080 (D.C. Cir. 1996) ("Rather than being faced with 51 different standards, as they had feared, or with only one, as they had sought, manufacturers must cope with two regulatory standards . . . ."); Motor & Equip. Mfrs. Ass'n v. Nichols (*MEMA II*), 142 F.3d 449, 463 (D.C. Cir. 1998).

41. Members of Congress favored states' rights, but also were concerned that having 50 different sets of requirements related to emissions controls would "unduly burden interstate commerce." H.R. REP. NO. 95-294, at 309 (1977).

mobile sources (including automobiles).[42] Section 109 requires the EPA Administrator to establish basic requirements for ambient air quality, known as National Ambient Air Quality Standards ("NAAQS"), for particular criteria pollutants, which the states would be required to meet.[43] The current list of criteria pollutants includes sulfur dioxide, particulate matter, nitrogen oxide, carbon monoxide, ozone, and lead, but does not include carbon dioxide.[44]

In 1977, Congress revised the provision to read as it does today. Section 202(a)(1) requires the EPA Administrator to establish motor vehicle emissions standards for pollutants "which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare."[45] The 1977 Clean Air Act Amendments strengthened the deference given to California under the waiver provision in two significant ways. First, the 1977 Amendments revised section 209(b)(1) by requiring the EPA Administrator to grant a preemption waiver for 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."[46] This amendment allows California, rather than the EPA, to make its own determination as to whether the regulations are sufficiently protective of public health and welfare. It also allows California to make this determination by looking at the entire program as a whole, rather than evaluating each regulation individually. Thus, as long as the entire set of regulations is more protective than the federal system, the EPA must allow California to implement these measures. The EPA Administrator can deny the waiver only if the state's determination is "arbitrary and capricious" or the state does not need its standards to meet "compelling and extraordinary conditions."[47] Second, the 1977 Amendments added section 177, which enhanced the strength of California's motor vehicle emissions regulations by allowing other states to adopt California's approved standards in lieu of the federal standards.[48] According to the House Report, the Committee on

42. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1678; *Evolution of the Clean Air Act*, EPA, https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act [https://perma.cc/7XMF-6QVB].

43. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 109(a)(1), § 110(a)(1), 84 Stat. 1676, 1679–80.

44. *Criteria Air Pollutants*, EPA, https://www.epa.gov/criteria-air-pollutants [https://perma.cc/Y9JR-T8K6].

45. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 401(d)(1), 91 Stat. 685, 791.

46. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 207, 91 Stat. 685, 755 (emphasis added).

47. *Id.*

48. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 177, 91 Stat. 685, 750.

Interstate and Foreign Commerce makes clear that it sought to "ratify and strengthen the California waiver provision . . . to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare."[49] The legislative and statutory history thus suggests that Congress intended to give California broad discretion to regulate air pollutants in the way it deems most appropriate to protect public health and welfare.

B. HISTORY OF CALIFORNIA'S MOTOR VEHICLE REGULATIONS AND WAIVER REQUESTS

The Clean Air Act section 209(b)(1) waiver reflects a five-decade history of allowing California to implement motor vehicle emissions standards that are more stringent than federal government standards.[50] California was granted its first waiver in 1968 and has since received over one hundred waivers for a range of new or amended motor vehicle and motor vehicle engine standards.[51] Smog in Los Angeles initially spurred California to adopt statewide standards to regulate criteria pollutants,[52] and CARB has consistently developed the first emission standards in the nation.[53]

49. H.R. REP. NO. 95-294, at 301–02 (1977).

50. *Pollution Standards Authorized by the California Waiver: A Crucial Tool for Fighting Air Pollution Now and in the Future*, CAL. AIR RES. BD. (Sept. 17, 2019), https://ww2.arb.ca.gov/resources/fact-sheets/pollution-standards-authorized-california-waiver-crucial-tool-fighting-air [https://perma.cc/P6EX-HUGH]; Emily Wimberger & Hannah Pitt, *Come and Take It: Revoking the California Waiver*, RHODIUM GRP. (Oct. 28, 2019), https://rhg.com/research/come-and-take-it-revoking-the-california-waiver [https://perma.cc/3Q28-6RBA] ("Since 1970, the federal government has granted California over 100 waivers . . . ."); *see Vehicle Emissions California Waivers and Authorizations*, EPA, https://www.epa.gov/state-and-local-transportation/vehicle-emissions-california-waivers-and-authorizations [https://perma.cc/VA5H-RSVG] (documenting all the waivers the EPA has granted).

51. *Pollution Standards Authorized by the California Waiver: A Crucial Tool for Fighting Air Pollution Now and in the Future*, CAL. AIR RES. BD. (Sept. 17, 2019), https://ww2.arb.ca.gov/resources/fact-sheets/pollution-standards-authorized-california-waiver-crucial-tool-fighting-air [https://perma.cc/P6EX-HUGH]; *Vehicle Emissions California Waivers and Authorizations*, EPA, https://www.epa.gov/state-and-local-transportation/vehicle-emissions-california-waivers-and-authorizations [https://perma.cc/VA5H-RSVG] (documenting all the waivers the EPA has granted).

52. See *infra* Section I.A.

53. The California Air Resources Board ("CARB") developed the nation's first tailpipe emissions standards for hydrocarbons and carbon monoxide in 1966, oxides of nitrogen in 1971, and particulate matter from diesel-fueled vehicles in 1982, as well as catalytic converters in the 1970s. More recently, CARB has delved into regulations seeking to mitigate climate change by encouraging Low-Emission Vehicles ("LEVs"). It promulgated LEV regulations that established criteria pollutant regulations for light and medium-duty vehicles in 1990 for the 1994–2003 model years (LEV I), and in 1999 for the 2004 model year and after (LEV II). *Low-Emission Vehicle Program*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/our-work/programs/low-emission-vehicle-program/about [https://perma.cc/R7KV-ME7L]; *Low-Emission Vehicle (LEV II) Program*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/lev-program/low-emission-vehicle-lev-ii-program [https://perma.cc/MG4U-3U6M].

As California transitioned from regulating criteria pollutants to promulgating regulations that address GHG emissions, certain EPA administrations began to challenge its waiver requests, leading to the ping-ponging back and forth between administrations. In 2002, recognizing that global warming would impose "compelling and extraordinary impacts" on California, the state enacted Assembly Bill (AB) 1493, Chapter 200.[54] The bill acknowledged that motor vehicle emissions are a major source of the state's GHG emissions and that reducing GHG emissions is critical to slowing down the effects of global warming and protecting public health and the environment.[55] The bill directed CARB to adopt regulations that achieve the "maximum feasible . . . reduction of greenhouse gas emissions" from passenger vehicles, beginning with the 2009 model year.[56] Thus, in 2004, CARB approved the first regulations in the nation that control GHG emissions from motor vehicles (Pavley regulations), which applied to new vehicles for the 2009–2016 model years.[57]

In December 2005, CARB requested a waiver to allow California to enforce its new GHG emission standards.[58] The EPA delayed action pending the outcome of litigation regarding whether the EPA had authority to regulate GHG emissions under the Clean Air Act, as the Clean Air Act did not explicitly regulate GHG emissions at the time.[59] The Supreme Court addressed GHG emissions for the first time in *Massachusetts v. EPA*, holding in a 5-4 decision that carbon dioxide is considered an "air pollutant" that the EPA may regulate under section 202(a)(1) of the Clean Air Act.[60] Thus, the Court held that the EPA has the statutory authority to regulate GHG emissions from new motor vehicles and that Congress provided the EPA with the flexibility to address new air pollutant threats that the EPA determines endanger the public welfare.[61]

Despite the Supreme Court ruling, in March 2008, the Bush administration's EPA denied the waiver for the Pavley regulations, which

54. Assemb. B. 1493, Ch. 200, 2001–2002 Leg. Reg. Sess. (Cal. 2002).

55. *Id.*

56. *Id.*

57. *Low-Emission Vehicle Program,* CAL. AIR RES. BD., *supra* note 53.

58. *California's Greenhouse Gas Vehicle Emission Standards Under Assembly Bill 1493 of 2002 (Pavley)*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/californias-greenhouse-gas-vehicle-emission-standards-under-assembly-bill-1493-2002-pavley [https://perma.cc/6T52-5YNF].

59. Letter from John B. Stephenson, Director, Natural Resources and Environment, to Congressional Requesters (Jan. 16, 2009) (on file with the United States Government Accountability Office).

60. Massachusetts v. EPA, 549 U.S. 497, 532 (2007).

61. *Id.*

was the first time the EPA denied a waiver for California.[62] In its decision, the EPA deviated from the traditional interpretation of the "compelling and extraordinary" waiver criteria[63] to narrowly interpret that Congress authorized the EPA to grant a waiver only when "California standards were necessary to address peculiar local air quality problems," as opposed to global climate change problems.[64] Unlike California's previous motor vehicle programs, which addressed local smog problems, the GHG emission standards aimed to address climate change. Thus, the EPA determined that California did not need its new motor vehicle standards to meet "compelling and extraordinary" conditions related to GHG emissions because emissions from California cars "become one part of the global pool of GHG emissions"[65] and do not directly cause elevated concentrations of GHGs in the region.[66] Alternatively, the EPA determined that because climate change is a global issue, the impacts of climate change in California were not sufficiently unique and different.[67]

In July 2009, the Obama administration's EPA reversed the 2008 denial and granted California's waiver request to enforce its GHG emission standards for model year 2009 and later new motor vehicles.[68] As the EPA stated, CARB has repeatedly demonstrated the need for its motor vehicle program to address "compelling and extraordinary" conditions in California, and Congress did not intend to allow California to address *only* local or regional air pollution problems.[69] Rather, Congress intended California to have broad discretion and autonomy, acting as a pioneer and a "laboratory for innovation."[70] Thus, narrowing the waiver's scope would hinder

62. California State Motor Vehicle Pollution Control Standards, Notice of Decision Denying a Waiver of Clean Air Act Preemption, 73 Fed. Reg. 12156, 12157 (Mar. 6, 2008) [hereinafter 2008 Waiver Denial].

63. 42 U.S.C. § 7543(b)(1); *see* Rachel L. Chanin, *California's Authority to Regulate Mobile Source Greenhouse Gas Emissions*, 58 N.Y.U. ANN. SURV. AM. L. 699, 723 (2001); California State Motor Vehicle Pollution Control Standards, 49 Fed. Reg. 18887, 18889–92 (May 3, 1984).

64. 2008 Waiver Denial, 73 Fed. Reg. at 12161.

65. *Id.* at 12160.

66. *Id.* at 12162 ("The local climate and topography in California have no significant impact on the long-term atmospheric concentrations of greenhouse gases in California.").

67. *Id.* at 12168.

68. Notice of Decision Granting a Waiver of Clean Air Act Preemption, 74 Fed. Reg. 32744, 32746 (July 8, 2009) [hereinafter 2009 Waiver Grant].

69. *Id.* at 32761.

70. *Id.* (citing Motor & Equip. Mfrs. Ass'n v. EPA (*MEMA I*), 627 F.2d 1095, 1111 (D.C. Cir. 1979)); *see* S. REP. NO. 90-403, at 33 (1967) ("The Nation will have the benefit of California's experience with lower standards which will require new control systems and design. In fact California will continue to be the testing area for such lower standards and should those efforts to achieve lower emission levels be successful it is expected that the Secretary will . . . give serious consideration to strengthening the Federal standards.").

California from implementing motor vehicle programs "as it deems appropriate to protect the health and welfare of its citizens."[71] In contrast to the 2008 EPA's reasoning, the 2009 EPA determined that the impacts of global climate change can exacerbate the local air pollution problem.[72] It found compelling California's assessment that its GHG standards are linked to improving California's smog problems and that higher temperatures from global warming will exacerbate California's high ozone levels and the "climate, topography, and population factors conducive to smog formation in California, which were the driving forces behind Congress's inclusion of the waiver provision in the Clean Air Act."[73] The EPA noted that California's GHG regulations will reduce greenhouse gas concentrations, even if only slightly, and "every small reduction is helpful . . . ."[74] Given California's unique geographical and climatic conditions that foster extreme air quality issues, its ongoing need for dramatic emissions reductions, and growth in its vehicle population and use, the EPA determined that California's need met "compelling and extraordinary" conditions.[75] Still, the EPA acknowledged that "conditions in California may one day improve such that it no longer has the need for a separate motor vehicle program."[76]

In 2012, CARB adopted the Advanced Clean Cars I ("ACC I") regulations to increase the stringency of criteria pollutant and GHG emission standards for new passenger vehicles for the 2015–2025 model years.[77] In 2013, the Obama administration's EPA granted California a waiver for its ACC I regulations.[78] The EPA largely followed the 2009 waiver decision in determining that the new standards continued to meet "compelling and extraordinary" conditions.[79] The EPA found a rational connection between

71. 2009 Waiver Grant, 74 Fed. Reg. at 32761.
72. *Id.* at 32763.
73. *Id.*
74. *Id.* at 32766.
75. *Id.* at 32760.
76. *Id.* at 32762.
77. The regulations consisted of two programs: (1) the Low Emission Vehicle program, designed for cars to emit 75% less smog-forming pollution (criteria pollutants) than the average car sold in 2012 and to reduce GHG emissions by about 40% from 2012 model year vehicles by 2025; and (2) the Zero Emission Vehicle program, which requires manufacturers to ensure that about 22% of their California sales consist of zero-emission vehicles and plug-in hybrids by 2025. *Advanced Clean Cars Program*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/about [https://perma.cc/W2R9-KFF7].
78. Notice of Decision Granting a Waiver of Clean Air Act Preemption, 78 Fed. Reg. 2112, 2145 (Jan. 9, 2013) [hereinafter 2013 Waiver Grant].
79. *Id.* at 2131.

CARB's emission standards and long-term air quality goals,[80] as well as compelling and extraordinary conditions within the state pertaining to the effects of pollution.[81]

In September 2019, in an unprecedented move, the Trump administration's EPA revoked the 2013 waiver, marking the first time the EPA retroactively withdrew a previously granted waiver.[82] The EPA went a step further than its 2008 waiver decision, narrowly interpreting that "Congress did not intend the waiver provision . . . to be applied to California measures that address pollution problems of a national or global nature," but only conditions "extraordinary" with respect to California; that is, "with a particularized nexus to emissions in California and to topographical or other features peculiar to California."[83] The EPA argued that climate change caused by carbon dioxide emissions is not a local air pollution problem and that California's new motor vehicle standards deviated too far from what Congress intended in granting California a waiver.[84] The EPA concluded that California's GHG standards were missing a specific connection to local features, and thus excluded GHG regulation from the scope of the waiver.[85]

In March 2022, the Biden administration's EPA rescinded the 2019 waiver withdrawal, restoring the 2013 waiver and California's authority to enforce its GHG emission standards and ZEV sales mandate.[86] In determining that California has a compelling need for its GHG standards and

80. *Id.* ("Whether or not the ZEV standards achieve additional reductions by themselves above and beyond the LEV III GHG and criteria pollutant standards, the LEV III program overall does achieve such reductions, and EPA defers to California's policy choice of the appropriate technology path to pursue to achieve these emissions reductions."). The long-term goals were to have ZEVs be nearly 100% of new vehicle sales between 2040 and 2050, and reduce GHG emissions by 80% below 1990 levels by 2050. *Id.* at 2131–32.

81. CARB noted: "Record-setting fires, deadly heat waves, destructive storm surges, loss of winter snowpack—California has experienced all of these in the past decade and will experience more in the coming decades . . . . In California, extreme events such as floods, heat waves, droughts and severe storms will increase in frequency and intensity. Many of these extreme events have the potential to dramatically affect human health and well-being, critical infrastructure and natural systems." *Id.* at 2129.

82. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51310, 51310 (Sept. 27, 2019) [hereinafter 2019 Waiver Withdrawal]. The EPA and National Highway Traffic Safety Administration (NHTSA) issued a joint rulemaking that withdrew the waiver of California's GHG and ZEV standards that were part of the ACC I program.

83. *Id.* at 51347.

84. *Id.* at 51350 n.285 ("Attempting to solve climate change, even in part, through the Section 209 waiver provision is fundamentally different from that section's original purpose of addressing smog-related air quality problems.") (quoting the SAFE proposal).

85. *Id.* at 51347, 51350.

86. Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision, 87 Fed. Reg. 14332, 14332 (Mar. 14, 2022) [hereinafter 2022 Waiver Reconsideration].

ZEV sales mandate, the EPA essentially reverted back to its 2013 analysis, maintaining that pollution continues to pose a distinct problem in California.[87] The EPA saw no reason to distinguish between local and global air pollutants, reasoning that all pollutants play a role in California's local air quality problems and that the EPA should provide deference to California in its comprehensive policy choices for addressing them.[88] The 2022 EPA refuted the 2019 EPA's premise that GHG emissions from motor vehicles in California do not pose a local air quality issue,[89] noting that criteria pollution and GHGs have interrelated and interconnected impacts on local air quality.[90]

Congress recently expanded the Clean Air Act to include GHGs, clarifying that GHGs are pollutants under the Clean Air Act. On August 16, 2022, President Biden signed the Inflation Reduction Act into law, the single largest climate package in U.S. history, which will invest almost $370 billion in clean energy and other climate-related measures over the next ten years, and is expected to reduce U.S. carbon emissions by 40% by 2030 compared to 2005 levels.[91] The Act reinforces the EPA's authority to regulate GHGs under the Clean Air Act, amending sections of the Clean Air Act to define "greenhouse gas" to include "the air pollutants carbon dioxide, hydrofluorocarbons, methane, nitrous oxide, perfluorocarbons, and sulfur hexafluoride."[92] It also grants money under the Clean Air Act for any project that "reduces or avoids greenhouse gas emissions and other forms of air pollution."[93] This language supports that Congress fully intends to include GHGs in the Clean Air Act and that California is acting within the scope of the Clean Air Act in implementing its forward-looking motor vehicle emissions regulations.

87. *Id.* at 14352–53, 14367.

88. *Id.* at 14363.

89. *Id.* at 14365–66.

90. "[T]he Agency [in SAFE 1] failed to take proper account of the nature and magnitude of California's serious air quality problems, including the interrelationship between criteria and GHG pollution." *Id.* at 14334. "The air quality issues and pollutants addressed in the ACC program are interconnected in terms of the impacts of climate change on such local air quality concerns such as ozone exacerbation and climate effects on wildfires that affect local air quality." *Id.* at 14334 n.10. CARB also attributed GHG emissions reductions to vehicles in California, projecting that the standards will reduce car CO_2 emissions by about 4.9% a year. *Id.* at 14366.

91. THE WHITE HOUSE, BUILDING A CLEAN ENERGY ECONOMY: A GUIDEBOOK TO THE INFLATION REDUCTION ACT'S INVESTMENTS IN CLEAN ENERGY AND CLIMATE ACTION 5–6 (2023); *Summary: The Inflation Reduction Act of 2022*, SENATE DEMOCRATS, https://www.democrats.senate.gov/imo/media/doc/inflation_reduction_act_one_page_summary.pdf [https://perma.cc/Z4ED-W32A].

92. Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 132(d)(4), 136 Stat. 1818, 2067.

93. *Id.* § 134(c)(3)(A), 136 Stat. 1818, 2064.

C. PENDING LAWSUIT—*OHIO V. EPA*

Similar to its prior motor vehicle regulations, California will need to request a preemption waiver from the EPA under section 209(b)(1) of the Clean Air Act to regulate post-2025 vehicles. In the meantime, the Biden administration's EPA's latest March 2022 waiver decision prompted Republican-led states and private petitioners to challenge the constitutionality of the Clean Air Act waiver provision, making the case highly relevant for California's ability to regulate motor vehicle emissions in the future.[94] In May 2022, seventeen states filed a lawsuit in the U.S. Court of Appeals for the D.C. Circuit (*Ohio v. EPA*), claiming, *inter alia*, that the section 209(b)(1) waiver provision violates the equal sovereignty principle because it limits state political authority unequally by allowing only California to set new car emission standards and "exercise sovereign authority that section 209(a) takes from every other State."[95] Under this principle, the petitioners alleged, Congress cannot give only some states favorable treatment of sovereignty authority, as it has done with California.[96] Even if section 209(b)(1) allowed California to regulate unique state-specific issues, the petitioners argued that the waiver would still be unconstitutional because it allows California to regulate GHGs to address climate change, which is not a problem unique to California.[97] The petitioners disagreed with the Biden administration's EPA's statement that "California is particularly impacted by climate change,"[98] arguing that other states will be impacted just as much, if not more, from climate change.[99]

The petitioner states also took issue with the idea of giving one state power to regulate a major national industry.[100] The states argued that California's "special treatment" under the Clean Air Act—giving California special power to regulate a major national industry and exercise sovereign authority that the Act withdraws from every other state, when California has no unique interest[101]—violates the Constitution's intent to hold all states

94. Brief for Petitioners, *supra* note 19, at 28.
95. *Id.*
96. *Id.* at 26.
97. *Id.* at 13.
98. 2022 Waiver Reconsideration, 87 Fed. Reg. at 14363.
99. Brief for Petitioners, *supra* note 19, at 32.
100. "A federal law giving one State special power to regulate a major national industry contradicts the notion of a Union of sovereign States." *Id.* at 29–30.
101. *Id.* at 26.

equal.[102] In a separate brief, a group of private petitioners, including the American Fuel & Petrochemical Manufacturers and Clean Fuels Development Coalition, argued that the equal sovereignty principle does not allow the federal government to give only one state the authority to regulate national and international issues.[103] They claimed that any mandate to shift the nation's automobile fleet to electric vehicles must come from Congress, because such a shift would "substantially restructure the American automobile market, petroleum industry, agricultural sectors, and the electric grid, at enormous cost and risk."[104] The private petitioners cited the recent *West Virginia v. EPA* decision, which essentially restricted the EPA's authority to regulate GHG emissions from power plants.[105] Applying the major questions doctrine,[106] the Court held that the EPA must point to "clear congressional authorization"[107] to justify its regulatory authority in "extraordinary cases" when the EPA asserts broad authority in an area of "economic and political significance."[108] The Court concluded that the EPA does not have the authority to "substantially restructure the American energy market . . . ."[109] If the EPA cannot upend energy generation in the country, as *West Virginia v. EPA* held, then, the petitioners argued, California similarly cannot "upend the transportation and energy sectors."[110] The petitioners further argued that section 177 also allows California to shape

102. *Id.* at 30. "Instead of allowing all States with a unique environmental concern to seek a waiver, it accords special treatment to a category of States defined to forever include only California and to forever exclude all other States, without regard to whether other States face their own localized environmental concerns." *Id.* at 30.

103. Initial Brief for Private Petitioners at 15, Ohio v. EPA, No. 22-1081 (D.C. Cir. Oct. 24, 2022).

104. *Id.* at 23.

105. *See id.* at 23; West Virginia v. EPA, 142 S. Ct. 2587, 2612, 2615–16 (2022).

106. The major questions doctrine states that if an agency seeks to decide an issue of major national significance—that is, in cases where the "history and breadth of the authority" an agency asserts or the "economic and political significance" of that assertion is extraordinary—its action must be supported by clear congressional authorization. *Id.* at 2607–08. *See* Kate R. Bowers, CONG. RSCH. SERV., IF12077, THE MAJOR QUESTIONS DOCTRINE 1 (2022) (providing an overview of the major questions doctrine).

107. *West Virginia*, 142 S. Ct. at 2609 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

108. *West Virginia*, 142 S. Ct. at 2608–09 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)). The case centers around the Clean Power Plan, a regulation the EPA issued in 2015 that would have curbed carbon emissions from existing coal and gas plants via "'generation shifting from higher-emitting to lower-emitting' producers of electricity." *Id.* at 2603 (quoting Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64728 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60)). The decision was the first time the Supreme Court has used the term "major questions doctrine" in a majority opinion. Bowers, *supra* note 106, at 2.

109. *West Virginia*, 142 S. Ct. at 2610.

110. Initial Brief for Private Petitioners, *supra* note 104, at 19–20.

national industries, which may burden the states that decline to adopt California's standards.[111]

On the other hand, several electric utility providers, clean energy industry groups, and auto manufacturers have backed California.[112] A few automakers have indicated that they support the more stringent California standards. In July 2019, CARB reached a voluntary agreement with four major automakers—BMW of North America, Ford, Honda, and Volkswagen Group of America—to adopt a modified version of the GHG standards.[113] Building on this voluntary framework, in 2020, Volvo joined the four automakers in agreeing to a 17% emissions cut through the 2026 model year.[114] The automakers filed a motion to intervene to defend the EPA's March 2022 decision.[115]

To date, the Supreme Court has not addressed the constitutionality of the Clean Air Act under the equal sovereignty principle. In its 2019 decision revoking the 2013 California waiver, the Trump administration's EPA interpreted the statutory criteria in the context of the equal sovereignty principle, explaining that section 209(b)(1) provides "extraordinary treatment" to California and therefore should be interpreted to require a "state-specific particularized" pollution problem.[116] In contrast, in its 2022 waiver grant, the Biden administration's EPA noted that it has historically declined to consider constitutional issues, reviewing the waiver solely based on the section 209(b)(1) criteria because the statute and legislative history reflect a broad policy of deference to California to address its air quality problems.[117] Although equal sovereignty presented a new constitutional argument, the EPA limited its role in evaluating waiver requests to "the

111. *Id.* at 54.

112. Goldberg, *supra* note 13.

113. *California and Major Automakers Reach Groundbreaking Framework Agreement on Clean Emission Standards*, CAL. AIR RES. BD. (July 5, 2019), https://ww2.arb.ca.gov/news/california-and-major-automakers-reach-groundbreaking-framework-agreement-clean-emission [https://perma.cc/52VH-PCLS].

114. *Framework Agreements on Clean Cars*, CAL. AIR RES. BD. (Aug. 17, 2020), https://ww2.arb.ca.gov/news/framework-agreements-clean-cars [https://perma.cc/EN78-JR87].

115. Ford Motor Co., Volkswagen Grp. of Am., Inc., BMW of N. Am., LLC, Am. Honda Motor Co., Inc., and Volvo Car USA LLC, Motion to Intervene in Support of Respondents, Ohio v. EPA, No. 22-1081 (D.C. Cir. June 7, 2022).

116. 2019 Waiver Withdrawal, 84 Fed. Reg. at 51340.

117. 2022 Waiver Reconsideration, 87 Fed. Reg. at 14376. This interpretation has been upheld by the U.S. Court of Appeals for the D.C. Circuit. *See* Motor & Equip. Mfrs. Ass'n v. EPA (*MEMA I*), 627 F.2d 1095, 1115 (D.C. Cir. 1979) (declining to consider whether California standards are constitutional); Am. Trucking Ass'ns. v. EPA, 600 F.3d 624, 628 n.1 (D.C. Cir. 2010) (declining to express a view on a constitutional challenge to the California standards). In both cases, the Court upheld prior EPA decisions to not consider constitutional objections.

criteria that Congress directed EPA to review."[118] Nevertheless, the Biden administration's EPA briefly addressed the equal sovereignty principle, arguing that the waiver does not impose a burden on any state and that Section 177, in enabling other states to adopt California's standards, undermines the notion that the section 209(b)(1) waiver treats California in an extraordinary manner.[119] Rather, in deliberately compromising between having one national standard and fifty different state standards by authorizing just two—the federal standard and California's standards—Congress allowed California to be a "laboratory for innovation" and address the state's extraordinary pollution problems, while ensuring that automakers were not overburdened with varying state standards.[120]

D. CALIFORNIA'S ADVANCED CLEAN CARS II REGULATIONS

California recently promulgated the Advanced Clean Cars II ("ACC II") regulations in the shadow of the pending *Ohio v. EPA* lawsuit. ACC II stems from an executive order Governor Gavin Newsom signed in September 2020 directing CARB to develop regulations contributing to the goal that 100% of in-state sales of new passenger cars and trucks will be zero-emission by 2035.[121] As a result of the executive order, on August 25, 2022, CARB promulgated a new regulation, the ACC II program, phasing out all sales of new fossil fuel cars by 2035.[122] The regulation requires that automakers increase the percentage of electric vehicles progressively, nearly tripling it to 35% by 2026 and reaching 100% by 2035 (see Figure 1).[123]

118. 2022 Waiver Reconsideration, 87 Fed. Reg. at 14376.

119. *Id.* at 14356.

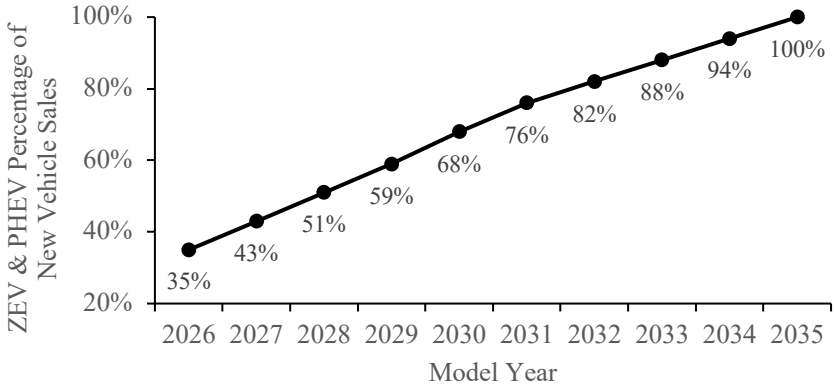
120. *Id.* at 14360, 14377.

121. Cal. Exec. Order No. N-79-20 (Sept. 23, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/09/9.23.20-EO-N-79-20-Climate.pdf [https://perma.cc/F4SE-B5AB]. As a point of comparison, in 2022, nearly 19% of all new light-duty vehicles sold in the state were electric vehicles. *New ZEV Sales in California*, CAL. ENERGY COMM'N, https://www.energy.ca.gov/data-reports/energy-almanac/zero-emission-vehicle-and-infrastructure-statistics/new-zev-sales [https://perma.cc/TDY9-TXST].

122. CAL. AIR RES. BD., *supra* note 1.

123. CAL. AIR RES. BD., *supra* note 3.

FIGURE 1. Percentage of new vehicle sales that must be zero-emission vehicles



The ACC II regulations amend the ZEV and LEV standards for model years 2026–2035,[124] following the ACC I regulations, which address model year 2015–2025 vehicles.[125] CARB estimates that the new regulations will reduce vehicle GHG emissions by more than 50% by 2040.[126] Thus, the decision from *Ohio v. EPA* will have implications for California's ability to implement standards including the ACC II program going forward.

E. THE EQUAL SOVEREIGNTY PRINCIPLE

The Supreme Court didn't develop the equal sovereignty principle as a meaningful concept until *Shelby County v. Holder* in 2013,[127] in which the Supreme Court held a statute (the Voting Rights Act) unconstitutional based on the equal sovereignty principle for the first time. The Court did not clarify

124. CAL. AIR RES. BD., *supra* note 77. The ACC II regulations: (1) amend the ZEV regulation to require an increasing number of zero-emission vehicles, and rely on advanced vehicle technologies, including battery-electric, hydrogen fuel cell electric and plug-in hybrid electric vehicles, to meet air quality and climate change emissions standards; and (2) amend the LEV regulations to include increasingly stringent standards for gasoline cars and heavier passenger trucks to continue to reduce smog-forming emissions while the sector transitions toward 100% electrification by 2035. CAL. AIR RES. BD., *supra* note 1.

125. CAL. AIR RES. BD., *supra* note 1.

126. Goldberg, *supra* note 13.

127. Shelby County v. Holder, 570 U.S. 529, 540 (2013); *see Equal Sovereignty Five Years After Shelby County*, HARV. C.R.-C.L. L. REV.: AMICUS BLOG (Oct. 31, 2018), https://harvardcrcl.org/equal-sovereignty-five-years-after-shelby-county [https://perma.cc/S5G8-QSAQ].

what constitutional provision this principle is based on.[128] Although the Constitution requires equal treatment among the states in particular contexts,[129] no provision explicitly requires Congress to treat all states equally as a general matter.[130] This absence of an explicit statement could mean that the founders did not intend to establish a generally applicable equal sovereignty principle.[131] Critics of *Shelby County* have claimed that the Supreme Court invented the equal sovereignty principle to achieve political ends.[132] Other scholars argue that questions about the sovereign power of the states have existed since the drafting of the U.S. Constitution.[133] Many scholars agree there is some support for the principle in the historical record and constitutional doctrine, but they doubt that is sufficient for it to be considered a "fundamental" principle, as *Shelby County* claims.[134] This Section traces the history of how courts have applied the equal sovereignty principle, from the context of admitting new states into the Union to voting rights.

128. *See Amdt 10.4.3 Equal Sovereignty Doctrine*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt10-4-3/ALDE_00013628 [https://perma.cc/US7J-4YU9].

129. *See, e.g.*, U.S. CONST. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State . . . ."); U.S. CONST. art. I, § 8, cl. 1 (requiring "Duties, Imposts and Excises" to be "uniform throughout the United States"); U.S. CONST. art. I, § 8, cl. 4 (requiring "a uniform Rule of Naturalization" and "uniform Laws on the subject of Bankruptcies throughout the United States"); U.S. CONST. art. I, § 9, cl. 6 ("No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another . . . ."); U.S. CONST. art. IV, § 1 (Full Faith and Credit Clause – "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); U.S. CONST. art. IV, § 2, cl. 1 (Privileges and Immunities Clause – "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); U.S. CONST. art. V ("[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate."); U.S. CONST. amend. XI.

130. *See* Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1230–32 (2016); Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1099–1100 (2016).

131. *See* Final Brief for Respondents at 33, Ohio v. EPA, No. 22-1081 (D.C. Cir. Mar. 20, 2023).

132. *See* Abigail B. Molitor, *Understanding Equal Sovereignty*, 81 U. CHI. L. REV. 1839, 1840 (2014); Litman, *supra* note 130. Judge Richard Posner, Chief Judge of the Seventh Circuit Court of Appeals, wrote regarding the equal sovereignty principle: "This is a principle of constitutional law of which I had never heard—for the excellent reason that . . . there is no such principle . . . . The opinion [*Shelby County*] rests on air." Richard A. Posner, *The Supreme Court and the Voting Rights Act: Striking Down the Law Is All About Conservatives' Imagination*, SLATE (June 26, 2013, 12:16 AM), https://slate.com/news-and-politics/2013/06/the-supreme-court-and-the-voting-rights-act-striking-down-the-law-is-all-about-conservatives-imagination.html [https://perma.cc/P7WJ-62A7].

133. *See* Molitor, *supra* note 132, at 1877; Colby, *supra* note 130, at 1102; Valerie J.M. Brader, *Congress' Pet: Why the Clean Air Act's Favoritism of California Is Unconstitutional Under the Equal Footing Doctrine*, 13 HASTINGS W.-NW. J. ENV'T L. & POL'Y 119, 151 (2007); Jeffrey M. Schmitt, *In Defense of* Shelby County's *Principle of Equal State Sovereignty*, 68 OKLA. L. REV. 209, 238 (2016).

134. *See* Molitor, *supra* note 132, at 1841; Litman, *supra* note 130, at 1212; David Kow, *An "Equal Sovereignty" Principle Born in* Northwest Austin*, Texas, Raised in* Shelby County*, Alabama*, 16 BERKELEY J. AFR.-AM. L. & POL'Y 346, 375 (2015).

1. Origins: The Equal Footing Doctrine—New Admission of States

The equal sovereignty principle dates back to the equal footing doctrine referenced in Article IV, Section 3 of the Constitution: "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State . . . without the Consent of the Legislatures of the States concerned as well as of the Congress."[135] The Northwest Ordinance of 1787, which provided a path toward statehood for the territories northwest of the Ohio River,[136] further required that these states be admitted "on an equal footing with the original States in all respects whatever," on the condition that the new state constitutions and governments were "republican, and in conformity to the principles contained in these articles . . . ."[137]

Several court cases also interpret the Constitution to support the equal sovereignty principle. *Pollard's Lessee v. Hagan* held that Congress must admit every state into the Union on the same terms and with the same powers as the original states.[138] Every state must be "admitted into the union on an equal footing with the original states,[139] with "equal sovereign rights."[140] Further, the court held that "no compact" can "diminish or enlarge" the rights a state has when it enters the Union.[141] *Northwest Austin v. Holder* referenced this case as support for the historic tradition that all states enjoy equal sovereignty.[142] *Coyle v. Smith* held that states, not Congress, have sovereignty to choose where to locate their state capital: the United States

135. U.S. CONST. art. IV, § 3.

136. These territories would later become Illinois, Indiana, Michigan, Ohio, Wisconsin, and part of Minnesota. *The Northwest Ordinance of 1787*, U.S. H.R.: HIST., ART & ARCHIVES, https://history.house.gov/Historical-Highlights/1700s/Northwest-Ordinance-1787/ [https://perma.cc/CLG2-V2ZA].

137. Ordinance for the Government of the Territory of the United States North-West of the River Ohio art. V (1787), https://www.archives.gov/milestone-documents/northwest-ordinance [https://perma.cc/2ZUF-U5DT]. The act also banned slavery in the new territories but allowed for the return of fugitive slaves. *Id.*, art. VI. Professor Litman argues, however, that the Northwest Ordinance's meaning is unclear because "equal footing" did not necessarily promise new states the same legislative sovereignty as the original states, but rather just that new states would receive fair representation in Congress. Litman, *supra* note 130, at 1235–36. Additionally, Litman notes that the Northwest Ordinance actually broadened Congress's powers over the would-be states, resulting in different treatment of those states, since it prohibited religious discrimination and slavery in the new states. *Id.* James Madison inferred that Congress would determine whether newly admitted states have the same "legislative sovereignty" as the original states. *Id.*

138. "The new states have the same rights, sovereignty, and jurisdiction [over the shores of navigable waters] as the original states." Pollard's Lessee v. Hagan, 44 U.S. 212, 230 (1845).

139. *Id.* at 216.

140. *Id.* at 231.

141. *Id.* at 229.

142. Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 203 (2009) (citing United States v. Louisiana, 363 U.S. 1, 16 (1960) (citing Pollard's Lessee v. Hagan, 44 U.S. 212, 223 (1845))).

"was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself."[143] No state is "less or greater . . . in dignity or power" than another.[144] Thus, Congress may not unequally limit or expand the states' political and sovereign power.[145] Indeed, "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized."[146] Thus, these cases establish the origins of the equal sovereignty principle in the admission of new states into the Union.

2. Equal Sovereignty Applied to Voting Rights

When the equal sovereignty principle was brought up in the context of the Voting Rights Act, courts had to determine whether the principle applied outside the state admission context.

Congress designed the Voting Rights Act of 1965 to address continuing voting discrimination after the Civil War.[147] The Fifteenth Amendment to the Constitution, ratified in 1870, prohibited voting discrimination based on race,[148] and Congress subsequently enacted the Enforcement Act of 1870, which prohibited obstruction of the exercise of the right to vote.[149] However, enforcement of the law was ineffective, and throughout Reconstruction, many southern states continued to enact tests designed to prevent Black people from voting.[150] To address this continuing discrimination, section 5 of the Voting Rights Act established a preclearance requirement, mandating that the federal government approve all new voting regulations to ensure that they did not perpetuate racial discrimination.[151] However, the preclearance requirement only applied to states with a history of voting discrimination, as

143. Coyle v. Smith, 221 U.S. 559, 567 (1911).

144. *Id.* at 566.

145. *See* Stearns v. Minnesota, 179 U.S. 223, 245 (1900) ("It has often been said that a State admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations . . . .").

146. *Coyle*, 221 U.S. at 580.

147. South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966).

148. *See id.* at 310; U.S. CONST. amend. XV, § 1.

149. *See Katzenbach*, 383 U.S. at 310; Enforcement Act of 1870, ch. 114, 41st Congress, Sess. II.

150. *See Katzenbach*, 383 U.S. at 310–11. Literacy tests disproportionately affected African Americans due to the high illiteracy rates in comparison with Whites. At the same time, grandfather clauses, property qualifications, character tests, and interpretation requirements were employed to "assure that white illiterates would not be deprived of the franchise." *Id.* at 311.

151. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439.

determined by the coverage formula in section 4 of the Voting Rights Act.[152] The coverage formula implicated states located primarily in the South; thus, a select group of states were subject to more stringent requirements than other states when seeking to change their voting laws.

In its 1966 decision in *South Carolina v. Katzenbach*, the Supreme Court rejected the notion that the equal sovereignty principle prohibited differential treatment in the voting rights context. The Court held that the equal sovereignty principle only applied to situations involving the admission of new states, not the Voting Rights Act: "The doctrine of the equality of States . . . applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared."[153] The Court observed that Congress passed the Voting Rights Act in response to the "insidious and pervasive evil" of racial discrimination in voting,[154] and thus held that the Voting Rights Act was a constitutional and appropriate means for carrying out the Fifteenth Amendment.[155]

Fourteen years later in *City of Rome v. United States*, the Supreme Court again upheld the Voting Rights Act as constitutional, finding that the Reconstruction Amendments were "specifically designed as an expansion of federal power and an intrusion on state sovereignty," and thus, Congress had the authority to regulate state and local voting.[156] The Court cited *Fitzpatrick v. Bitzer*, which held that the principle of state sovereignty embodied by the Eleventh Amendment is "necessarily limited by the enforcement provisions of section 5 of the Fourteenth Amendment."[157] However, the Court would later apply the equal sovereignty principle to invalidate part of the Voting Rights Act.

3. *Shelby County v. Holder*—Equal Sovereignty as a General Principle

Only two Supreme Court cases discuss equal sovereignty as a general principle.[158] *Northwest Austin v. Holder*,[159] though still a voting rights case,

152. The coverage formula established that if the state used a law like a literacy or character test to keep people from registering to vote as of November 1, 1964, and less than 50% of the eligible voting population was registered to vote on November 1, 1964 or voted in the presidential election of November 1964, then the state was subject to preclearance. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(b), 79 Stat. 437, 438.

153. *Katzenbach*, 383 U.S. at 328–29.

154. *Id.* at 309.

155. *Id.* at 328–29.

156. City of Rome v. United States, 446 U.S. 156, 179 (1980).

157. *Id.* at 156–58 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976)).

158. Molitor, *supra* note 132, at 1879.

159. Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 203 (2009).

applied the equal sovereignty principle more broadly in 2009, laying the foundation for *Shelby County v. Holder*[160] to overrule Voting Rights Act section 4 in 2013.[161]

In *Northwest Austin*, the Supreme Court observed that the section 4 coverage formula of the Voting Rights Act went against the "historic tradition that all the States enjoy 'equal sovereignty' " by differentiating between the states.[162] The Court acknowledged that differentiating between states is sometimes justified, citing *Katzenbach* as an example.[163] However, it held that departing from "the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[164] Thus, the equal sovereignty principle limits Congress's ability to subject different states to unequal burdens, at least without sufficient justification.[165] The Court also noted that the Act "imposes current burdens and must be justified by current needs."[166] While the Court ultimately resolved the case on statutory grounds,[167] it expressed concern that sections 4 and 5 of the Voting Rights Act raised "serious constitutional questions."[168] The Court observed that improved conditions in the South since 1965 may distinguish the case from *Katzenbach* because current conditions in 2009 may no longer reflect the discriminatory state actions that Congress meant for section 5 to address, and cited a lower racial gap in voter registration as an example to show that the coverage formula may rely on outdated statistics.[169] The Court also observed that the Voting Rights Act's preclearance requirements "authorize[d] federal intrusion into sensitive areas of state and local policymaking" and imposed "substantial 'federalism costs.' "[170]

These concerns formed the basis for *Shelby County* to hold that section 4 of the Voting Rights Act was unconstitutional because it departed from the

160. Shelby County v. Holder, 570 U.S. 529, 544 (2013).

161. *See* Molitor, *supra* note 132, at 1878 ("Since Shelby County, only one court has issued an opinion dealing with equal sovereignty [*NCAA v. New Jersey*, a Third Circuit case].").

162. *Nw. Austin*, 557 U.S. at 203 (citing United States v. Louisiana, 363 U.S. 1, 16 (1960) (citing Lessee of Pollard v. Hagan, 3 How. 212, 223 (1845))).

163. *Id.* (citing South Carolina v. Katzenbach, 383 U.S. 301, 328–29 (1966)).

164. *Id.*

165. *Amdt 10.4.3 Equal Sovereignty Doctrine*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt10-4-3/ALDE_00013628 [https://perma.cc/US7J-4YU9].

166. *Nw. Austin*, 557 U.S. at 203.

167. *Id.* at 206–11.

168. *Id.* at 204.

169. *Id.* at 202–04 (2009). The Court notes that "[v]oter turnout and registration rates now approach parity[,]" "[b]latantly discriminatory evasions of federal decrees are rare," and "minority candidates hold office at unprecedented levels." *Id.* at 202.

170. *Id.* at 202.

"fundamental principle" of equal sovereignty.[171] The Supreme Court found the "fundamental principle of equal sovereignty" to be "highly pertinent in assessing subsequent disparate treatment of States."[172] The Court adopted the guidelines *Northwest Austin* set—namely, that the Voting Rights Act "imposes current burdens and must be justified by current needs," and that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[173] The Court also distinguished the case from *Katzenbach*. Whereas in *Katzenbach*, the coverage formula was "relevant to the problem" of voting discrimination at the time,[174] here, the coverage formula was not updated to reflect contemporary improvements in voting participation, including higher voter registration and turnout numbers.[175] The Court concluded that Congress did not sufficiently justify its reauthorization of the "extraordinary and unprecedented features" of the Voting Rights Act;[176] thus, the Court held that the coverage formula no longer met the test introduced in *Northwest Austin*.[177]

Shelby County, the only Supreme Court case to apply the test established in *Northwest Austin*, gave little guidance on how to apply the equal sovereignty principle in future cases, other than indicating that the law should rely on "current data reflecting current needs" when the degree of voting discrimination that prompted the original passage of the Voting Rights Act had changed.[178] The Supreme Court has not decided an equal sovereignty challenge since *Shelby County*, leaving lower courts to interpret how to apply the equal sovereignty principle outside the voting rights context.

II. APPLYING THE *SHELBY COUNTY* TEST TO THE CLEAN AIR ACT

Under the *Northwest Austin* test that *Shelby County* applied (the "*Shelby County* test"), the statute "must be justified by current needs," and if federal legislation departs from the "fundamental principle of equal sovereignty," it "requires a showing that a statute's disparate geographic coverage is

171. Shelby County v. Holder, 570 U.S. 529, 544 (2013).
172. *Id.*
173. *Id.* at 542; *see Nw. Austin*, 557 U.S. at 203.
174. *Shelby County*, 570 U.S. at 551–52; *see* South Carolina v. Katzenbach, 383 U.S. 301, 301 (1966).
175. *Shelby County*, 570 U.S. at 547–49, 551.
176. *Id.* at 549.
177. *Id.* at 551.
178. *Id.* at 552–53.

sufficiently related to the problem that it targets."[179] This Part argues that the equal sovereignty principle likely does not apply to the Clean Air Act, thus the *Shelby County* test should not even apply. But even if it were to apply and the *Shelby County* test is triggered, this Part concludes that the principle does not invalidate section 209(b)(1) of the Clean Air Act because California's current needs continue to justify its differential treatment. California's unique exemption is sufficiently related to the public health problem that the Clean Air Act waiver provision targets; allowing California broad discretion to regulate motor vehicle emissions directly contributes to Congress's goal of addressing public health threats from motor vehicle pollution in the state.

A. THE EQUAL SOVEREIGNTY PRINCIPLE LIKELY DOES NOT APPLY TO THE CLEAN AIR ACT

This Section argues that the scope of the *Shelby County* test is limited and likely does not apply to the Clean Air Act. *Shelby County* emphasizes that the equal sovereignty principle applies to federal laws that "authorize[] federal intrusion into sensitive areas of state and local policymaking."[180] The Supreme Court thus applied the equal sovereignty principle to the Voting Rights Act because it determined that election regulation was a sensitive area of state policymaking. Highlighting the "extraordinary" nature of the Voting Rights Act's preclearance provisions,[181] the Court noted that the law suspends "*all* changes to state election law—however innocuous—until they have been precleared by federal authorities . . . ."[182] The federal government must explicitly grant states permission to implement voting laws that they "would otherwise have the right to enact and execute on their own . . . ."[183] Because the Voting Rights Act intruded into a sensitive area of state policymaking that had traditionally been the exclusive province of the states, the Court limited Congress's authority under the Fifteenth Amendment to restrict states' election procedures disparately.

Professor Leah Litman goes even farther to posit that only federal action that lessens the dignity of a state or group of states triggers the *Shelby County* conception of equal sovereignty.[184] Under this narrower interpretation, Litman argues that laws will violate equal sovereignty only if they single out

179. *Id.* at 542; *see Nw. Austin,* 557 U.S. 193, 203 (2009).
180. *Shelby County*, 570 U.S. at 545 (citing Lopez v. Monterey County, 525 U.S. 266, 282 (1999)).
181. *Id.*
182. *Id.* at 544 (citing *Nw. Austin*, 557 U.S. at 202).
183. *Id.*
184. Litman, *supra* note 130, at 1214.

particular states that have behaved in morally-blameworthy ways, limiting the scope of the principle to legislation enacted under the Reconstruction Amendments.[185] Under this interpretation, the equal sovereignty principle primarily serves as a check on the Fourteenth and Fifteenth Amendments and should only apply in cases similar to those involving voting rights, in which the dignity of human beings is at stake.[186]

Since *Shelby County*, a few weak equal sovereignty claims have been made in the lower courts in areas outside of voting rights, and the courts have distinguished these cases from *Shelby County*. For example, in *Mayhew v. Burwell*, the U.S. Court of Appeals for the First Circuit held that the equal sovereignty principle does not apply to Medicaid laws.[187] Perhaps most relevant to the Clean Air Act waiver is *National Collegiate Athletic Association (NCAA) v. Governor of New Jersey*, which addressed the constitutionality of the Professional and Amateur Sports Protection Act of 1992 ("PASPA").[188] PASPA prohibits states from licensing sports gambling, except for states that had gambling operations prior to the Act's passage, which only includes Nevada.[189] The U.S. Court of Appeals for the Third Circuit determined that the equal sovereignty principle does not apply to PASPA, distinguishing the Voting Rights Act from PASPA by finding that regulating gambling via the Commerce Clause is "not of the same nature" as regulating elections via the Reconstruction Amendments.[190] The court held that the Commerce Clause allowed Congress to enact laws "aimed at matters of national concern and finding national solutions will necessarily affect states differently,"[191] such that federal Commerce Clause regulation "does not require geographic uniformity."[192] The court found that applying *Shelby County* to all situations is "overly broad" and that the equal sovereignty principle does not apply outside "the context of 'sensitive areas of state and local policymaking.' "[193]

185. *Id.* at 1214–15.

186. *Id.*

187. In *Mayhew v. Burwell*, the U.S. Court of Appeals for the First Circuit held that the Affordable Care Act ("ACA") did not violate equal sovereignty even though it prevented Maine from "design[ing] its [own] Medicaid laws in ways that many of its sister States remain[ed] free to do." Mayhew v. Burwell, 772 F.3d 80, 93 (1st Cir. 2014). The court reasoned that the ACA did not intrude into an area of authority traditionally occupied by the states because it governed Maine's administration of a federal program that is primarily funded by the federal government. *Id.* at 95. Thus, the statute at issue "does not similarly effect a federal intrusion into a sensitive area of state or local policymaking." *Id.* at 93.

188. Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208, 214 (3d Cir. 2013).

189. *Id.* at 214–15; *see* 28 U.S.C. § 3702, 3704.

190. *Nat'l Collegiate Athletic Ass'n*, 730 F.3d at 238.

191. *Id.*

192. *Id.* (citing Morgan v. Virginia, 328 U.S. 373, 388 (1946)).

193. *Id.* at 238–39 (citing Shelby County v. Holder, 570 U.S. 529, 545 (2013)).

Similar to PASPA, Congress acted pursuant to its Commerce Clause authority in passing the Clean Air Act to regulate motor vehicle emissions; thus, Congress is exercising the federal power of regulating interstate commerce and can treat states differently in the process.[194] The Clean Air Act likely does not intrude into "sensitive areas of state and local policymaking" as the Voting Rights Act does. Regulating motor vehicles has not traditionally been the exclusive province of the states. Three agencies set federal and state vehicle emissions standards: the EPA, the National Highway Traffic Safety Administration, and CARB.[195] Section 209(a) of the Clean Air Act explicitly provides for federal preemption, prohibiting states from adopting their own motor vehicle regulations.[196] Regulating motor vehicle emissions affects interstate commerce because air pollution crosses state borders.[197] Thus, like PASPA, the Clean Air Act does not intrude into a sensitive area of policymaking traditionally occupied by the states.

At its core, the outcome the petitioners demand in *Ohio v. EPA* is inconsistent with the fundamental principle of equal sovereignty. Without the waiver, the Clean Air Act defaults to only federal standards and federal preemption, leaving states with no choice but to adopt the federal standard. Thus, invalidating the California waiver—as petitioners seek to do—gives states *fewer* choices. It fails to promote the principle of equal sovereignty, which arguably protects the power of the states to enact policies that differ from those of the federal government.[198] In her amicus brief, Professor Litman noted that the petitioners' invocation of the equal sovereignty principle is inconsistent with its history because the petitioners' arguments would result in less authority and flexibility for the states, and more coercive

194. *See* Vikram David Amar, *Why the Clean Air Act's Special Treatment of California is Permissible Even in Light of the Equal-Sovereignty Notion Invoked in Shelby County*, JUSTIA: VERDICT (Aug. 2, 2022), https://verdict.justia.com/2022/08/02/why-the-clean-air-acts-special-treatment-of-california-is-permissible-even-in-light-of-the-equal-sovereignty-notion-invoked-in-shelby-county [https://perma.cc/EYD8-H26N] ("[T]he Clean Air Act was enacted under Congress's Commerce Clause powers, a provision that decidedly does *not* require geographic uniformity"); Final Brief for Respondents, *supra* note 131, at 32–35.

195. *Federal Vehicle Standards*, CTR. FOR CLIMATE & ENERGY SOLS., https://www.c2es.org/content/regulating-transportation-sector-carbon-emissions [https://perma.cc/BK55-6TCA].

196. 42 U.S.C. § 7543(a).

197. S. Allan Adelman, *Control of Motor Vehicle Emissions: State or Federal Responsibility?* 20 CATH. U. L. REV. 157, 158, 163–64 (1970).

198. Schmitt, *supra* note 133, at 262; *see infra* Section I.E.1; 2022 Waiver Reconsideration, *supra* note 86, at 14360 ("Indeed, if section 209(b) is interpreted to limit the types of air pollution that California may regulate, it would diminish the sovereignty of California and the states that adopt California's standards pursuant to section 177 without enhancing any other state's sovereignty.").

authority for the federal government.[199] By allowing California to promulgate more stringent standards and allowing other states to choose between the federal and California standards, Congress has offered those states more options, not fewer. This is likely not an abuse of state sovereignty.[200] By arguing for an expansion of federal preemption, thereby preempting more state legislative and policy goals, the petitioners seek a result that does not promote state sovereignty and instead runs contrary to the equal sovereignty principle's historical use as a limit on congressional power.[201]

Congressional debates regarding California's special status indicate that Congress clearly considered the equal sovereignty problem and rejected it. In 1970, members of the House of Representatives expressed concern that all states should have the "same right that the State of California has in setting standards that they deem necessary for the health and safety of their people."[202] Representatives of other states, including Pennsylvania and New York, argued that their air quality problems were worse than California's, so they too should have the power to create state regulations exceeding federal standards.[203] Thus, proper application of the equal sovereignty principle would allow all states to promulgate their own motor vehicles emissions regulations. Congress was more concerned about other states not being able to promulgate their own motor vehicles emissions standards than about California having special privileges. In contrast, in *Ohio v. EPA*, the petitioner states attempt to prevent California from enacting more stringent policies that could benefit other states, thus flipping the use of the equal sovereignty principle to make it more difficult for states to enact their own policies.

The Supreme Court has suggested in *Shelby County* that the equal sovereignty principle does not extend to all areas of the law, and this Section concludes that the equal sovereignty principle does not apply to the Clean Air Act. However, even if it were to apply, the Clean Air Act waiver provision passes the *Shelby County* test and remains constitutional, as analyzed in the next Section.

199. Brief for Professor Leah M. Litman as Amici Curiae Supporting Respondents at 2, Ohio v. EPA, No. 22-1081 (D.C. Cir. Jan. 20, 2023).

200. *Id.* at 28.

201. *Id.* at 5, 30; *see infra* Section I.E.1.

202. *See* 91 CONG. REC. H19232 (daily ed. Jun. 10, 1970) (statement of Rep. Leonard Farbstein, New York).

203. Pennsylvania "has had more deaths due to air pollution than any other State in the Nation" and "is interested in increasing its standards." *Id.* at 19231. "New York has a problem with fog and smog that is just as bad as that condition which exists in California." *Id.* at 19232.

B. EVEN IF THE EQUAL SOVEREIGNTY PRINCIPLE APPLIES TO THE CLEAN AIR ACT, IT DOES NOT INVALIDATE SECTION 209(b)(1) OF THE CLEAN AIR ACT

Even if the equal sovereignty principle were to apply to the Clean Air Act, the Clean Air Act waiver provision remains constitutional. Applying the *Shelby County* test, the Clean Air Act waiver likely departs from the "fundamental principle of equal sovereignty" in creating a differential in its treatment of states' political authority. As a result, the "statute's disparate geographic coverage" must be "sufficiently related to the problem that it targets." This Section concludes that this criterion is met; thus, the waiver provision remains constitutional. Congress had strong justifications for granting California an exemption that continue to remain relevant. First, the Clean Air Act targets not only smog in one region of California, but also the broader problem of public health from automobile emissions. Second, allowing California to implement more stringent motor vehicle regulations would directly help address this broader problem. California faces new and increasingly formidable threats from climate change, which have exacerbated the existing problems that initially compelled California's motor vehicle regulations. Allowing California broad discretion to regulate GHG emissions is directly related to Congress's goal of addressing the public health threats from motor vehicle pollution in California because the effects of GHG emissions and smog are interrelated and affect one another. This Section thus concludes that California's current needs continue to justify Congress's differential treatment of California—maintaining, and perhaps even strengthening, section 209(b)'s relevance in the twenty-first century.

1. By Treating States' Political Authority Differently, the Clean Air Act Waiver Likely Violates the Equal Sovereignty Principle

The equal sovereignty principle does not require the federal government to treat states equally in every scenario, but requires that all states have equal *political* authority.[204] *Black's Law Dictionary* defines "sovereignty" as "[s]upreme dominion, authority, or rule"[205] and "state sovereignty" as "[t]he right of a state to self-government; the supreme authority exercised by each state."[206] The Court in *Shelby County* explained that "[s]tates retain broad autonomy . . . in structuring their governments and pursuing legislative objectives,"[207] referencing the Tenth Amendment and federalism principles

204. Schmitt, *supra* note 133, at 220.
205. *Sovereignty*, BLACK'S LAW DICTIONARY (11th ed. 2019).
206. *State sovereignty*, BLACK'S LAW DICTIONARY (11th ed. 2019).
207. Shelby County v. Holder, 570 U.S. 529, 543 (2013).

as crucial in preserving the "integrity, dignity, and residual sovereignty of the States."[208] In *United States v. Texas*, the Supreme Court noted that the equal footing doctrine applies to political rights and sovereignty, but not economic issues.[209] The Court observed that the equal footing doctrine was not designed to eliminate diversity in economic aspects such as area, location, and geology, but rather to "create parity as respects political standing and sovereignty."[210] Thus, Congress violates the equal sovereignty principle when it limits the political power of a particular subset of states.[211]

Legislation that prohibits some states but not others from enacting laws about the same topic likely would violate the equal sovereignty principle. For example, the Voting Rights Act limits only southern states' ability to regulate elections and PASPA permits only Nevada to legalize sports betting;[212] thus, these laws would in theory violate the principle. Similarly, the Clean Air Act treats California's sovereign authority differently from the other states. By permitting only California to regulate motor vehicles and promulgate new motor vehicles emissions standards, while limiting other states to either adopt the California or federal standards, the Clean Air Act waiver arguably limits other states' rights to govern themselves in the area of motor vehicles, as well as transportation and energy more broadly. Rather than allow all states with certain air quality conditions to set regulations, the Clean Air Act allowed the state that first adopted its own motor vehicle regulations to continue setting the standard for new regulations.[213] Thus, if we were to apply the equal sovereignty principle to the Clean Air Act, the Clean Air Act likely departs from the equal sovereignty principle by exhibiting disparate treatment of the states' political authority pertaining to motor vehicle regulations.

208. *Id.* at 530 (citing Bond v. United States, 564 U.S. 211, 221 (2011)).

209. United States v. Texas, 339 US 707, 716 (1950).

210. *Id.*

211. Schmitt, *supra* note 133, at 220.

212. Colby, *supra* note 130, at 1155. PASPA "does not merely regulate private conduct; it curtails the regulatory and revenue-raising authority of the states. It precludes non-exempted states from legalizing sports gambling . . . . Nevada may derive enormous financial benefits from casino sports book betting, but other states may not." *Id.*

213. *See* Brader, *supra* note 133, at 155–56. "The one state that had chosen to regulate in particular ways was given a power denied to all the states that had chosen not to exercise their equal right to do so . . . . These provisions are not about an inequality of economics or geography—they are about sovereignty." *Id.*

2. Nevertheless, the Clean Air Act Waiver Provision Remains Constitutional Because Its Disparate Geographic Coverage Favoring California Is "Sufficiently Related to the Problem that It Targets"

Violating the equal sovereignty principle does not automatically invalidate a law as unconstitutional. However, it triggers heighted scrutiny, meaning that Congress must justify the disparate treatment of the states as unequal sovereigns[214] by showing that the differential treatment is sufficiently related to the problem the law is addressing.[215] This higher standard "ensures that when Congress limits the sovereign power of some of the states in ways that do not apply to others, it has a good reason to do so."[216]

In *Shelby County*, the Supreme Court concluded that the coverage formula, while perhaps justified in 1965, was no longer justified in 2006 when Congress reauthorized the Voting Rights Act.[217] Because the coverage formula continued to distinguish states "based on 'decades-old data and eradicated practices,' " including the past use of literacy tests that "have been banned nationwide for over 40 years" and on racial disparity in "voter registration and turnout in the 1960s and early 1970s" that no longer persisted, the Court held that the 2006 reauthorization statute's disparate geographic coverage was not sufficiently related to the problem of twenty-first century racial discrimination in voting that it targeted, so "current needs" no longer justified it.[218] Thus, the Court found circumstances in 2013 to be sufficiently changed to render the coverage formula unconstitutional.[219]

Applying this line of reasoning to the Clean Air Act, the petitioners in *Ohio v. EPA* claim that because California has transitioned to regulating GHG emissions, the waiver provision is no longer sufficiently related to the problem that it targets because California's standards are targeting climate change, which is global, not state-specific, in nature: "[C]limate change is not an acute California problem."[220] This Section counteracts this argument and asserts that the waiver provision continues to be sufficiently related to the problem that it targets, distinguishing California's motor vehicle

214. *See* Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 203 (2009) ("Distinctions can be justified in some cases.").

215. Colby, *supra* note 130, at 1155–56. If the statute departs from the "fundamental principle of equal sovereignty," it "requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." Shelby County v. Holder, 570 U.S. 529, 542 (2013) (citing *Nw. Austin*, 557 U.S. at 203 (2009)).

216. Schmitt, *supra* note 133, at 213.

217. *Shelby County*, 570 U.S. at 551.

218. *Id.* at 551–53.

219. *Id.* at 550–53, 556–57; Molitor, *supra* note 132, at 1849–50.

220. Brief for Petitioners, *supra* note 19, at 30–31.

regulations from the voting regulations at issue in *Shelby County*. First, the Clean Air Act targets not only smog in one region of California, but also the broader problem of public health from automobile emissions. Second, allowing California to implement more stringent motor vehicle regulations would directly help address this broader problem. California faces new and increasingly formidable threats from climate change that have exacerbated the existing problems that initially compelled California's motor vehicle regulations. The effects of GHG and smog pollution are directly interrelated and affect one another; thus, addressing GHG emissions is directly related to Congress's goal of addressing the public health threats from motor vehicle pollution in California. This Section therefore concludes that California's current needs continue to justify the state's differential treatment.

i. The Clean Air Act Targets the Broad Problem of Public Health Threats from Automobile Emissions

How courts frame the problem that Congress is targeting can shape their determination of whether a statute is constitutional. In *NCAA v. Governor of New Jersey*, the U.S. Court of Appeals for the Third Circuit held that even if the equal sovereignty principle were to apply to Commerce Clause legislation, PASPA passed the *Shelby County* test because its "true purpose" was to "stop the *spread* of *state-sanctioned* sports gambling," rather than eliminate it altogether.[221] Because PASPA was drafted in neutral terms, any state that already supported gambling could continue to do so, and Congress likely knew that Nevada was the only state that had existing gambling operations.[222] PASPA's disparate geographic coverage was therefore justified: "Targeting only states where the practice did not exist is . . . *precisely tailored* to address the problem."[223] If the court had defined the problem PASPA was targeting as eliminating *all* sports gambling, Nevada's exemption would be harder to justify, and the statute would likely be unconstitutional for not being sufficiently related to the problem. However, because the court defined the problem as halting the *spread* of sports gambling, the Third Circuit's analysis was a stronger one.

In *Ohio v. EPA*, the petitioners argue that the problem Congress designed the Clean Air Act to target was a narrow, California-specific

221. Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208, 239 (3d Cir. 2013).

222. "It shall be unlawful . . . to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . ." 28 U.S.C. § 3702. However, § 3702 shall not apply to a state that conducted a gambling scheme "at any time during the period beginning January 1, 1976, and ending August 31, 1990 . . . ." 28 U.S.C. § 3704. "Nevada alone began permitting widespread betting on sporting events in 1949 . . . ." *Nat'l Collegiate Athletic Ass'n*, 730 F.3d at 215.

223. *Nat'l Collegiate Athletic Ass'n*, 730 F.3d at 239.

problem.[224] However, while smog may have been the impetus for the legislation,[225] Congress also intended a broader goal of enabling California to use its developing expertise in vehicle pollution to develop innovative regulatory programs and serve as a leader in automobile emissions regulations.[226] In 1967, Congress acknowledged California's serious air quality problems as well as its role as a laboratory for emissions control technology for the country.[227] The Senate Report concluded that with California's experience in control systems and design, the waiver provision will allow California to "continue to be the testing area" for more stringent standards, potentially strengthening federal standards and benefiting all states.[228]

Multiple instances from the Congressional Record suggest that the broader problem Congress intended to target was the public health threats caused by motor vehicle pollution.[229] Congress could have amended the Clean Air Act in 1977 to restrict the waiver provision. Instead, it ratified and strengthened the waiver by giving California the flexibility to adopt a *complete program* of motor vehicle emission controls.[230] The original 1967 waiver provision required the EPA Administrator to grant a waiver "unless he finds that such State does not require standards more stringent than applicable Federal standards . . . ."[231] In contrast, the amended version requires that the EPA grant the waiver "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."[232] Congress intentionally granted California deference in creating motor vehicle standards in order to "afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare."[233] The amendment "confers broad discretion" on California to "weigh the degree of health hazards from various pollutants and the degree of emission reduction achievable for various pollutants with various emission control technologies

224. Brief for Petitioners, *supra* note 19, at 30–31.

225. *See* H.R. REP. NO. 90-728, at 50 (1967) (recognizing the "critical concern of California for air pollution control, which is prompted especially by the acute susceptibility of the Los Angeles basin to concentrations of smog").

226. *See* Chanin, *supra* note 63, at 716–17.

227. *See* H.R. REP. NO. 90-728, at 96 (1967).

228. S. REP. NO. 90-403, at 33 (1967).

229. *See* H.R. REP. NO. 90-728, at 3–8, 96 (1967); S. REP. NO. 90-403, at 32–33 (1967).

230. Motor & Equip. Mfrs. Ass'n v. EPA (*MEMA I*), 627 F.2d 1095, 1110 (D.C. Cir. 1979) (citing H.R. REP. NO. 95-294, at 301–02 (1977); *see infra* Section I.A.

231. Clean Air Act of 1967, Pub. L. No. 90-148, § 208(b), 81 Stat. 485, 501.

232. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 207, 91 Stat. 685, 755 (emphasis added); *see infra* Section I.A.

233. H.R. REP. NO. 95-294, at 301–02 (1977); *see MEMA I*, 627 F. 2d at 1110–11.

and standards."[234] Congress made clear that the EPA should defer to California's policy decisions, unless they are overwhelmingly arbitrary and capricious: the EPA Administrator "is not to overturn California's judgment lightly. Nor is he to substitute his judgment for that of the State. There must be clear and compelling evidence that the State acted unreasonably in evaluating the relative risks of various pollutants . . . ."[235] The EPA recognized in its 2013 waiver decision that Congress allowed it only limited review based on the section 209(b)(1) criteria to "ensure that the federal government did not second-guess state policy choices."[236] As the EPA affirmed, "Congress recognized that California could serve as a pioneer and a laboratory for the nation in setting new motor vehicle emission standards."[237] Thus, as long as the regulations protect the health of California residents, the EPA should defer to California on the scope of those regulations.

ii. Allowing California Broad Discretion to Regulate GHG Emissions Is Sufficiently Related to Addressing the Public Health Threats from Motor Vehicle Pollution in California

In *Shelby County*, the Voting Rights Act coverage formula factored in states' voting discrimination history, which consisted of specific, unchangeable factors.[238] In contrast, Congress noted that California's circumstances can change: if California no longer faces "compelling and extraordinary" conditions, it can no longer establish its own standards.[239] This possibility creates a built-in mechanism to continually evaluate whether California needs its separate regulations[240] and whether the waiver provision is "justified by current needs."[241] Recognizing "the unique problems facing California as a result of its climate and topography," Congress noted in 1967 that only California has demonstrated "compelling and extraordinary circumstances sufficiently different from the Nation as a whole to justify standards on automobile emissions which may, from time to time, need [to]

234. H.R. REP. NO. 95-294, at 23 (1977).

235. *Id.* at 302.

236. 2013 Waiver Grant, 78 Fed. Reg. at 2115.

237. *Id.* at 2113.

238. The coverage formula established that if the state used a law like a literacy or character test to keep people from registering to vote as of November 1, 1964, and less than 50% of the eligible voting population was registered to vote on November 1, 1964 or voted in the presidential election of November 1964, then the state was subject to preclearance. Voting Rights Act of 1965, Pub. L. 89-110, § 4(b), 79 Stat. 437.

239. S. REP. NO. 90-403, at 33 (1967).

240. *See* Final Brief for Respondents, *supra* note 131, at 42.

241. *See* Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 203 (2009).

be more stringent than national standards."[242] The petitioners in *Ohio v. EPA* treat GHG emissions as if they are a separate and mutually exclusive concept from smog and criteria pollutants, claiming that because California has shifted from regulations to reduce local smog problems to regulations to reduce GHGs and address global climate change, the waiver provision no longer justifies California's exemption.[243] On the contrary, this Section argues that the effects of GHG emissions and smog pollution are interrelated and affect one another. Thus, addressing GHG emissions is directly related to Congress's goal of addressing the public health threats from motor vehicle pollution in California.

Given the history of California's early motor vehicle regulations and Congress's interest in having California as a "laboratory for innovation" while not overburdening automobile manufacturers by forcing them to comply with multiple state standards, Congress intentionally struck a balance by authorizing just two standards: the national standard and the California standard.[244] This compromise would allow California to continue to innovate and improve its air quality without creating a practical nightmare for automakers and interstate commerce.[245] Congress deliberately exempted California from federal preemption of motor vehicle regulations because of its "pioneering role in regulating automobile-related emissions, which predated the Federal effort."[246] Because California had already adopted a robust air quality program and established its own motor vehicle emission standards prior to the passage of the federal Clean Air Act, it had expertise in emissions regulations that other states did not have.[247]

California's large automobile market and economy continue to justify its disparate treatment. At the time Congress passed the Clean Air Act waiver, it recognized the "presence and growth of California's vehicle population, whose emissions were thought to be responsible for ninety

242. H.R. REP. NO. 90-728, at 21–22 (1967); S. REP. NO. 90-403 at 33 (1967).

243. *See* Brief for Petitioners, *supra* note 19, at 32 ("[T]here is no evidence California will suffer effects that are worse—in magnitude or in kind—than those experienced by the other forty-nine States.").

244. 2022 Waiver Reconsideration, 87 Fed. Reg. at 14360, 14377; H.R. REP. NO. 90-728, at 21 (1967); *see* S. REP. NO. 90-403 at 33–34 (1967).

245. Members of Congress favored states' rights but were also concerned that having 50 different sets of requirements related to emissions controls would "unduly burden interstate commerce." H.R. REP. NO. 95-294, at 309 (1977).

246. *Id.* at 301.

247. *See* Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281, 314 (2003) ("The prospect of fifty separate standards for automobiles is untenable. But California has unique air pollution problems and an economy large enough to support separate standards."); *id.* at 311 (noting that California "is probably unique in the country in the amount of expertise and sophistication it has developed in the regulation of auto emissions").

percent of the air pollution in certain parts of California."[248] Congress noted the large effect of vehicles on local air pollution: "Motor vehicles are responsible for about 90 percent of the smog in the Los Angeles County, some 56 percent in the San Francisco Bay area, and about 50 percent in San Diego."[249] Congress also noted that because of its large size, California has "an economy large enough to support separate standards."[250] Thus, California's market was large enough that automobile companies could still make a sizable profit while producing cars to meet California's more stringent environmental requirements.[251] There were twice as many vehicles in California as in any other state, including New York.[252] Today, California continues to be the largest automobile market in the United States; if the state were a country, it would be the tenth largest auto market in the world.[253] California makes up 11% of U.S. new light-duty vehicle sales, and combined with the states that have already adopted its LEV rules, makes up 40.1% of U.S. new light-duty vehicle sales.[254] Forty-three percent of ZEVs sold in the U.S. are sold in California.[255]

California's unique topography and climate conditions have also contributed to the air pollution problems exacerbated by climate change. The legislative history indicates that Congress granted California an exemption to regulate motor vehicle emissions primarily because California was facing unique, severe air pollution problems across the state, particularly in the Los Angeles area.[256] California's air pollution problem was among "the most pervasive and acute in the Nation" at the time.[257] Geographical and climatic factors were consistently cited as "compelling and extraordinary" factors

248. 2013 Waiver Grant, 78 Fed. Reg. at 2126.

249. H.R. REP. NO. 90-728, at 97 (1967).

250. Carlson, *supra* note 247, at 314.

251. "The auto industry has shown itself willing and able to make the modifications required for its lucrative California market." H.R. REP. NO. 90-728, at 97 (1967).

252. 113 CONG. REC. H30942 (daily ed. Nov. 2, 1967) (statement of Rep. Chet Holifield, California).

253. Based on new passenger car/light vehicle registrations. Felix Richter, *California Is Among the World's Largest Car Markets*, STATISTA (Sept. 24, 2020), https://www.statista.com/chart/23023/top-10-markets-for-new-passenger-car-registrations [https://perma.cc/6886-64FN].

254. CAL. AIR RES. BD., *supra* note 8.

255. *California ZEV Sales Near 18% of All New Car Sales in 2022*, OFF. CAL. GOVERNOR GAVIN NEWSOM (Oct. 19, 2022), https://www.gov.ca.gov/2022/10/19/california-zev-sales-near-18-of-all-new-car-sales-in-2022 [https://perma.cc/XM2W-6F3U].

256. *See* H.R. REP. NO. 90-728, at 50 (1967) (recognizing the "critical concern of California for air pollution control, which is prompted especially by the acute susceptibility of the Los Angeles basin to concentrations of smog").

257. H.R. REP. NO. 95-294, at 301 (1977); *see* 113 CONG. REC. H30943 (daily ed. Nov. 2, 1967) (statement of Rep. Tunney, California: "We are facing a serious and spreading smog problem, primarily caused by motor vehicle emissions.").

during the House debate, including the "unique problems facing California as the result of numerous thermal inversions that occur within that State because of its geography and prevailing winds pattern."[258] Rep. Holifield noted that California has a unique problem due to an atmospheric inversion which "the peculiar topography of the metropolitan area of Los Angeles County" has caused to some extent by keeping smog in the area and surrounding counties.[259] Even though members of Congress recognized that air pollution also affects other states in concerning ways,[260] they agreed that California's distinct conditions and topography continue to contribute to the unique effects of pollution in the state, creating a critical need for air pollution control.[261] As CARB established, California's ozone levels will be exacerbated by higher temperatures from global warming, and "there is general consensus that temperature increases from climate change will exacerbate the historic climate, topography, and population factors conducive to smog formation in California, which were the driving forces behind Congress's inclusion of the waiver provision."[262]

Most significantly, climate change has only exacerbated the air pollution and smog problems that initially compelled California's motor vehicle regulations and the Clean Air Act waiver. Automobiles emit both GHGs and smog-forming emissions including nitrogen oxide, carbon monoxide, and particulate matter.[263] The 2021 report of the United Nations' Intergovernmental Panel on Climate Change ("IPCC") reflects the latest scientific consensus that climate change is both a local and global problem.[264] The report establishes a connection between climate change and

258. 113 CONG. REC. H30948 (daily ed. Nov. 2, 1967) (statement of Rep. Harley Staggers, Chairman, House Interstate and Foreign Commerce Committee); *see also id.* at H30955 (statement of Rep. Roybal, California, referring to "atmospheric inversion"); *id.* at H30975 (statement of Rep. John Moss, California, referring to California's "unique" meteorological problems).

259. *Id.* at H30942 (statement of Rep. Chet Holifield, California).

260. William Macomber, Jr., Assistant Secretary for Congressional Relations, noted that air pollution has become an increasingly pressing problem in most metropolitan areas, including New York City, Detroit, Pittsburgh, Chicago, Baltimore, and Washington D.C. H.R. REP. NO. 90-728, at 50 (1967).

261. *See* S. REP. NO. 90-403, at 33 (1967) ("California's unique problems and pioneering efforts justified a waiver . . . in the 15 years that auto emission standards have been debated and discussed, only the State of California has demonstrated compelling and extraordinary circumstances sufficiently different from the Nation as a whole . . . .").

262. 2022 Waiver Reconsideration, 87 Fed. Reg. at 14364 n.297.

263. *Greenhouse Gas Versus Smog Forming Emissions*, EPA, https://19january2017snapshot.epa.gov/greenvehicles/greenhouse-gas-versus-smog-forming-emissions_.html [https://perma.cc/ULA6-84AC].

264. *Summary for Policymakers*, *in* CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 25 (Valérie Masson-Delmotte et al. eds., 2021)

intensifying weather extremes including heat waves and droughts.[265] Additionally, GHGs contribute to respiratory disease from smog and air pollution.[266] GHG emissions lead to hotter global temperatures,[267] which is expected to enhance the formation of ground-level ozone (a main component of smog).[268] Exposure to ozone can cause respiratory problems[269] and aggravate lung diseases including asthma, particularly within more vulnerable groups.[270] Thus, GHGs can worsen exposure to ground-level ozone and smog, which is associated with increased mortality from respiratory and cardiovascular diseases.[271] As a result, it has been well established that GHGs and smog are interrelated and affect air quality separately and together.[272]

Contrary to what the petitioners claim, climate change continues to uniquely affect California as an "acute California problem."[273] While GHG emissions from California cars can "become one part of the global pool of GHG emissions,"[274] this global pool eventually affects local conditions. The EPA recognized CARB's strong evidence that California is "particularly impacted by climate change, including increasing risks from record-setting fires, heat waves, storm surges, sea-level rise, water supply shortages and extreme heat," and that "GHG emissions contribute to local air pollution."[275]

[hereinafter IPCC 2021 Report] ("Cities intensify human-induced warming locally, and further urbanization together with more frequent hot extremes will increase the severity of heatwaves.").

265. *Id.* at 8.

266. Christina Nunez, *Carbon Dioxide Levels are at a Record High. Here's What You Need to Know*, NATIONAL GEOGRAPHIC (May 13, 2019), https://www.nationalgeographic.com/environment/article/greenhouse-gases [https://perma.cc/T2EQ-QABH].

267. IPCC 2021 Report, *supra* note 264, at 5.

268. John H. Tibbetts, *Air Quality and Climate Change: A Delicate Balance*, 123 ENV'T HEALTH PERSPS. A148, A149 (2015); Junfeng (Jim) Zhang, Yongjie Wei & Zhangfu Fang, *Ozone Pollution: A Major Health Hazard Worldwide*, 10 FRONTIERS IMMUNOLOGY 1, 2–3 (2019); *Criteria Pollutants*, N.H. DEP'T ENV'T SERVS., https://www.des.nh.gov/air/state-implementation-plans/criteria-pollutants [https://perma.cc/F8HD-GUFC] (noting ozone is a key ingredient in smog).

269. Tibbetts, *supra* note 268, at A151.

270. *Greenhouse Gas Versus Smog Forming Emissions,* EPA, *supra* note 263; *Health Effects of Ozone Pollution*, EPA, https://www.epa.gov/ground-level-ozone-pollution/health-effects-ozone-pollution [https://perma.cc/LVH2-6KX8]; *see also Ozone Effects*, CAL. AIR RES. BD. (Nov. 3, 2016), https://ww2.arb.ca.gov/resources/fact-sheets/ozone-effects [https://perma.cc/P7TL-JJ4V]; *Ozone and Your Health*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 16, 2023), https://www.cdc.gov/air/ozone.html [https://perma.cc/YEB4-Z7XM].

271. Zhang et al., *supra* note 268, at 5.

272. *See* 2022 Waiver Reconsideration, *supra* note 86, at 14363 ("[A]ir pollution problems, including local or regional air pollution problems, do not occur in isolation."); *see also* Final Brief for Respondents, *supra* note 131, at 89–90.

273. *See* Final Brief for Respondents, *supra* note 131, at 52.

274. 2008 Waiver Denial, 73 Fed. Reg. at 12160.

275. 2022 Waiver Reconsideration, 87 Fed. Reg. at 14363, 14365.

Climate change impacts ozone exacerbation and wildfires, which affect local air quality.[276] California continues to have a serious smog problem, exacerbated by climate change.[277] Seven of the ten cities with the worst air pollution nationwide are in California.[278] Ten million Californians in the San Joaquin Valley and Los Angeles air basins currently live under "severe non-attainment" conditions for ozone, where people suffer unusually high rates of asthma and cardiopulmonary disease.[279] Climate change has increased the number of hot days that can result in smog events and exacerbate wildfires.[280] Thus, smog exacerbates climate change, which in turn exacerbates smog, and GHGs—which lead to climate change—continue to pose a direct and local threat.[281] As the 2022 EPA decision concluded, the 2019 EPA decision to withdraw the 2013 EPA waiver grant failed to properly consider "the nature and magnitude of California's serious air quality problems, including the interrelationship between criteria and GHG pollution."[282] The EPA noted that the 2019 record contained evidence that GHG emissions can lead to locally elevated carbon dioxide concentrations with local impacts such as ocean acidification, in addition to the longer-term global impacts from global emissions.[283] Thus, just like smog, climate change poses serious threats to the public health and safety of residents in California. As a result, ZEV regulations are crucial in protecting the public health and safety of Californians.

Even adopting the 2019 EPA's narrow "local nexus" test, which required that the California waiver only applies to measures that address conditions "extraordinary" with respect to California, or those with a specific connection to local features and emissions peculiar to California,[284] California's ZEV standard meets this test in directly addressing local air pollutant conditions by reducing criteria pollutant emissions. California's 2020 Executive Order and resulting ACC II regulations made clear that California intended to regulate both GHG emissions and smog pollutants.

276. *Id.* at 14334 n.10.

277. *California & the Waiver: The Facts*, CAL. AIR RES. BD. (Sept. 17, 2019), https://ww2.arb.ca.gov/resources/fact-sheets/california-waiver-facts [https://perma.cc/N9DL-6B2P].

278. *Id.*; *see Most Polluted Cities*, AM. LUNG ASS'N, https://www.lung.org/research/sota/city-rankings/most-polluted-cities [https://perma.cc/Z535-6KNT].

279. CAL. AIR RES. BD. *supra* note 277.

280. *Id.*

281. *Cause and Effects of Climate Change*, U.N., https://www.un.org/en/climatechange/science/causes-effects-climate-change [https://perma.cc/6G32-UAYX] ("As greenhouse gas emissions blanket the Earth, they trap the sun's heat. This leads to global warming and climate change.").

282. 2022 Waiver Reconsideration, 87 Fed. Reg. at 14334.

283. *Id.* at 14366.

284. 2019 Waiver Withdrawal, 84 Fed. Reg. at 51347.

The 2020 Executive Order states that zero emissions technologies "reduce both greenhouse gas emissions and toxic air pollutants,"[285] and the ACC II regulations require new vehicles to "produce zero exhaust emissions of any criteria pollutant (or precursor pollutant) or greenhouse gas . . . ."[286] California's more stringent standards will thus continue to achieve critical reductions in conventional criteria pollution and help the state address public health problems caused by smog and soot.[287] Congress has not provided any indication that California cannot take measures to reduce criteria pollutants *and* GHGs. Transportation is the largest source of air pollution in the state, responsible for nearly 40% of GHG emissions, 80% of nitrogen oxide pollution, and 90% of diesel particulate matter pollution.[288] The EPA concluded that GHG measures are relevant to addressing local criteria pollutant issues[289] and that regulations to reduce GHGs often simultaneously address smog-forming pollutants like nitrogen oxide.[290] The legislative history provides no basis for the claim that California cannot mitigate climate change threats or address environmental problems within their boundaries as soon as the problems extend beyond them.[291] In fact, Congress expressed an interest in allowing California to "continue its already excellent program" and continue to be the testing area of motor vehicle standards, which is expected to benefit its people and the nation by strengthening federal

285. Cal. Exec. Order No. N-79-20 (Sept. 23, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/09/9.23.20-EO-N-79-20-Climate.pdf [https://perma.cc/F4SE-B5AB].

286. CAL. CODE REGS. tit. 13, § 1962.4.

287. *See* 2022 Waiver Reconsideration, 87 Fed. Reg. at 14353 ("CARB's motor vehicle emission standards operate in tandem and are designed to reduce both criteria and GHG pollution and the ways in which GHG pollution exacerbates California's serious air quality problems, including the heat exacerbation of ozone . . . ."); *id.* at 14364 ("CARB had demonstrated the need for GHG standards to address criteria pollutant concentrations in California.").

288. *Transforming Transportation,* CAL. ENERGY COMM'N, *supra* note 2; *Current California GHG Emission Inventory Data,* CAL. AIR RES. BD., *supra* note 2.

289. 2009 Waiver Grant, *supra* note 68, at 32763 ("[A]lthough the factors that cause ozone are primarily local in nature and [] ozone is a local or regional air pollution problem, the impacts of global climate change can nevertheless exacerbate this local air pollution problem . . . California has made a case that its greenhouse gas standards are linked to amelioration of California's smog problems. Reducing ozone levels in California cities and agricultural areas is expected to become harder with advancing climate change . . . 'California's high ozone levels—clearly a condition Congress considered—will be exacerbated by higher temperatures from global warming.' "); *id.* at 32750 ("CARB also found that its greenhouse gas standards will increase the health and welfare benefits from its broader motor vehicle emissions program by directly reducing upstream emissions of criteria pollutants from decreased fuel consumption.").

290. 2022 Waiver Reconsideration, 87 Fed. Reg. at 14364 (citing Heavy-Duty Tractor-Trailer Greenhouse Gas Regulations); Notice of Decision, 79 Fed. Reg. 46256, 46261 (Aug. 7, 2014) (projecting that GHG standards will reduce nitrogen oxide emissions by one to three tons per day through 2020).

291. *See* Final Brief for Respondents, *supra* note 131, at 52.

standards.[292] The Senate report reflected opposition to displacing California's right to set more stringent standards, as justified by California's "unique problems and pioneering efforts."[293] Members of Congress concurred with the principle that California's advances in air pollution regulation should not be nullified and that the state's progress should not be impeded. Congressman John Dingell stated: "To penalize California for being ahead of the rest of the country in combating the menace of air pollution is totally incomprehensible."[294] The Ninth Circuit has also stated that California should be "encouraged to continue and to expand its efforts . . . to lower carbon emissions."[295] Thus, Congress's reasons for granting California a waiver continue to be compelling and extraordinary, and California's current needs continue to remain relevant as ever in justifying the Clean Air Act waiver provision.

Congress did not justify the Clean Air Act waiver provision based on whether pollution problems were of a more local or global nature, but rather on the unique effects of smog in the Los Angeles area.[296] This emphasis suggests that Congress intended to give California the flexibility to adopt motor vehicle standards that the state determines are needed to address air pollution in the state, regardless of whether those problems might also be global in nature.[297] Thus, California's problems are serious enough and its efforts are such a model for the nation that a waiver provision is necessary in order for California to adequately protect public health. More recently, Congress's clarification in the 2022 Inflation Reduction Act that GHGs are pollutants regulated under the Clean Air Act suggests that Congress intends the Clean Air Act to include GHGs.[298] This further strengthens the argument that California is acting within the scope of the Clean Air Act in regulating GHGs through its innovative motor vehicle program.

292. S. REP. NO. 90-403, at 33 (1967).

293. *Id.*

294. 113 CONG. REC. at H30946 (daily ed. Nov. 2, 1967) (remarks of Congressman John Dingell).

295. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1107 (9th Cir. 2013).

296. *See* H.R. REP. NO. 90-728, at 50 (1967) (recognizing the "critical concern of California for air pollution control, which is prompted especially by the acute susceptibility of the Los Angeles basin to concentrations of smog").

297. *See* 2022 Waiver Reconsideration, 87 Fed. Reg. at 14363 ("EPA sees no reason to distinguish between 'local or regional' air pollutants versus other pollutants that may be more globally mixed. Rather, it is appropriate to acknowledge that all pollutants and their effects may play a role in creating air pollution problems in California and that EPA should provide deference to California in its comprehensive policy choices for addressing them.").

298. Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818.

CONCLUSION

The equal sovereignty argument is a new attempt to invalidate the Clean Air Act waiver provision and California's ability to regulate motor vehicle emissions. As of this Note, no court has specifically addressed the constitutionality of the Clean Air Act under the equal sovereignty principle, and the decision is pending for *Ohio v. EPA*, which is expected to address this constitutional question.

This Note concludes that the equal sovereignty principle does not apply to the Clean Air Act, but even if it were to apply, it does not invalidate section 209(b)(1). Distinguishing from the outcome in *Shelby County*, the Clean Air Act waiver provision remains constitutional because granting California an exemption is "sufficiently related to the problem that it targets." First, the Clean Air Act targets the broader problem of public health from automobile emissions. Second, allowing California to implement more stringent motor vehicle regulations will directly help address this problem. Congress had strong justifications for granting California an exemption which continue to remain compelling and relevant today. California's history with air pollution control, its large economy, and its characteristic geographic and climate conditions put the state in a unique position to influence the automobile market and address GHG emissions. California faces new and increasingly formidable threats from climate change, which have exacerbated the existing problems that initially compelled California's motor vehicle regulations. Allowing California broad discretion to regulate GHG emissions is directly related to Congress's goal of addressing the public health threats from motor vehicle pollution in California because the effects of GHGs and smog are directly related and affect one another. Even as California's motor vehicle regulations have shifted from reducing local smog by regulating criteria pollutants to reducing GHG emissions by eliminating gasoline-powered cars, California's current needs continue to justify its differential treatment—maintaining, and perhaps even strengthening, section 209(b)(1)'s relevance in the twenty-first century.

The court's decision on whether section 209(b)(1) of the Clean Air Act remains constitutionally valid will determine the extent to which California can continue to realize the localized benefits of the Clean Air Act while helping accelerate the nation's transition towards a clean energy economy. It will also have implications for California's ability to continue to regulate GHG emissions as a leader in addressing the most pressing environmental issues of the day.

Is the court going to handcuff California's ability to protect the health and safety of its residents in the name of equal sovereignty? That was not the intention of Congress when it discussed equal sovereignty concerns pertaining to the Clean Air Act waiver. On the contrary, Congress debated whether other states should also be able to enact more stringent standards than the federal government, which would be the more reasonable remedy if the Clean Air Act waiver provision were deemed unconstitutional per equal sovereignty, as the petitioners demand.

To strengthen the ability of motor vehicle regulations to withstand future court challenges, California could emphasize criteria pollutants in its regulations. Since criteria pollutants have been more directly linked to local air pollution issues and Congress originally implemented the waiver provision in response to regional smog problems, this change could make it more difficult to challenge a regulation on the basis of it only regulating climate change. It will likely be simpler to show that the disparate treatment of California is sufficiently related to the problem that the Clean Air Act targets if legislators explicitly provide how they expect the regulations to affect local air quality as well as the local co-benefits of implementing them. For example, replacing internal combustion passenger vehicles with EVs will reduce not only GHG emissions, but also criteria pollutants including nitrogen oxides that are emitted.

California's motor vehicle standards alone may not reverse or solve climate change, but the EPA has a duty to take steps to slow or reduce it.[299] Allowing California to continue to promulgate innovative, forward-looking motor vehicle standards is crucial to its ability to lead the country as a "laboratory of innovation," as Congress intended, and address the urgent environment and public health consequences of motor vehicle pollution.

299. States need not "resolve massive problems in one fell regulatory swoop." Massachusetts v. EPA, 549 U.S. 497, 524 (2007).