

ARTICLES

State Authority To Regulate Mobile Source Greenhouse Gas Emissions, Part 2: A Legislative And Statutory History Assessment

GREG DOTSON*

ABSTRACT

In September 2019, the Trump Administration finalized regulations that dramatically upended the nation's approach to regulating greenhouse gas emissions from cars and trucks by purporting to determine that California's emissions standards are preempted by the Energy Policy and Conservation Act of 1975 (EPCA).

This Article evaluates the Administration's position through a review of the relevant statutory and legislative history. Specifically, the article examines the history of the Energy Policy and Conservation Act of 1975, the Clean Air Act Amendments of 1977, the Clean Air Act Amendments of 1990, the Energy Policy Act of 1992, the Energy Independence and Security Act of 2007, and a number of subsequent Congressional acts, including the Fixing America's Surface Transportation Act of 2015. The Article finds abundant evidence of Congress's consistent intent to ensure that state emissions standards are protected from preemption. Importantly, this evidence is not limited to the ample legislative history. It also includes statutory history – actual changes in the law that demonstrate Congress's desire to preserve state authority to adopt and enforce greenhouse gas emissions standards for cars and trucks. While the interpretative value of legislative history has been discounted by some in recent years, statutory history remains relevant in the interpretation of law to even the staunchest textualist.

The Article discusses why this history is compelling and concludes that the best reading of the law is that Congress has preserved – not encroached upon – California's authority to regulate greenhouse gas emissions from cars and trucks.

* Assistant Professor, University of Oregon School of Law. I am grateful for a detailed review of an early version of this paper by Joan Rocklin and research assistance from Charles W. Woodward, IV, and Jack Watson. I am thankful for guidance on this project from Stuart Chinn and Adell Amos. I would like to express my appreciation to the Georgetown Environmental Law Review student editors, especially Maxine Walters, Sara Douki, and Samuel Harris, for their thoughtful suggestions and careful edits. © 2020, Greg Dotson.

TABLE OF CONTENTS

Introduction	627
I. How the Legislative and Statutory History Inform the Debate	630
A. How the History of the Energy Policy and Conservation Act of 1975 Informs the Debate	630
1. The Role of the Energy Crisis in Congressional Deliberations.	631
2. The Relationship Between Fuel Economy and Air Pollution.	634
3. President Ford’s Proposals to Prioritize Fuel Economy Over Air Pollution Reduction	636
a. The Proposed Energy Independence Act of 1975	636
b. The Proposed Five-Year Freeze in Federal Emissions Standards.	640
4. Congressional Rejection of a Five-Year Freeze and Establishment of Fuel Economy Standards that Could be Adjusted Based Upon Emissions Standards	641
5. “Balancing” Air Emissions and Fuel Economy	641
B. How the History of the Clean Air Act Amendments of 1977 Informs the Debate	644
C. How the Clean Air Act Amendments of 1990 Informs the Debate	646
D. How the History of the Energy Policy Act of 1992 Informs the Debate	647
E. How the History of the Energy Independence and Security Act Informs the Debate	650
1. The Role of <i>Massachusetts v. EPA</i> in Congressional Deliberations.	652
2. Congress Rejected a Proposal to Directly Revoke EPA and State Authority	652
3. Congress Rejected a Proposal to Indirectly Revoke EPA and State Authority	656
4. Explicit Protection for EPA and State Authority Included in EISA Legislation.	658
5. Congress Rejected Behind-the-Scenes Efforts to Weaken or Constrain EPA and State Authorities.	659
6. Congress Established a New Federal Fleet Requirement that Adopted California’s Greenhouse Gas Tailpipe Standard as a Baseline for Federal Fleet Purchases	660
7. Floor Debate Reflects Legislative Intent to Protect EPA and State Authority	663
F. Congress has repeatedly demonstrated its understanding that epa and state authority were protected by eisa	667
1. The 2010 Resolution of Disapproval Attempted to Undermine EPA and State Authority	670
2. The Energy Tax Prevention Act of 2011 Sought to Repeal EPA and State Authority	671

3. The FAST Act Acknowledged the Legitimacy of California Greenhouse Gas Emissions Standards	674
II. Assessing the Legislative and Statutory History	674
A. Legislative History Does not Support a Broad Interpretation of Preemption	675
B. Statutory History Precludes Broad Preemptive Interpretation	679
Conclusion	682

INTRODUCTION

In August 2018, the Trump Administration proposed regulatory amendments that would upend the nation’s successful regulatory approach for addressing tailpipe emissions from cars and trucks. The National Highway Traffic Safety Administration (NHTSA) and the U.S. Environmental Protection Agency (EPA) proposed regulations that would relax federal tailpipe standards for greenhouse gases (GHGs).¹ The proposed regulations also included text providing that states would be preempted from regulating mobile source emissions of carbon dioxide and from requiring zero emission vehicles (ZEV) to be offered for sale.²

In September 2019, the agencies finalized the portion of the proposal that revoked EPA’s 2009 waiver of federal preemption for California’s GHG standards. Further, the agencies determined that EPCA preempted state authority to set GHG emissions tailpipe standards and require the sale of ZEVs.³ The final rule on preemption adopted the substance and rationale of the 2018 proposed rule with few significant differences.

The agencies’ expansive interpretation of EPCA’s scope of preemption faces legal challenge as this article goes to press. Twenty-three states, along with three U.S. cities, have filed suit to challenge the rule in court.⁴ A group of prominent environmental groups has also joined in this litigation.⁵

The rationale for the agencies’ determination of preemption rests on the argument that Congress preempted the states from adopting emissions standards that affect automobile fuel economy when it passed EPCA in 1975.⁶ This article is the second in a two-part series that examines this rationale. The first article, *State Authority to Regulate Mobile Source Greenhouse Gas Emissions, Part 1: History*

1. Safer Affordable Fuel-Efficient Vehicles Rule, 83 Fed. Reg. 42986, 43233 (proposed Aug. 24, 2018) [hereinafter “SAFE proposal”].

2. *Id.* at 43234.

3. Safer Affordable Fuel-Efficient Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51310 (Sept. 27, 2019) [hereinafter “SAFE rule”].

4. Adam Beam, *23 States Sue Trump to Keep California’s Auto Emission Rules*, ASSOCIATED PRESS (Sept. 20, 2019), <https://perma.cc/YN3R-EJF2>.

5. David Shepardson, *U.S. Environmental Groups Sue Over Trump Auto Emissions Move*, REUTERS (Sept. 27, 2019, 12:06 PM), <https://perma.cc/FX5E-5YEB>.

6. See SAFE proposal, *supra* note 1, at 43232–35.

and Current Challenge, explains the statutory structure that governs air emissions and fuel economy of mobile sources, examines more than 40 years of implementation of these laws, and evaluates the legal basis for the agencies' position.⁷ That article provides a description of the EPA's authority to regulate emissions under section 202 of the Clean Air Act, California's authority to do the same pursuant to section 209(b) of the Clean Air Act, and NHTSA's authority to regulate fuel economy under EPCA. This second article further evaluates the agencies' position by examining the history of EPCA and the relevant subsequent acts of Congress.

The importance of this debate is far from theoretical. California and the states that have adopted its standards have succeeded in requiring the sale of more and more less-polluting vehicles each year.⁸ By requiring a growing fleet of zero emissions vehicles,⁹ these states are laying the groundwork for a revolutionary transition in the technology that powers our cars and trucks. The agencies' preemption interpretation, if upheld, would stop these regulatory efforts in their tracks.

The agencies' argument hinges on fifty words in EPCA. EPCA states that when a federal fuel economy standard is in effect a state may not adopt "a law or regulation related to fuel economy standards."¹⁰ The agencies argue that California's regulation of greenhouse gases is so closely "related" to fuel economy that EPCA preempts California from issuing *any* standard that controls greenhouse gas pollution or could have an ancillary effect of reducing petroleum consumption.¹¹

NHTSA and EPA state that "[t]here is no hint in the histories of either EPCA or [the Energy Independence and Security Act of 2007, which subsequently amended EPCA,] of an intent" to protect California's emissions standards from preemption.¹² However, this article examines Congress's approach to state and federal automobile standards over the past forty four years and finds that not only are there hints, but indeed there is an abundance of evidence of Congress's consistent intent to ensure that state emissions standards are protected from preemption. Indeed, as this article explains, applying the agencies' expansive interpretation of EPCA's preemption clause unavoidably clashes with multiple subsequent acts of Congress that recognize the validity of the California rules.

Importantly, the evidence refuting the agencies' arguments is not limited to the ample legislative history, which includes statements made by key legislators,

7. Greg Dotson, *State Authority to Regulate Mobile Source Greenhouse Gas Emissions, Part 1: History and Current Challenge*, 49 ENVTL. L. REP. 11037 (2019) [hereinafter "Dotson, Part 1"].

8. *The Zero Emission Vehicle (ZEV) Regulation*, CAL. AIR RES. BD. (Dec. 10, 2018), <https://perma.cc/T8PZ-26ZD>.

9. *Id.*

10. 49 U.S.C. § 32919(a).

11. See SAFE proposal, *supra* note 1, at 43232–38.

12. *Id.* at 43237.

congressional committees, and the President during consideration of key legislation. The evidence includes statutory history: “the formal changes in the Code made by the legislature when it enacts new laws and amends them over time.”¹³ While the interpretative value of *legislative* history has been discounted by some in recent years due to the arguments of Justice Antonin Scalia and others, *statutory* history remains relevant in the interpretation of law to even the staunchest textualist.¹⁴

Part I examines the statutory and legislative history of key pieces of legislation between 1975 and 2015 that define the regulatory landscape for fuel economy and air emissions from mobile sources. The section begins by examining the purpose and consideration of the Energy Policy and Conservation Act of 1975, which established the fuel economy program. The section then describes how the Clean Air Act Amendments of 1977 and 1990 subsequently addressed mobile source emissions and fuel economy. These amendments strengthened the deference Congress offered the state of California in establishing emissions standards and recognized the validity of California’s ZEV program. Next, a review of the Energy Policy Act of 1992 demonstrates that Congress explicitly sought to encourage “any” state action to more rapidly deploy electric and other alternative-fueled vehicles.¹⁵ The article then examines congressional consideration of the Energy Independence and Security Act of 2007. Ultimately, Congress and the President squarely and robustly debated whether to preempt California vehicle standards. Congress decided not to preempt the state standards. Instead, the law used California’s greenhouse gas emissions standards as a foundation for a new federal fleet program.¹⁶ Finally, Part I identifies evidence from the past decade supporting the conclusion that Congress understands that California has not been preempted from regulating greenhouse gas emissions from cars and trucks.

Part II explains how this extensive legislative and statutory history can be applied to the preemption position currently being advanced by the Trump Administration. The legislative history reveals a consistent congressional intent to protect and defer to state authority to adopt emissions standards even when those standards may affect fuel economy. The statutory history demonstrates that Congress amended the laws over the years to effectuate this intent.

The article concludes that NHTSA and EPA’s position that California was preempted by Congress forty four years ago is untenable in light of the statutory and legislative history available. The agencies’ 2019 preemption determination is

13. WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 204 (2016).

14. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 256 (2012).

15. *See* Energy Policy Act of 1992 § 409, 42 U.S.C. § 1323513201.

16. *See* Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 102(a)(2)(b)(2), 121 Stat. 1492; Sec. 3, H.R. 6, 110th Cong. (2007), <https://www.congress.gov/bill/110thcongress/house-bill/6/text>.

ultimately lacking because the agencies fail to meaningfully consider, reconcile, or in many cases even acknowledge, most of the relevant statutory and legislative history. When all of the statutory and legislative history is comprehensively considered, it is clear that federal law provides for both federal and state roles in regulating the performance of automobiles. Congress may at some point decide to preempt innovative rules from the state of California, but that time has not yet occurred.

I. HOW THE LEGISLATIVE AND STATUTORY HISTORY INFORM THE DEBATE

This section explores the relevant histories of the Energy Policy and Conservation Act, the Clean Air Act Amendments of 1977, the Clean Air Act Amendments of 1990, the Energy Policy Act of 1992, and the Energy Independence and Security Act of 2007. This section also describes some relevant Congressional activities from 2007 onwards that are useful in understanding how Congress has viewed EPCA preemption.

A. HOW THE HISTORY OF THE ENERGY POLICY AND CONSERVATION ACT OF 1975 INFORMS THE DEBATE

The heart of the NHTSA/EPA preemption interpretation is that regulation of greenhouse gases “relate to” fuel economy standards, and thus, California’s tailpipe standards are preempted by EPCA.¹⁷ This section explores how the history of EPCA can inform a better understanding of the preemption language. First, the section examines the importance of the energy crisis in congressional deliberations over EPCA. Then it describes how the goals of increased fuel economy and reduced air pollution were seen to be at odds, resulting in President Gerald Ford’s proposals to prioritize fuel economy improvements over air emissions reductions. The section then explains how Congress rejected the President’s proposals in favor of a structure that would prioritize emissions standards over fuel economy improvements. Finally, the section explains how today’s discussion of reducing GHG emissions from mobile sources is fundamentally different than the one that occurred over the 1975 law.

Congress and the Administration spent the entire year of 1975 developing energy legislation. Oil price controls were perhaps the most significant issue contested between the White House and Congress. However, fuel economy was also a key issue that repeatedly demanded President Ford’s personal attention. The White House proposed prioritizing federal fuel economy goals over federal air quality goals.¹⁸ The circumstances could not have been more compelling as the

17. See SAFE proposal, *supra* note 1, at 43233.

18. See S. REP. NO. 94-179, at 6 (June 5, 1975).

nation was in crisis due in part to shortages of petroleum.¹⁹ However, Congress rejected the concept of making emissions controls subservient to fuel economy. Instead, EPCA provided for fuel economy standards to be adjusted if warranted by air emissions standards.²⁰

The legislative history provides few details on the specific preemption language included in EPCA. However, the history does reveal two important themes that are directly relevant to today's debate. First, policymakers and stakeholders were concerned about interactions between fuel economy and emissions standards because of evidence that emissions standards could inhibit increased fuel economy. In 1975, the field of emissions control was still young, and its full potential had yet to be realized. At the time, there was an understanding that depending on the control technology used, compliance with emissions standards could have a negative effect on a vehicle's potential fuel efficiency. A concern expressed by lawmakers, executive branch officials, scientists, automakers, and others was whether emissions standards might limit the amount of oil that could be conserved. Conversations around this topic were a key part of deliberation over EPCA's new fuel economy program.

Second, stakeholders' approach to federal mobile source emissions standards differed from their approach to California's mobile source emissions standards. While some stakeholders supported a "freeze" of federal emissions standards, as proposed by the President, there appeared to be no interest in preempting California's authority to establish emissions standards, despite the understanding that those state standards were significantly affecting the fuel economy of the vehicles they applied to. In fact, legislative proposals, summaries of those proposals, and Presidential briefing materials reflect the intentions of Congress and the executive branch to protect California's authority to establish emissions standards. No stakeholder submitted a request for California's emissions standards to be preempted or curtailed during the 1975 congressional hearings.

1. The Role of the Energy Crisis in Congressional Deliberations

Production and consumption of oil became a matter of the highest level of concern in the 1970's. Apprehensions over increasing reliance on oil imports and possible shortfalls between supply and demand gave way to a full-blown

19. U.S. Dep't of State, Office of the Historian, *Oil Embargo, 1973-1974* (2016), <https://perma.cc/MD53-9639>.

20. See 42 Fed. Reg. 33,537 (June 30, 1977) (explaining how the "unavoidable consequences of compliance" with emissions standards should be accounted for when establishing fuel economy standards). For a detailed examination of how EPCA's fuel economy program functions and has been implemented over the past 44 years, see Dotson, Part 1, *supra* note 7.

emergency in 1973.²¹ In October of that year, the Arab members of the Organization of Petroleum Exporting Countries (OPEC) imposed an oil embargo against the United States and other nations supporting Israel during the Arab-Israeli war.²² The embargo posed tremendous economic and governance challenges.

In November 1973, President Nixon spoke to the nation about the serious challenge the embargo posed: “We are heading toward the most acute shortages of energy since World War II. Our supply of petroleum this winter will be at least ten percent short of our anticipated demands, and it could fall short by as much as seventeen percent.”²³ President Nixon called for immediate actions to conserve energy, including cancellation of some jet plane flights, reduction of residential thermostat settings during winter by at least six degrees, and for Governors to lower speed limits to fifty miles per hour.²⁴ He also announced plans to increase domestic oil production.²⁵

The President called upon Congress to pass legislation to grant new authorities to the federal government to increase oil production and decrease oil consumption.²⁶ The scope of the authorities the President requested demonstrated the seriousness of the emergency: the authority to relax environmental regulations, the authority to restrict the working hours for shopping centers and other commercial establishments, the authority to reduce highway speed limits throughout the nation, and the authority to adjust the schedules of planes, ships, and other carriers.²⁷ Still, the President warned, “If shortages persist despite all of these actions and despite inevitable increases in the price of energy products, it may then become necessary . . . to take even stronger measures.”²⁸

Reflecting the importance of the energy crisis, President Nixon broke with tradition in 1974 and called on Congress to act prior to his State of the Union address, saying that “No single legislative area is more critical or more challenging.”²⁹ The President’s proposal included a windfall tax on oil companies, a new unemployment insurance program for workers who lost their jobs due to the energy crisis, deregulation of the gas industry, and a new legal framework to promote the surface mining of coal.³⁰ President Nixon also asked Congress “to grant

21. See Dep’t of State, *supra* note 19.

22. *Id.*

23. Richard Nixon, 37th President of the U.S., Address to the Nation About Policies To Deal With the Energy Shortages (Nov. 7, 1973), <https://perma.cc/L3RK-CSJ9>.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. President Richard Nixon, 37th President of the U.S., Special Message to the Congress on the Energy Crisis (Jan. 23, 1974), (transcript available in the American Presidency Project archives), <https://perma.cc/NK8N-N2DT>.

30. *Id.*

authority for temporary relaxation of requirements and freezing the standards for auto emissions—now applicable to 1975 model cars—for two additional years.”³¹ According to the President, this action would “permit auto manufacturers to concentrate greater attention on improving fuel economy while retaining a fixed target for lower emissions.”³²

Congress balked at many of these requests. However, the legislature did enact the Energy Supply and Environmental Coordination Act of 1974 which, among other policies, kept the 1975 motor vehicle emissions standards in place for up to two years, rather than allowing scheduled increases in the stringency of emissions standards to go into effect.³³ Even during this period of crisis however, Congress carefully retained California’s authority to establish emissions standards, noting in the conference report that “California retains the right under section 209 of the Clean Air Act to seek a waiver for a more stringent standard.”³⁴

Although the oil embargo ended in March 1974, ongoing concerns would lead to a robust set of actions, policies, and institution-building in the months and years to come. New state and federal energy programs were established.³⁵ A new international treaty on energy was quickly negotiated and entered into by many developed nations.³⁶ This new agreement, known as the Agreement On An International Energy Programme, established an international oil sharing program among the oil consuming nations.

In August 1974, President Nixon stepped down as President, and Vice President Gerald Ford assumed the presidency.³⁷ Days after taking office, President Ford told a joint session of Congress, “We must not let last winter’s energy crisis happen again.”³⁸ Within two months of taking office, President Ford returned to Congress and announced a list of legislative priorities, including a proposal to develop a “national energy policy and program.”³⁹ President Ford set a specific goal to “reduce imports of foreign oil by 1 million barrels per day by the end of 1975, whether by savings here at home, or by increasing our own sources.”⁴⁰ By his first State of the Union address in January 1975, President Ford

31. *Id.*

32. *Id.*

33. Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, § 5, 88 Stat. 246 (1974).

34. H.R. Rep. No. 93-1085, at 41 (1974) (Conf. Rep.).

35. See Richard Nixon, Special Message to the Congress on the Energy Crisis, *supra* note 29.

36. Agreement On An International Energy Programme, 14 I.L.M. 1 (Nov. 18, 1974), <https://perma.cc/SY4E-TSYE>.

37. President Gerald R. Ford, 38th President of the U.S., Memorandums on the Transition of the Presidency (Aug. 10, 1974), <https://perma.cc/KT3S-3MMD>.

38. President Gerald R. Ford, 38th President of the U.S., Address to a Joint Session of the Congress (Aug. 12, 1974), <https://perma.cc/P8CB-7SZZ>.

39. President Gerald R. Ford, 38th President of the U.S., Address to a Joint Session of the Congress on the Economy (Oct. 8, 1974), <https://perma.cc/72G6-KTEQ>.

40. *Id.*

strengthened his goal for reducing oil imports “by 1 million barrels per day by the end of this year and by 2 million barrels per day by the end of 1977.”⁴¹

The Energy Policy and Conservation Act of 1975 (EPCA) was a primary policy response to this challenge. Not only did the Act contain the implementing legislation for the Agreement On An International Energy Programme by establishing the nation’s Strategic Petroleum Reserve, it also contained numerous provisions to promote efficiency, including a new program establishing automobile fuel economy standards.⁴²

A thorough discussion of these developments is beyond the scope of this article. However, it is important to understand that the serious concerns over the nation’s oil consumption were the primary motivation in the development and enactment of EPCA.

2. The Relationship Between Fuel Economy and Air Pollution

In developing the automobile efficiency provisions that would ultimately be included in EPCA, policymakers sought to better understand the relationship between automobile fuel efficiency and air pollution controls. Specifically, the need to achieve better fuel economy in the nation’s automobiles prompted the question of whether fuel economy could be improved even as automobiles were required to emit less pollution. In 1973, the National Academy of Sciences had reported that some emissions controls had a “profound effect” on fuel economy.⁴³ Later that same year, EPA Administrator Russell Train testified that model year 1973 automobiles had suffered a fuel penalty attributable to meeting emissions standards of 10 percent.⁴⁴ However, by model year 1975, auto manufacturers were reporting to the EPA that the use of catalytic converters would allow vehicles to become significantly more fuel efficient.⁴⁵ As EPA Administrator Train concluded, “Considering the Nation’s anticipated gasoline shortage and considering the fact that different emission control systems have different energy requirements, there is clearly a need to provide detailed analysis of this matter.”⁴⁶

Accordingly, a number of studies were undertaken to inform policymakers about the interaction between fuel economy and emissions standards. As a

41. President Gerald R. Ford, 38th President of the U.S., Address before a Joint Session of the Congress Reporting on the State of the Union (Jan. 15, 1975), <https://perma.cc/23PF-5MFL>.

42. See Energy Policy and Conservation Act of 1975, 94 P.L. 163, 89 Stat. 871 (1975).

43. See NAT’L RES. COUNCIL, REPORT BY THE COMMITTEE ON MOTOR VEHICLE EMISSIONS, 62 (Feb. 1973), (the fourth in a series of five reports bearing the same name; on file with the author).

44. *New Motor Vehicle Emission Standards and Fuel Economy: Hearing Before the Subcomm. on Public Health and Environment of the Comm. on Interstate and Foreign Commerce*, 93d Cong. 2 93-65 (1973) (statement of Hon. Russell E. Train, Administrator, Environmental Protection Agency), [https://congressional-proquest-com.proxygt-law.wrlc.org/congressional/result/pqpresultpage.gispdfhitspanel.pdf?link/\\$2fapp-bin\\$2fgis-hearing\\$2ff\\$2fb\\$2f8\\$2f5\\$2fhr-1973-fch-0022_from_1_to_558.pdf&entitlementkeys=1234%7Capp-gis%7Chearing%7Chrg-1973-fch-0022](https://congressional-proquest-com.proxygt-law.wrlc.org/congressional/result/pqpresultpage.gispdfhitspanel.pdf?link/$2fapp-bin$2fgis-hearing$2ff$2fb$2f8$2f5$2fhr-1973-fch-0022_from_1_to_558.pdf&entitlementkeys=1234%7Capp-gis%7Chearing%7Chrg-1973-fch-0022).

45. *Id.*

46. *Id.*

complement to the two-year freeze in automobile tailpipe standards, the Energy Supply and Environmental Coordination Act of 1974 directed the Department of Transportation and the Environmental Protection Agency to conduct a joint study on the practicality of establishing a fuel economy improvement standard.⁴⁷ Congress specifically required the study to examine “the technological problems of meeting any such standard, including . . . the impact of applicable safety and emission standards.”⁴⁸

In October 1974, Claude S. Brinegar, Secretary of the Department of Transportation, and EPA Administrator Train transmitted the required report to Congress.⁴⁹ The report concluded that substantial improvements in fuel economy were feasible but detailed the numerous factors that might inform whether to require such an improvement and at what level.⁵⁰ With regard to emissions standards, the report concluded:

Fuel economy improvements obtained while simultaneously achieving interrelated objectives such as low emissions and occupant safety will involve competition for capital, expertise, and other resources. . . . Achievement of the statutory emission standards for hydrocarbons and carbon monoxide with substantial fuel economy improvement is feasible in the new car fleet of 1980 compared to 1974. The issue of the level and cost of the oxides of nitrogen emission achievable by 1980 concurrent with substantial fuel economy improvement is unresolved.⁵¹

The report explained that achievement of the NO_x standard “simultaneously with good fuel economy, is judged to be possible, but has not been demonstrated.”⁵²

A June 1975 National Research Council report advised against relaxing emissions standards, concluding that emissions improvements could and should be “achieved while improving fuel economy.”⁵³ The report noted that a significant improvement in fuel economy could be achieved by changes that are “independent of the level of emissions.”⁵⁴ The authors of the report later clarified that while

47. Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, § 10, 88 Stat. 246 (1974).

48. *Id.*

49. *Presidential Energy Program: Hearings Before the Subcomm. on Energy and Power of the Comm. on Interstate and Foreign Commerce*, 94th Cong. 94-20 (1975) (letter from Claude S. Brinegar, Secretary of the Department of Transportation, and Hon. Russell Train, Administrator of the Environmental Protection Agency, to Sen. Warren G. Magnuson), <https://perma.cc/Y62Z-FTLH>.

50. U.S. DEP’T OF TRANSPORTATION AND U.S. ENVIRONMENTAL PROTECTION AGENCY, POTENTIAL FOR MOTOR VEHICLE FUEL ECONOMY IMPROVEMENT, REPORT TO CONGRESS, 1 (1974) [hereinafter DOT-EPA REPORT], <https://perma.cc/YMH4-R7BG>.

51. *Id.*

52. *Id.* at 93.

53. NAT’L RES. COUNCIL, REPORT OF THE CONFERENCE ON AIR QUALITY AND AUTOMOTIVE EMISSIONS, 21 (1975) [hereinafter NRC REPORT].

54. *Id.*

there was generally a fuel economy penalty associated with greater emissions control, that could change with developments in emission control technology.⁵⁵

The National Academy of Sciences calculated that compliance with the 1975 California emissions standards imposed a five percent fuel economy penalty as compared to compliance with the less stringent federal standard.⁵⁶

These studies demonstrate that by the time EPCA was being finalized in Congress, policymakers were well aware that emissions standards, including state emissions standards, could have significant impacts on fuel economy.

3. President Ford's Proposals to Prioritize Fuel Economy Over Air Pollution Reduction

Throughout 1975, the Ford Administration attempted to convince Congress to build upon the Energy Supply and Environmental Coordination Act of 1974 and further postpone, perhaps indefinitely, the tailpipe emissions standards contemplated by the Clean Air Act of 1970.⁵⁷ The Administration sought that goal presumably to prioritize fuel economy.

a. The Proposed Energy Independence Act of 1975

In October 1974, the same month that the DOT-EPA report on potential fuel economy improvements was released, President Ford announced to Congress his intention to develop an approach with the auto manufacturing industry to address vehicle efficiency, saying "I will meet with top management of the automobile industry to assure, either by agreement or by law, a firm program aimed at achieving a 40 percent increase in gasoline mileage within a 4-year development deadline."⁵⁸ On January 13, 1975, President Ford publicly revealed his plan to increase American automobile efficiency.⁵⁹ He stated, "My national energy conservation plan will urge Congress to grant a 5-year delay on higher automobile pollution standards in order to achieve a 40-percent improvement in miles per gallon."⁶⁰ President Ford described his plan as a trade-off.⁶¹ The automakers would voluntarily increase the fuel economy of their vehicles by 40 percent if

55. NAT'L RES. COUNCIL, A SUPPLEMENTARY STATEMENT CONCERNING THE REPORT OF THE CONFERENCE ON AIR QUALITY AND AUTOMOBILE EMISSIONS 9-10 (1975).

56. NAT'L RES. COUNCIL, *supra* note 43, at 1.

57. *See* NRC REPORT, *supra* text accompanying note 53.

58. President Gerald R. Ford, 38th President of the U.S., Address to a Joint Session of the Congress on the Economy (Oct. 8, 1974), <https://perma.cc/72G6-KTEQ>.

59. President Gerald R. Ford, Address to the Nation on Energy and Economic Programs (January 13, 1975) (transcript available in the Weekly Compilation of Presidential Documents, HeinOnline).

60. *Id.*

61. President Gerald Ford, Remarks at a Briefing for State and Local Officials on Energy and Economic Programs (Jan. 16, 1975) (transcript available in the Weekly Compilation of Presidential Documents, HeinOnline).

Congress relaxed the scheduled increase in stringency of federal emissions standards.⁶²

The President proposed legislation reflecting his plan, entitled the Energy Independence Act of 1975, to Congress on January 30, 1975.⁶³ The proposal included provisions to amend the Clean Air Act and federally adopt California's standards for hydrocarbons and carbon monoxide, which were less stringent than the standards scheduled to go into effect pursuant to the Clean Air Act of 1970.⁶⁴ Additionally, the proposal would have retained the less stringent 1975 federal interim standard for nitrogen oxides.⁶⁵ Finally, the proposal would have retained California's authority to adopt and enforce state tailpipe standards.⁶⁶

The effect of this proposal would have been to adopt more stringent federal standards than were currently in effect while foregoing more stringent standards currently required by the Clean Air Act for 1977.⁶⁷

	<u>HC</u>	<u>CO</u>	<u>NO</u>
1975 (Interim) & 1976	1.5	15.0	3.1
1977 statutory	.41	3.4	2.0
1975 California	.9	9.0	2.0
1977-81 Administration Recommendation (Energy Independence Act)	.9	9.0	3.1

An excerpt of an internal memorandum to President Ford from March 1975.

The summary attached to the President's transmittal letter explained that "the amendments seek a better balance between automobile fuel economy and air quality by stabilizing auto emission requirements for five years at the level of California's 1975 standards for hydrocarbons and carbon monoxide emissions, and holding at national 1975 standards for oxides of nitrogen."⁶⁸ It went on to explain the rationale for the amendment:

62. *Id.*

63. *Economic Impact of President Ford's Energy Program: Hearings Before the S. Comm. on Interior and Insular Affairs*, REP. NO. 94-6, 94th Cong., at 380 (1975) (transmittal letter and attached policy summary from President Gerald Ford to Sen. Nelson A. Rockefeller, President of the Senate).

64. *Id.* at 387.

65. *Id.*

66. *Id.* at 407.

67. Memorandum from James T. Lynn to President Ford, Pending EPA Announcement on Auto Emission Standards (An Energy Independence Act Item) (Mar. 1, 1975) (on file at the Gerald R. Ford Presidential Library), <https://perma.cc/38NZ-HG6T>.

68. *Economic Impact of President Ford's Energy Program: Hearings Before the S. Comm. on Interior and Insular Affairs*, 94th Cong. 382 (1975) (transmittal letter and attached policy summary from President Gerald Ford to Sen. Nelson A. Rockefeller, President of the Senate).

Auto Emission Standards

Problem. – Given the Nation's increasing concern regarding dependence on foreign oil, auto makers should be allowed to strike an appropriate balance so as to significantly improve fuel economy while maintaining stringent environmental controls.

Proposal. – Make .9 grams per mile (gpm) hydrocarbons (HC) and 9.0 gpm carbon monoxide (CO) the emission standards for light-duty vehicles manufactured for model years 1977 through 1981. These are the same as the 1975 interim standards in effect in California. Beginning with the 1982 model year, the original statutory standards would take effect. Regarding nitrogen oxides (NOx) 3.1 gpm would be the 1977 through 1981 requirement and be set administratively thereafter. *Nevertheless, authority would be retained allowing California to establish more stringent emission standards.* The 1975 California standards represent roughly a 90 percent reduction in CO and HC in comparison with pre-1968 vehicles and will provide significant fuel savings over five years.⁶⁹

The Administration's proposal was introduced in the U.S. Senate by Senate Minority Leader Hugh Scott, Republican of Pennsylvania, and in the U.S. House of Representatives by House Minority Leader John Rhodes, a Republican from Arizona.⁷⁰ Representative Harley Staggers, Democrat of West Virginia and Chair of the Interstate and Foreign Commerce Committee, also introduced an identical bill.⁷¹

If enacted, these amendments to the Clean Air Act would have made the achievement of air quality goals subservient to fuel economy goals in both the near and long term. First, more stringent federal statutory standards for tailpipe emissions slated for implementation in 1977 would be delayed for at least five years with the explicit goal of delaying action to improve air quality for the purpose of focusing on achieving fuel economy benefits.⁷² Second, the amendment would establish a new set of criteria for tailpipe standards after the five-year period.⁷³ Standards would be based upon "air quality, energy efficiency, availability of technology, cost, and other relevant factors."⁷⁴ Had this language been enacted, it would have required consideration of factors that could allow air quality efforts to be compromised on an ongoing basis.

Congress was immediately resistant to the Administration's proposal. President Ford's advisors notified the President in the weeks after the proposal

69. *Id.* at 387 (emphasis added).

70. Energy Independence Act, S. 594, 94th Cong. (1975); Energy Independence Act, H.R. 2650, 94th Cong. (1975).

71. Energy Independence Act, H.R. 2633, 94th Cong. (1975). Rep. Staggers presumably introduced the legislation as a courtesy to the Administration, a common practice for Committee Chairs.

72. See S. 594 § 502 & H.R. 2650 § 502, *supra* note 70.

73. *Id.*

74. *Id.*

was unveiled that as “the major elements of [the House and Senate energy plans were] beginning to surface,” the Senate was offering “no modification of environmental standards.”⁷⁵

Complicating matters, evidence emerged in February 1975 that the promising technology of catalytic converters might in itself create a new public health threat by emitting sulfuric acid mists.⁷⁶ The EPA acted to prevent more stringent emissions standards from going into effect for the 1977 model year vehicles because those standards would have accelerated the deployment of catalytic converters.⁷⁷ Unfortunately, the President’s proposal was so dependent on the increased use of catalytic converters that in March 1975, White House staff informed him that “your objective of improving automobile fuel economy by 40% is at least jeopardized, if not impossible, if catalytic converters are not used on automobiles, and the California Standards are maintained.”⁷⁸ Catalytic converters, White House staff explained, “improve fuel economy by allowing the removal of pollution control equipment from engines.”⁷⁹ Discontinuing the use of catalytic converters “could increase fuel consumption for the next 2 to 4 years by 10 percent” if emissions standards were to be met with non-catalytic technology.⁸⁰ In May 1975, White House staff informed the President that the Energy Independence Act proposal was “no longer viable.”⁸¹

Indeed, no legislative action was ever taken on any of the bills reflecting the President’s proposal. In June 1975, the Senate Committee on Commerce reported legislation to require fuel economy improvements.⁸² Instead of providing for emissions standards to be relaxed so that fuel economy would be the dominant consideration, as requested by the Administration, the Committee took the opposite approach: providing that fuel economy goals could be adjusted if the Secretary of Transportation found that the goals should be modified because they cannot reasonably be attained or could reasonably be made more stringent.⁸³

The Committee report accompanying the Senate legislation identified numerous deficiencies in the Administration’s proposal, including the proposal for addressing emissions standards. The report states:

The President’s program would unnecessarily freeze automobile emission standards for the next 5 years at current California standards for hydrocarbons and carbon monoxide, and at the current 49-state standard for nitrogen oxides.

75. Memorandum from Frank Zarb to the President Gerald Ford (Feb. 25, 1975), <https://perma.cc/RXY3-CHCK>.

76. Dan Fisher, *Auto Makers to Be Given Year’s Delay on Emissions*, L.A. TIMES, Feb. 28, 1975, at A1.

77. *Id.*

78. Memorandum from James T. Lynn to President Ford, *supra* note 67.

79. *Id.* (emphasis in original).

80. *Id.*

81. Memorandum from Jim Cannon to the President, Subject: Auto Emission Standards (May 19, 1975), <https://perma.cc/TR97-GG6A>.

82. See S. 1883, 94th Cong. (1975).

83. S. 1883 § 504(b), 94th Cong. (1975).

This freeze would ostensibly be imposed in order to meet the fuel economy improvement target. Technical data available to the Committee clearly refutes the need for such a freeze.⁸⁴

The Senate report discounts the value of industry's "highly qualified, and legally unenforceable" voluntary commitments to improve fuel economy, saying "there is no basis for believing Congress will freeze automobile emission standards, and therefore the voluntary approach does not represent any commitment at all by the industry."⁸⁵

b. The Proposed Five-Year Freeze in Federal Emissions Standards

In response, President Ford decided to transmit a new proposal to Congress in June 1975⁸⁶ to freeze currently applicable emissions standards through model year 1981.⁸⁷ To support the President's proposal to freeze standards, the White House released an accompanying memorandum providing details on the analytic basis and justification for the proposal.⁸⁸ The proposal would address the question of risks posed by catalytic converters by not requiring an expansion of their use.⁸⁹ Therefore, the proposal would "permit substantially greater fuel efficiencies over the next five years."⁹⁰ In fact, the White House argued that the "basic philosophy and approach to future auto emission controls need to be reconsidered in light of the current conditions."⁹¹

In discussing the air quality effects of this proposal, the White House memorandum notes the effect of preserving California's air emissions standards.⁹² According to modeling, the memorandum explained, urban areas in all parts of the country would exceed the ambient air quality standard for NO₂, with the exception of San Francisco, where "California has the more stringent limitation in force as a State regulation."⁹³ Additionally, in discussing the health risks of NO_x exposure, the memorandum argues that the only urban area to face "increased risk for excess respiratory disease" is Los Angeles, California, and implies that risk cannot be blamed on federal emissions standards because "California has the lower 2.0 grams/mile level in effect as a State regulation."⁹⁴

84. S. REP. NO. 94-179, at 6 (1975).

85. *Id.* at 6-7.

86. Administratively Confidential Memorandum from Jim Conner to Jim Cannon, Subject: Auto Emissions (June 26, 1975), <https://perma.cc/HD3L-KQMH>.

87. Presidential Decision Memorandum from Jim Cannon to the President, Subject: Auto Emissions (June 24, 1975), <https://perma.cc/HD3L-KQMH>.

88. White House Release, Energy Resource Council Memorandum (June 27, 1975), <https://perma.cc/HD3L-KQMH>.

89. *Id.*

90. *Id.* at 1.

91. *Id.* at 12.

92. *Id.* at 5-6.

93. *Id.* at 5.

94. *Id.* at 6.

The President's second proposal was drafted into legislative language and subsequently transmitted to congressional leaders the following month.⁹⁵ The legislative language did not amend the Clean Air Act provision directing the U.S. EPA to waive preemption of California standards.

4. Congressional Rejection of a Five-Year Freeze and Establishment of Fuel Economy Standards that Could be Adjusted Based Upon Emissions Standards

Ultimately, when finalizing and passing EPCA, Congress rejected the Administration's second proposal as well, choosing instead to set ambitious goals for fuel economy improvement, which could be adjusted based upon the effects of emissions standards. EPCA did not amend the EPA's duty, pursuant to CAA section 209(b), to grant California a waiver of preemption for mobile source emissions standards. As the President weighed whether to sign EPCA into law, his top energy advisor explained that the fuel economy standards the bill set "may not be attainable under the emission standards emerging from Congress, although there are cumbersome provisions to adjust the fuel economy standards in the 1978-80 period."⁹⁶

Despite Congress's rejection of the White House's preferred approaches for addressing automobile efficiency, President Ford signed EPCA into law in December 1975.⁹⁷

5. "Balancing" Air Emissions and Fuel Economy

As the plain language of EPCA indicates, Congress determined that a mandatory efficiency program for motor vehicles was necessary, but ambition for increased fuel economy would have to be tempered by economics and technology as well as the demands of other public policy priorities such as safety and emissions reductions. This statutory structure, in combination with the legislative history, demonstrates that policymakers and stakeholders were concerned that air quality goals and fuel economy goals worked in opposition to each other. The resistance to demanding rigidly-maximized fuel economy standards arose because of the view, not uniformly held, that requirements to reduce air emissions could make it harder to improve efficiency.

For instance, the 1974 DOT-EPA report to Congress, discussed above,⁹⁸ highlighted auto industry concerns over their ability to meet specific standards and

95. White House, Press Release, Text of Letters from the President to the Speaker of the House of Representatives and the President of the Senate (July 28, 1975) (on file at the Gerald R. Ford Presidential Library).

96. Memorandum from Frank Zarb to the President (Dec. 12, 1975), <https://perma.cc/J7UG-89PC>. It is important to note that there were no emissions standards established beyond this time frame, so it is reasonable that the memorandum to the President would not address emissions standards for those model years.

97. Gerald R. Ford, Remarks Upon Signing the Energy Policy and Conservation Act (Dec. 22, 1975), <https://perma.cc/MLN2-YRDS>.

98. See *supra* text accompanying note 49; DOT-EPA REPORT, *supra* text accompanying note 50.

potential limitations on the industry resources needed to meet both emissions and fuel economy goals. The agencies opened a docket for public submissions on the topic of fuel economy improvement.⁹⁹ The auto industry dominated public submissions to such an extent that the report explains that the submissions “show much of what is felt most strongly by manufacturers who would be affected by fuel economy improvement standards.”¹⁰⁰ According to the report, there are “frequent statements that the uncertainty surrounding emissions and safety standards make it impossible to predict whether a particular fuel standard could be reached.”¹⁰¹ The report also raises concerns that requiring automakers to comply with emissions standards would divert limited resources from efforts to improve fuel economy. The agencies concluded that “[f]uel economy improvements obtained while simultaneously achieving interrelated objectives such as low emissions and occupant safety will involve competition for capital, expertise, and other resources.”¹⁰²

White House staff shared this concern about both the competition for industry resources and the effects of the nation’s high demand for oil. White House staff argued that forcing automakers to comply with emissions standards would “strip industry of capital needed to retool for more efficient engines,” and cause other challenges.¹⁰³ The staff developed arguments in support of President Ford’s proposal to freeze emission standards based upon increased operating costs associated with reduced fuel efficiency.¹⁰⁴ White House briefing materials correlated emissions standards with their effect on oil consumption to inform decision making:¹⁰⁵

B. Energy Impacts*	
<u>Options</u>	<u>Barrels per day (in 1980)</u>
Energy Independence Act	85,000 (loss)
EPA Proposal	137,000 (loss)
1975 Stds. thru 1981	0
Canadian and 1974 Stds. thru 1981	27,000 (gain)

* Base is 1975 model year automobiles meeting 1975 interim emission standards.

An excerpt from a 1975 White House memorandum explaining how different emissions standards would impact the nation’s oil consumption.

99. DOT-EPA REPORT, *supra* note 50, at 133.

100. *Id.*

101. *Id.*

102. *Id.* at 40.

103. White House Memorandum from William F. Gorog to L. William Seidman (July 17, 1975) (on file with the Gerald R. Ford Presidential Library).

104. *Id.*

105. White House briefing materials, Box 4, Table 6, Folder “Auto Emissions (7)” of the James M. Cannon Files at the Gerald R. Ford Presidential Library (undated).

This tension between fuel economy and emissions reductions was also evident in the congressional record. The Senate Commerce Committee report on the automobile efficiency program that was ultimately included in EPCA dismissed concerns about emissions standards, saying that “[t]echnical data available to the Committee clearly refutes the need to” freeze emissions standards.¹⁰⁶ Yet, Senators Robert P. Griffin and James L. Buckley filed additional views with the report that took exception with the majority’s perspective, saying a “major problem” with the bill is the “failure to deal with the question of auto pollution controls—which could be a key barrier to better fuel economy, depending on the state of available technology.”¹⁰⁷

Similarly, the House Committee on Interstate and Foreign Commerce found that “[t]he effects of emissions controls on fuel economy are particularly difficult to assess.”¹⁰⁸ The report noted that, because of the catalytic converter, fuel economy had improved even as emissions had been reduced, yet the scheduled increased stringency of emissions standards at both the state and federal level could impose fuel penalties on vehicles in the future.¹⁰⁹ The Department of Transportation projected that meeting improved emissions standards in 1980 would impose a fuel economy penalty, but that projection was inconsistent with the findings of the EPA, who concluded that no fuel economy penalty would be necessary.¹¹⁰ The minority views included in the Committee report expressed concern about the adverse effect of emissions controls on fuel economy.¹¹¹

Finally, the President of the United Auto Workers explained at a Senate hearing that his organization supported the President’s proposed emissions standards “freeze” because the additional time might allow for the development of new emissions control technology that could address concerns that federal emissions standards might interfere with fuel economy improvements.¹¹²

These concerns from the 1975 legislative process do not seem to apply in the case of greenhouse gas emissions standards because, rather than being at odds, the goals of reduced greenhouse gas emissions and improved fuel economy are aligned. Today, the NHTSA and EPA acknowledge that technologies built to comply with greenhouse gas standards also generally improve fuel economy.¹¹³ Even if the preemption language in EPCA was viewed as a congressional effort to resolve tensions between emissions standards and fuel economy standards, that tension does not exist between GHG emissions standards and fuel economy

106. S. REP. NO. 94-179, at 6 (1975).

107. *Id.* at 64.

108. H.R. REP. NO. 94-340 at 86 (1975)

109. *Id.* at 87.

110. *Id.*

111. *Id.* at 305.

112. *The 1976 First Concurrent Resolution on the Budget: Hearing Before the S. Comm. on the Budget*, 94th Cong. Pg. 8 (Mar. 4, 1975) (testimony of Leonard Woodcock, President, United Auto Workers).

113. See SAFE rule, *supra* note 3, at 51315.

standards, rendering the agencies' expansive interpretation of EPCA preemption unnecessary.

B. HOW THE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977 INFORMS
THE DEBATE

The Clean Air Act Amendments of 1977¹¹⁴ were a comprehensive set of amendments applying to a panoply of issues across the scope of the Act. The amendments included numerous provisions that address mobile sources of air pollution, including provisions relating to research, inspection, testing, and standard setting.¹¹⁵ The purpose of the 1977 Amendments, in part, was “to provide a greater role and greater assistance for State and local governments in the administration of the Clean Air Act.”¹¹⁶ In fact, the D.C. Circuit has recognized that “Congress consciously chose to permit California to blaze its own trail with a minimum of federal oversight.”¹¹⁷ Two statutory provisions relating to mobile sources reflect this purpose. First, the 1977 Amendments included a provision to “broaden and strengthen” California’s authority to adopt and enforce emissions standards separate from the federal standards.¹¹⁸ Second, the Act provided for other states to adopt California’s emissions standards that had received a waiver under section 209(b).¹¹⁹

The amendments were developed in the House of Representatives by the Committee on Interstate and Foreign Commerce – the same House Committee that developed EPCA.¹²⁰ The members and staff of this Committee were best positioned to understand the interactions between the Clean Air Act and EPCA. Yet, there is no evidence in the Clean Air Act Amendments of 1977 that EPCA had any limiting effect on state or federal emissions standards.

In developing the 1977 Amendments, Congress closely followed research to understand the connections between air emissions and fuel economy. In developing the provisions related to automobile emissions, the jurisdictional House Committee addressed the question, “Is it possible to achieve continued reductions in automobile emission standards while meeting the automobile fuel economy standards established for 1980, and 1985 by the Energy Policy Conservation Act of 1975?”¹²¹ The Committee, citing a list of expert government agencies and officials, found that “[t]here is no doubt about the ability of the automobile industry to achieve the new automobile fuel economy standards while meeting the

114. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 766 (1977).

115. H.R. REP. NO. 95-294 (1977).

116. *Id.* at 1.

117. *Ford Motor Company v. EPA*, 606 F.2d 1293 (D.C. Cir. 1979).

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

119. *Id.* at 26.

120. *Id.*

121. *Id.* at 233.

standards contained in the Committee proposal.”¹²² The Committee supported this conclusion with a lengthy discussion of supporting evidence.¹²³

The Clean Air Act Amendments of 1977 provide several other key insights into how Congress understood issues that are relevant to the agencies’ 2019 rule determining that EPCA preempts state air emission standards.

First, Congress understood that, in legal terms and structure, EPCA was subservient to the CAA. Congress set attainable auto air emissions standards in the CAA that it believed would allow the auto industry to achieve the EPCA fuel economy goals.¹²⁴ Had EPCA superseded Clean Air Act, such a compromise in Congress would have been unnecessary.

Second, Congress was aware of and comfortable with the concept that emissions standards would result in changes in fuel economy performance. The Committee reported that compliance with emissions standards could result in a fuel economy penalty one year and a benefit in the following years as more advanced technology was brought to market.¹²⁵ The Committee provided an example:

[I]n 1975 and 1976, the emission standards went from 1974 levels of 3.0 HC, 28 CO, 3.1 NO_x to 1.5, 15 and 3.1. The Ford Motor Company experienced a 2.2% loss in fuel economy in 1975, but a 20.3% gain in 1976 due solely to improvements in emission controls.¹²⁶

Similarly, the Senate understood that stringent emissions standards could encourage technological advancement and provide fuel economy benefits. The Senate proposed a NO_x standard of 1.0 gram per mile for automobiles despite industry suggestions for a more lenient standard. The Senate explained that a less stringent standard would promote “inferior, fuel-inefficient technology,” while “[t]he 1.0 gram-per-mile standard is expected to require new levels of technological development with fuel economy benefits.”¹²⁷

Third, Congress continued to support maximum autonomy for California’s auto emissions control program. The House Committee report explained that the legislation sought to “ratify and strengthen the California waiver provision and to affirm the underlying intent of that provision, i.e. to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.”¹²⁸

Finally, Congress’s handling of heavy-duty vehicles in the Clean Air Amendments of 1977 demonstrated that Congress understood how to prioritize

122. *Id.* at 236.

123. *Id.* at 237–71.

124. *Id.* at 244.

125. *Id.* at 244.

126. *Id.* at 249.

127. S. REP. NO. 95-127, 72 (1977).

128. H.R. REP. NO. 95-294, 301-02 (1977).

fuel economy over emissions standards when it so desired. Under the CAA, a heavy-duty vehicle is any vehicle manufactured primarily for use on the public roads and which has a gross vehicle weight in excess of six thousand pounds.¹²⁹ California also regulates emissions from vehicles weighing more than six thousand pounds,¹³⁰ having received its first waiver of federal preemption to do so in 1968.¹³¹ EPCA establishes fuel economy standards for these same vehicles.¹³²

The 1977 Act contained a provision requiring substantial emissions reductions from heavy-duty vehicles and engines beginning in 1979.¹³³ The law required that these vehicles and engines achieve at least a 90% reduction in hydrocarbon and carbon monoxide emissions by 1983.¹³⁴ By 1985, they had to achieve at least a 75% reduction in nitrogen oxides emissions.¹³⁵ Congress specifically provided, however, that the EPA could temporarily relax the ambition of these standards if compliance with the statutory standard could not be achieved without “decreasing fuel economy to an excessive and unreasonable degree.”¹³⁶

The enacted provisions relating to heavy-duty vehicles show that Congress did not understand EPCA to limit the stringency of emissions standards. Instead, Congress established a special rule in the case of heavy-duty vehicles that factored in fuel economy, whereas it otherwise would not have been considered.¹³⁷

C. HOW THE CLEAN AIR ACT AMENDMENTS OF 1990 INFORMS THE DEBATE

In 1990, the California Air Resources Board (CARB) adopted the first Low Emission Vehicle (LEV) regulations, which established the state’s Zero Emission Vehicle (ZEV) program.¹³⁸ When Congress passed the landmark Clean Air Act Amendments of 1990,¹³⁹ it included language specifically recognizing and endorsing California’s new ZEV mandate.

129. 42 U.S.C. § 7521(b)(3)(C). This definition was added by the Clean Air Act Amendments of 1977. Clean Air Act Amendments of 1977, Title II, § 224 Pub. L. No. 95-95, 91 Stat. 765 (1977).

130. Department of Health, Education, and Welfare; Office of the Secretary; Motor Vehicle Pollution Control; California State Standards; Waiver of Application of Section 208, Clean Air Act, 33 Fed. Reg. 10160 (Jul. 16, 1968).

131. *Id.*

132. Energy Policy and Conservation Act of 1975, § 501(1)(b), 94 P.L. 163, 89 Stat. 871 (1975). NHTSA applied standards for nonpassenger automobiles manufactured in model year 1979 weighing up to 6,000 pounds. *See* National Highway Traffic Safety Administration, Part 533—Average Fuel Economy Standards for Nonpassenger Automobiles, 42 Fed. Reg. 13807 (March 14, 1977). From MY 1980 on, NHTSA increased the weight of covered nonpassenger automobiles to 8,500 pounds. *See* National Highway Traffic Safety Administration, Part 523—Vehicle Classification, Part 533 – Light Truck Fuel Economy Standards, Standards for Model Years 1980 and 1981, 43 Fed. Reg. 11995 (Mar. 23, 1978).

133. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 224, 91 Stat. 765 (1977).

134. *Id.*

135. *Id.*

136. *Id.* at 766

137. *Id.* at 765

138. *See* California Air Resources Board, Low-Emission Vehicle Program, <https://perma.cc/ZL53-GSZ3>.

139. Pub. L. 101-549, 104 Stat. 2399 (1990).

As part of the 1990 Amendments' comprehensive efforts to address air pollution, Congress required states facing difficult ozone and carbon monoxide problems to establish clean-fuel vehicle programs.¹⁴⁰ These programs required fleet operators to ensure that an increasing percentage of their fleet vehicles met the Clean Air Act's definition of a clean-fuel vehicle.¹⁴¹ The fleet operator maintained discretion to choose the type of vehicle technology and fuel used to comply with the requirement.¹⁴² To determine compliance with the program, Congress directed the EPA to establish a crediting system that would reflect the amount of emissions reduction achieved by the specific vehicles covered by the program.¹⁴³ Congress included a paragraph providing specific direction to the EPA Administrator on how to credit Ultra-Low Emission Vehicles (ULEVs) and ZEVs.¹⁴⁴ At this point, Congress referenced California's approach as the approach to be emulated: "The standards established by the Administrator under this paragraph for vehicles under 8,500 lbs. GVWR or greater shall conform as closely as possible to standards which are established by the State of California for ULEV and ZEV vehicles in the same class."¹⁴⁵

Congress was aware of California's ZEV program. Yet, rather than indicate that the program was preempted or problematic in any way, Congress chose to recognize the program and endorse it by using it as a benchmark for federal action. Accordingly, when the EPA promulgated regulations to implement the provision, the preamble to the final rule clarified that the federal ZEV standards worked in parallel with California's ZEV standards.¹⁴⁶ The EPA repeatedly stated that it would use the definitions of ULEV and ZEV "like CARB" does.¹⁴⁷

The 1990 Clean Air Act Amendments demonstrate that the agencies' 2019 insistence that California's ZEV program was preempted in 1975 has a poor legal basis. The legitimate existence of California's ZEV program was a necessary precondition for Congress's 1990 direction to the EPA.

D. HOW THE HISTORY OF THE ENERGY POLICY ACT OF 1992 INFORMS THE DEBATE

Crafted during the Persian Gulf War and finalized in its aftermath, the Energy Policy Act of 1992¹⁴⁸ was comprehensive energy legislation that sought, in part, to reduce "the costly, impending rise in U.S. oil imports" and "to reduce our use

140. 42 U.S.C. § 7586 (2020).

141. 42 U.S.C. § 7586(b) (2020).

142. 42 U.S.C. § 7586(d) (2020).

143. 42 U.S.C. § 7586(f) (2020).

144. 42 U.S.C. § 7586(f)(4) (2020).

145. *Id.*

146. Emission Standards for Clean-Fuel Vehicles and Engines, Requirements for Clean-Fuel Vehicle Conversions, and California Pilot Test Program, 59 Fed. Reg. 50,050 (Sept. 30, 1994) (to be codified at 40 C.F.R. pts. 9, 86, and 88).

147. *Id.*

148. Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. 2776 (1992).

of oil-based fuels in our motor vehicle sector.”¹⁴⁹ To achieve this outcome, the law contains numerous provisions designed to promote the development and adoption of electric vehicles.¹⁵⁰

The House Science Committee reported that electric vehicles offered an opportunity to address smog and climate change while displacing petroleum use.¹⁵¹ With such significant environmental and energy benefits available, the Committee stated that “it is important to expedite the development of electric vehicles. Overcoming such barriers as technical uncertainty, customer acceptance and the numerous institutional issues are key to accelerated adoption of electric vehicles.”¹⁵² Accordingly, methods employed to promote electric vehicles included demonstration programs, fleet programs, and incentive programs.¹⁵³ The legislation also amended EPCA to provide for sales of electric vehicles to ease compliance with the fuel economy program.¹⁵⁴

The legislation specifically sought to enlist the assistance of the states in the deployment of electric vehicles. Below are four policies Congress adopted in the Energy Policy Act of 1992 to encourage state or local governments to promote the adoption of electric vehicles.

First, Congress directed the Secretary of the Department of Energy, in consultation with the Secretary of Transportation, to establish a state and local incentive program to accelerate the introduction and use of alternative fueled vehicles, including electric vehicles.¹⁵⁵ The Secretary of Energy was directed to invite the Governor of each state to submit a plan “designed to result in scheduled progress toward, and achievement of, the goal of introducing substantial numbers of alternative fueled vehicles in such State by the year 2000.”¹⁵⁶ State plans were required to consider numerous policy options, including: 1) tax exemptions, 2) state procurement of alternative fueled vehicles, 3) special parking, 4) programs of public education, 5) treatment of fuel sales, 6) methods to provide recharging at public locations, 7) allowing public utilities to include in rates the cost of vehicles and charging infrastructure, and 8) any other programs and incentives as the State may describe.¹⁵⁷ The final category is particularly expansive, contemplating “any” state programs to introduce electric vehicles or other alternative fueled vehicles. Congress’s directive also required the state to examine whether accomplishing any of the goals in this section would require an

149. Comprehensive National Energy Policy, House Energy and Commerce Committee, H.R. REP. NO. 102-474, pt. 1, at 132 (1992) (accompanying H.R. 776).

150. Pub. L. No. 102-486, § 403(5)(H), 106 Stat. 2878 (1992).

151. Comprehensive National Energy Policy, House Energy and Commerce Committee, H.R. REP. NO. 102-474, pt. 2, at 69 (1992) (accompanying H.R. 776).

152. *Id.*

153. *Id.*

154. *Supra* note 150.

155. 42 U.S.C. § 13235 (2020).

156. 42 U.S.C. § 13235(a)(2) (2020).

157. 42 U.S.C. § 13235(a)(3)(A)–(H) (2020).

amendment to State law or regulation.¹⁵⁸ Once the Secretary of Energy approved a state plan, the Secretary was authorized to provide the state with “information and technical assistance, including model State laws and proposed regulations,” as well as grants to carry out the state plan and acquire vehicles.¹⁵⁹ In March 1995, the Department of Energy issued a proposed rule to guide the implementation of this statutory provision. Although the proposed rule was never finalized, the proposal provides insights into how the Department interpreted this provision of the Energy Policy Act of 1992. The Department of Energy proposed a number of criteria for the evaluation of proposed projects in approved State plans.¹⁶⁰ The key criterion for evaluation would be the “projected energy-related benefits, as measured by the amount of conventional motor fuel that may be displaced by the use of alternative fuels.”¹⁶¹ The Department would also evaluate a State plan based on the “projected number of registered alternative fueled vehicles as a percentage of all registered vehicles”¹⁶² and the reduction in greenhouse gases a plan would achieve.¹⁶³

Second, Congress required that states increase the purchase of electric vehicles or other alternative fueled vehicles for use in state government-owned fleets.¹⁶⁴ Ten percent of state fleet vehicles acquired in 1996 were required to be alternative fueled vehicles, and the required percentage was scheduled to grow to 75 percent for the year 2000 and beyond.¹⁶⁵

Third, Congress established an Electric Motor Vehicle Commercial Demonstration Program.¹⁶⁶ This program was designed to accelerate the development and use of electric vehicles while also evaluating the vehicles and their required infrastructure.¹⁶⁷ Proposals to participate in the program are required to describe state and local government involvement.¹⁶⁸ The Secretary of Energy then selects proposals based on a number of criteria, including the extent of involvement of state or local governments.¹⁶⁹

Fourth, Congress established an Electric Motor Vehicle Infrastructure and Support Systems Development Program to back the development of infrastructure and support systems necessary for electric vehicles.¹⁷⁰ State government

158. 42 U.S.C. § 13235(a)(3)(I) (2020).

159. 42 U.S.C. § 13235(b) (2020).

160. Department of Energy, Office of Energy Efficiency and Renewable Energy, Alternative Fuel Transportation Program, Notice of Proposed Rulemaking and Public Hearings, 60 Fed. Reg. 15020 (proposed Mar. 21, 1995) (to be codified at 10 C.F.R. pt. 490).

161. *Id.* at 15021.

162. *Id.* at 15020.

163. *Id.* at 15022.

164. 42 U.S.C. § 13257(o) (2020).

165. 42 U.S.C. § 13257(o)(1) (2020).

166. 42 U.S.C. § 13281.

167. 42 U.S.C. § 13281(a).

168. 42 U.S.C. § 13281(b)(2)(A).

169. 42 U.S.C. § 13282(b)(7).

170. 42 U.S.C. § 13291.

projects involving rates and cost recovery for electric utilities that invest in electric vehicle infrastructure would be eligible for participation in this program.¹⁷¹

The congressional establishment of these four programs argues against the agencies' 2019 interpretation of EPCA's preemption provision. The four programs comprise a multi-pronged federal approach to encourage states to use their engagement, purchasing power, and laws and regulations to increase the deployment of electric and other alternative fueled vehicles. It is difficult to see how the Energy Policy Act of 1992 can be seen as consistent with the agencies' expansive 2019 interpretation. EPCA contains only one helpful provision in this regard – a narrow provision that specifies that state and local governments “may prescribe requirements for fuel economy for automobiles obtained for its own use.”¹⁷² However the four programs enacted in the Energy Policy Act of 1992 go far beyond simply requiring governmental purchase of efficient or low polluting or zero emission vehicles. In fact, one of the four programs explicitly contemplates state laws and regulations to deploy electric vehicles and other alternative fuel vehicles. This conflicts with the agencies' broad interpretation of EPCA's preemption of state and local efforts to “adopt or enforce a law or regulation related to fuel economy standards.”¹⁷³

Congress was pursuing many policies to help deploy electric vehicles and other alternative fuel vehicles in 1992, including enlisting the help of state and local governments.¹⁷⁴ As a later legislative enactment, the 1992 law helps inform, or even revise, our understanding of EPCA's 1975 preemption language. Reading EPCA to broadly preempt state authority to promote zero emission vehicles would be at odds with a later enactment that explicitly calls upon states to develop “any” program to promote those vehicles and authorizes the Department of Energy to develop model state laws to assist in that endeavor.¹⁷⁵

E. HOW THE HISTORY OF THE ENERGY INDEPENDENCE AND SECURITY ACT INFORMS THE DEBATE

The Energy Independence and Security Act (EISA) significantly amended EPCA in 2007.¹⁷⁶ This section examines the history of EISA and explains how consideration of the regulation of GHGs from mobile sources received high level attention from Congress and the White House. This section discusses how

171. 42 U.S.C. § 13292(c)(3).

172. 49 U.S.C. § 32919(c).

173. *Id.* § 32919(a).

174. H. COMM. ON SCIENCE, SPACE, AND TECHNOLOGY, COMPREHENSIVE NATIONAL ENERGY POLICY ACT, H.R. REP. NO. 102-474, PT. 2, at 70-71 (accompanying H.R. 776), http://web.archive.org/web/20070703025326/http://energycommerce.house.gov/energy_110/Title%20I%20-%20Fuels%20060107.xml.pdf.

175. 42 U.S.C. § 13235(a)(3)(I) (2020).

176. Energy Independence and Security Act of 2007, Pub. L. 110-140, 121 Stat. 1942 (2007) <https://perma.cc/WZ24-6KYQ>.

Congress decided to reject proposals to directly and indirectly revoke EPA and state authority over GHG emissions, choosing instead to explicitly protect those authorities. The section concludes by explaining how congressional floor statements and the establishment of a new federal fleet requirement demonstrate Congress's understanding that these authorities were protected by EISA.

After an extensive and public deliberation, Congress chose to craft EISA to explicitly protect the EPA's authority to regulate GHG emissions under section 202 of the CAA and California's authority to do so pursuant to section 209(b) of the CAA.¹⁷⁷ Congress rejected multiple proposals to either directly or indirectly interfere with California's authority to establish GHG standards for light duty cars and trucks pursuant to section 209(b) of the CAA.¹⁷⁸

During consideration of EISA, perhaps no other set of issues received more deliberative focus by members of Congress and stakeholders than the twin issues of whether the EPA could establish GHG emissions standards pursuant to section 202 of the Clean Air Act and whether California could establish its own standards pursuant to a waiver of preemption under section 209(b) of the Clean Air Act.¹⁷⁹ Although some members of Congress and the White House proposed to repeal both the EPA's and California's authority to set GHG standards for motor vehicles, they did not prevail.¹⁸⁰ Instead, the status of these authorities was vigilantly monitored and protected by congressional leadership, members of Congress, governors, state attorneys general, state and local air pollution regulators, and environmental protection advocacy organizations.¹⁸¹ Congress was cognizant of the relationship between the EPCA and the Clean Air Act when crafting EISA. Accordingly, the enacted text of EISA explicitly protected the authority of both the EPA and the State of California.¹⁸² During floor debate as the legislation received final approval in Congress, legislators voiced the view that both the EPA

177. 42 USCA § 13212 (3)(A).

178. H.R. Amend. 288 to H.R. Res. 4, 107th Cong. (2001) <https://perma.cc/E9XL-KZ7P>; H.R. Amend. 65 to H.R. Res. 6, 108th Cong. (2003) <https://perma.cc/KW6H-UXPU>.

179. Discussion Draft, Subcomm. on Energy and Air Quality, H. Energy and Com. Comm., 110th Cong. at 29 (June 1, 2007), http://web.archive.org/web/20070703025326/http://energycommerce.house.gov/energy_110/Title%20I%20-%20Fuels%20060107_xml.pdf.

180. Press release, Nancy Pelosi, Statement on Legislation Addressing Energy Independence and Global Warming (June 5, 2007), <https://perma.cc/S4PC-WJTE>.

181. *See, e.g.* Letter from the Att'ys Gen. of the Commonw. of Mass. and the States of Cal., Conn., Del., Iowa, Me., Md., Minn., N.J., N.M., N.Y., Or., R.I., and Vt., and the Corp. Counsel for N.Y.C. to the Hon. John D. Dingell, Chair, H. Energy and Com. Comm. and the Hon. Joe Barton, Ranking Member, H. Energy and Commerce Comm. (June 6, 2007); Letter from Gov. Arnold Schwarzenegger, Cal., Gov. Deval Patrick, Mass., Gov. Christine O. Gregoire, Wash., Gov. Bill Richardson, N. M., Gov. Theodore R. Kulongoski, Or., Gov. Edward G. Rendell, Pa., Gov. Janet Napolitano, Ariz., Gov. Eliot Spitzer, N. Y. to the Hon. Rick Boucher, Chair, Energy and Air Quality Subcomm., H. Comm. on Energy and Com. Comm. (June 7, 2007) <https://perma.cc/75SL-JG24>; Letter to the Editor, *Leadership Needed: Higher fuel economy standards may be doomed without Nancy Pelosi's support*. WASH. POST, July 26, 2007 <https://perma.cc/RCV9-9VX4>.

182. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 3, 121 Stat. 1492 (2007) <https://perma.cc/S77R-RM7B>.

and California retained their preexisting authority to establish and enforce tail-pipe standards for greenhouse gases.¹⁸³ Those views went un rebutted.

The 2018 NHTSA/EPA proposal states that “[t]here is no hint in the histories of either EPCA or EISA of an intent to give other standards special, much less superior, status under EPCA.”¹⁸⁴ However, as described in detail in this section, the history of EISA provides ample evidence that Congress specifically wanted to preserve California’s authority to establish greenhouse gas emissions standards.

1. The Role of *Massachusetts v. EPA* in Congressional Deliberations

Throughout 2007, Congress labored to develop and pass an energy bill. In April 2007, the Supreme Court handed down its landmark decision in *Massachusetts v. EPA*,¹⁸⁵ which clarified that GHGs were pollutants subject to regulation under the CAA and laid the foundation for the EPA to establish GHG emissions standards for light duty cars and trucks.¹⁸⁶ The Supreme Court decision was of great interest to Members of Congress and immediately became a topic of discussion in the development of EISA. This was not an obscure legal development. In May 2007, President George W. Bush held a rose garden press event¹⁸⁷ to announce his efforts to comply with what the New York Times called “one of [the Court’s] most important environmental decisions in years.”¹⁸⁸

The Democratic majority in Congress and President Bush agreed that the energy bill should mandate greater fuel efficiency under the corporate average fuel economy (CAFE) laws.¹⁸⁹ Because this area of the law could overlap with emission standards under the CAA, the possibility of disturbing the Supreme Court’s ruling and affecting the EPA’s and states’ authorities over GHGs, perhaps even inadvertently, was an obvious risk that all the participants in the deliberations were aware of.

2. Congress Rejected a Proposal to Directly Revoke EPA and State Authority

The first effort to overturn *Massachusetts v. EPA* and revoke state authority was not inadvertent. On June 1, 2007, the Chairman of the Energy and Air Quality Subcommittee of the House Energy and Commerce Committee released a draft proposal to govern the regulation of fuels and vehicles with regard to

183. Statement of Rep. Henry A. Waxman, 153 CONG. REC. 32,478 (2007) [hereinafter “Waxman Statement”], <https://perma.cc/Z9LR-395D>.

184. See SAFE proposal, *supra* note 1, at 43237.

185. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

186. *Id.*

187. President George Bush, President Bush Discusses CAFE and Alternative Fuel Standards, OFFICE OF THE PRESS SECRETARY (May 14, 2007), <https://perma.cc/W9CL-G9HT>.

188. Linda Greenhouse, *Justices Rule Against Bush Administration on Emissions*, N.Y. TIMES, April 2, 2007, <https://perma.cc/5E8Z-NXYM>.

189. See Dotson Part 1, *supra* note 7, at 11053.

GHGs.¹⁹⁰ This “discussion draft” proposal would have provided that the EPA could no longer regulate GHG emissions from cars and trucks under section 202 of the CAA.¹⁹¹ It also would have amended section 209 of the CAA to ensure that waivers could not be provided for California standards “designed to reduce greenhouse gas emissions.”¹⁹²

The opposition to this proposal was swift and unequivocal. On June 5, 2007, Speaker of the House Nancy Pelosi issued a press release that stated in full:

‘Any legislation that comes to the House floor must increase our energy independence, reduce global warming, invest in new technologies to achieve these goals and create good jobs in America.

‘Any proposal that affects California’s landmark efforts to reduce greenhouse gas emissions or eliminate the EPA’s authority to regulate greenhouse gas emissions will not have my support.’¹⁹³

This alone amounted to a death knell for the proposal, given the authority of the Speaker to determine what legislation is considered in the House of Representatives. However, concern about the proposal quickly spread to numerous other stakeholders. The governors of eight states wrote to the Chairman of the Energy and Air Quality Subcommittee to express their strong opposition to the proposal:

We are writing to express our strong opposition to the June 1, 2007, discussion draft of Alternative Fuels, Infrastructure and Vehicles. This legislation preempts our states’ critical efforts to combat climate change by enacting regulations that reduce greenhouse gas emissions. While Federal action is necessary and long overdue on climate change, Congress must not deny states the right to pursue solutions in the absence of federal policy.

Specifically, this bill will preempt California’s passenger vehicles and light duty truck emission standards, which will reduce greenhouse gas emissions by 30 percent. Our states, which collectively represent over one-third of the automobile market, have either adopted or will adopt California’s standards. Not only does this bill deny our right to adopt California’s vehicle emissions standards – a right granted by the federal Clean Air Act – it eliminates the Environmental Protection Agency’s regulatory authority over greenhouse gases as a pollutant. This amounts to an about-face reversal of the Supreme Court decision identifying CO₂ as a pollutant within the scope of the Clean Air Act (*Massachusetts v. EPA*). Finally, we are opposed to the bill’s delegation of regulatory authority to the National Highway Traffic Safety Administration.

190. See Discussion Draft, *supra* note 179, at 29.

191. *Id.* at 29 (Subsection (c) EPA Vehicle Regulations).

192. *Id.* at 29 (Subsection (d) State Waivers).

193. Press release, Nancy Pelosi, Statement on Legislation Addressing Energy Independence and Global Warming (June 5, 2007), <https://perma.cc/S4PC-WJTE>.

. . . Congress must preserve states' ability to fight greenhouse gas emissions now. Going forward, states and the federal government must collaborate to take even stronger actions against the continuing threat of climate change.¹⁹⁴

Gov. Jodi Rell of Connecticut independently sent her own letter in strong opposition to the proposal.¹⁹⁵

Additionally, the attorneys general of fourteen states wrote to the Chairman and Ranking Member of the House Energy and Commerce Committee to express their strong opposition to how the June 2007 proposal would regulate motor vehicle emissions.¹⁹⁶ They stated first that "the bill would eliminate the authority that the Clean Air Act has provided EPA for decades to regulate greenhouse gas emissions, as the U.S. Supreme Court recently recognized."¹⁹⁷ The attorneys general also stated:

Second, the bill would eliminate EPA's ability to grant a waiver of preemption for California state motor vehicle standards for greenhouse gases. As you are aware, other states are currently free to adopt those standards pursuant to Section 177 of the Clean Air Act. A total of twelve of our states have adopted the California standards, with others currently considering them. The bill would eliminate the statutory right of states to do so, thereby upsetting the longstanding cooperative federalism established by the Act. The current system of allowing two, but only two, sets of motor vehicle standards has worked well over the last four decades. Indeed, most of the technological innovations needed to reduce air pollutant emissions have been because of California's standards.¹⁹⁸

The National Association of Clean Air Agencies (NACAA) also wrote to the Energy and Air Quality Subcommittee chair and ranking member to vigorously object to the language.¹⁹⁹ NACAA represented the air pollution control agencies

194. Letter from Gov. Arnold Schwarzenegger, Cal., Gov. Deval Patrick, Mass., Gov. Christine O. Gregoire, Wash., Gov. Bill Richardson, N. M., Gov. Theodore R. Kulongoski, Or., Gov. Edward G. Rendell, Pa., Gov. Janet Napolitano, Ariz., Gov. Eliot Spitzer, N. Y. to the Hon. Rick Boucher, Chair, Energy and Air Quality Subcomm., H. Comm. on Energy and Com. Comm. (June 7, 2007).

195. Letter from Gov. M. Jodi Rell, Conn., to the Hon. Rick Boucher, Chair, Energy and Air Quality Subcomm., H. Comm. on Energy and Com. Comm. and the Hon. Dennis Hastert, Ranking Member, Energy and Air Quality Subcomm., H. Comm. on Energy and Com. Comm. (June 7, 2007), https://congressional-proquest-com.proxygt-law.wrlc.org/congressional/result/congresultpage:pdfevent?rsId=173E3728194&pdf=/app-bin/gis-hearing/4/e/6/d/hrg-2007-hec-0074_0004_from_151_to_200.pdf&uri=/app-gis/hearing/hrg-2007-hec-0074.

196. Letter from the Attorneys General of the Commonwealth of Mass. and the States of Cal., Conn., Del., Iowa, Me., Md., Minn., N. J., N. M., N. Y., Or., R. I., and Vt., and the Corporation Counsel for the City of New York to the Honorable John D. Dingell, Chair, H. Energy and Commerce Comm. and the Honorable Joe Barton, Ranking Member, H. Energy and Commerce Comm. (June 6, 2007).

197. *Id.*

198. *Id.*

199. Letter from S. William Becker, Exec. Dir., Nat'l Ass'n of Clean Air Agencies, to the Hon. Rick Boucher, Chair, Subcomm. on Energy and Air Quality, H. Comm. on Energy and Com. Comm., and the Hon. J. Dennis Hastert, Ranking Member, Subcomm. on Energy and Air Quality, H. Comm. on Energy and Com. Comm. (June 6, 2007), https://congressional-proquest-com.proxygt-law.wrlc.org/congressional/result/congresultpage:pdfevent?rsId=173E3728194&pdf=/app-bin/gis-hearing/4/e/6/d/hrg-2007-hec-0074_0004_from_151_to_200.pdf&uri=/app-gis/hearing/hrg-2007-hec-0074.

in 54 states and territories and more than 165 metropolitan areas across the country.²⁰⁰ The letter explained that to prohibit state GHG emissions standards for motor vehicles as suggested in the June 2007 proposal “would be an inappropriate revocation of states’ rights.”²⁰¹ NACAA also objected to revoking the EPA’s authority to regulate transportation-related GHG emissions.²⁰² NACAA concluded by stating, “NACAA urges that you not only remove the aforementioned provisions from this Discussion Draft, but that you also work to ensure that any energy bill that proceeds through Congress be free of language that would limit state or federal authority to address global warming.”²⁰³

Environmental groups also announced their opposition to the proposal, strongly objecting to the revocation of federal authority and the preemption of state law to address global warming pollution from vehicles.²⁰⁴

Twelve members of the Energy and Commerce Committee formally expressed their opposition to the proposal in a letter to the Chairs of the full committee and subcommittee.²⁰⁵ Noting that the proposal would overturn *Massachusetts v. EPA* and block the efforts of twelve states to address GHG emissions from cars and trucks, the members wrote, “[t]he last thing we should do is attempt to stop important progress being made by the states. The draft’s preemption provision has no place in either this draft or any subsequent global warming legislation the Committee will consider.”²⁰⁶ They strongly opposed the proposal and urged the chairs to abandon the harmful policies that had been proposed.²⁰⁷

In the face of such strong opposition, the legislative proposal did not advance. On June 18, 2007, the Chairs of the Energy and Commerce Committee and its Subcommittee on Energy and Air Quality announced that the committee would consider legislation to address energy “efficiency standards, a smart electricity

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. Letter from Betsy Loyless, National Audobon Society, Robert Dewey, Def. of Wildlife, Erich Pica, Friends of the Earth, John Passacantando, Greenpeace, Tiernan Sittenfeld, League of Conservation Voters, Karen Steuer, National Environmental Trust, Karen Wayland, Nat. Res. Def. Council, Joan Claybrook, Pub. Citizen, Debbie Sease, Sierra Club, Alden Meyer, Union of Concerned Scientists, Anna Aurilio, U.S. PIRG, Linda Lance, The Wilderness Soc’y to U.S. Representatives (June 5, 2007), https://congressional-proquest-com.proxygt-law.wrlc.org/congressional/result/congressresultpage:pdfevent?rsId=173E3728194&pdf=/app-bin/gis-hearing/4/e/6/d/hrg-2007-hec-0074_0004_from_151_to_200.pdf&uri=/app-gis/hearing/hrg-2007-hec-0074.

205. Letter from Reps. Henry A. Waxman, Edward J. Markey, Anna G. Eshoo, Eliot L. Engel, Lois Capps, Thomas H. Allen, Janice D. Schakowsky, Hilda L. Solis, Jay Inslee, Anthony D. Weiner, Tammy Baldwin and Albert R. Wynn to the Hon. John D. Dingell, Chair, H. Energy and Com. Comm. and the Hon. Rick Boucher, Chair, Subcomm. on Energy and Air Quality, H. Comm. on Energy and Com. Comm. (June 7, 2007), https://congressional-proquest-com.proxygt-law.wrlc.org/congressional/result/congressresultpage:pdfevent?rsId=173E3728194&pdf=/app-bin/gis-hearing/4/e/6/d/hrg-2007-hec-0074_0004_from_151_to_200.pdf&uri=/app-gis/hearing/hrg-2007-hec-0074.

206. *Id.*

207. *Id.*

grid, loan guarantees for innovative energy technologies, renewable fuels infrastructure incentives, and advanced battery and plug-in hybrid vehicle promotion.”²⁰⁸ The committee would not take up the “more controversial issues” that had been previously raised as part of the energy bill.²⁰⁹ Accordingly, the legislative proposal was not introduced as a formal bill, nor was it ever marked up in subcommittee or full committee or considered on the floor of either chamber of Congress.

3. Congress Rejected a Proposal to Indirectly Revoke EPA and State Authority

After the proposal to directly revoke EPA and state authority failed, a subsequent legislative proposal, H.R. 2927, could have indirectly undermined *Massachusetts v. EPA*. Introduced on June 28, 2007, this proposal would have neither amended the CAA nor explicitly referenced any CAA authority. However, H.R. 2927 directed that CAFE standards established by the Department of Transportation “shall be expressed in terms of average miles per gallon of fuel and in terms of average grams per mile of carbon dioxide emissions, such that the specified average grams per mile of carbon dioxide emissions is equivalent to the average miles per gallon of fuel specified in the standard for that model year.”²¹⁰ While proponents of the legislation stated that they had no intent to affect EPA or the states’ authorities to regulate GHG emissions from motor vehicles, members of Congress and many stakeholders were concerned that the proposal, if enacted, could potentially resuscitate the claim, previously rejected by courts, that CAFE standards preempt California’s GHG emissions standards for vehicles and interfere with the EPA’s ability to establish such standards.²¹¹

Environmental groups wrote to members of Congress expressing opposition to H.R.2927, stating that the legislation would “interfere with EPA authority under the Clean Air Act to set vehicle pollution standards and the *Massachusetts v. EPA* decision, inviting future litigation of vehicles standards.”²¹² They stated that it would undermine “states’ progress in addressing global warming.”²¹³

208. Memorandum from the Hon. John D. Dingell, Chair, H. Energy and Commerce Comm. and the Hon. Rick Boucher, Chair, Subcomm. on Energy and Air Quality, H. Committee on Energy and Commerce Comm. to Members of the H. Energy and Commerce Comm. (June 18, 2007) <https://perma.cc/D62J-RUJN>.

209. *Id.*

210. H.R. 2927, 110th Cong. (2007).

211. See Dotson Part 1, *supra* note 7, at 11052 (discussing two 2007 federal court decisions rejecting an interpretation of EPCA that would preempt California’s GHG emissions standards for mobile sources).

212. Letter from Karen Steuer, Vice Pres., Gov’t Affairs, Nat’l Env’tl Trust, Dan Lashof, Science Dir., Climate Center, Nat. Res. Def. Council, Dan Becker, Dir., Global Warming Program, Sierra Club, Michelle Robinson, Dir., Clean Vehicles Program, Union of Concerned Scientists, Anna Aurilio, Dir., Washington DC Office, U.S. PIRG to Members of House of Representatives (July 5, 2007) (on file with the author).

213. *Id.*

Rep. Henry A. Waxman, who considered *Massachusetts v. EPA* to be a great victory and carefully monitored the energy bill's development to protect EPA and state authorities, wrote to all the members of the House to explain:

H.R. 2927, the Hill-Terry Corporate Average Fuel Economy (CAFE) bill, threatens to overturn these victories. By directing the Department of Transportation (DOT) to express CAFE requirements as CO₂ limits, the bill reinvigorates the claim that DOT's CAFE standards preempt state and EPA global warming standards for vehicles, which the Supreme Court rejected in *Massachusetts v. EPA*.

The interaction between EPA's authority to regulate air pollution and DOT's authority to establish CAFE standards was a key issue in *Massachusetts v. EPA*. In its decision, the Supreme Court held that DOT's and EPA's "obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency."

H.R.2927 amends the CAFE law to blur the line between fuel economy and greenhouse gas emissions standards, reopening and strengthening the claim rejected by the Supreme Court. It requires DOT's CAFE standards to be expressed both in miles per gallon and "in terms of average grams per mile of carbon dioxide emissions."

This provision would provide opponents of action on global warming with a new argument that Congress had decided to unify fuel economy standards and greenhouse gas emissions standards under DOT.²¹⁴

A group of state attorneys general joined together again and wrote in opposition to the legislation:

We write today to voice our strong opposition to H.R. 2927 which contains troublesome language that may be used to eliminate existing Clean Air Act authority to address global warming, including California's landmark greenhouse gas emissions standards. Our understanding is that H.R. 2927 may be voted on in the coming days as an amendment to the House of Representatives' energy bill.

While providing only modest increases in federal fuel economy standards, the bill includes language that has the potential to disrupt the statutory framework for controlling carbon dioxide emissions that was endorsed by the U.S. Supreme Court in *Massachusetts v. Environmental Protection Agency (EPA)*, 549 U.S. ____, 127 S.Ct. 1438 (2007). As currently drafted, the bill would require the Secretary of Transportation to issue fuel economy standards in terms of both "miles per gallon" and "grams per mile of carbon dioxide emissions." The Department of Transportation has never set emission standards –

214. Letter from Rep. Henry A. Waxman to all Members of the House of Representatives (July 26, 2007) (on file with the author).

its mandate is to promote energy efficiency by setting mileage standards. *See Massachusetts v. EPA*, 127 S. Ct. at 1462 (citing 49 U.S.C. § 6201(5)).

In contrast, EPA's statutory mandate is to prescribe standards applicable to "emissions of any air pollutant from any class or classes of new motor vehicle [s] . . ." 42 U.S.C. § 7521(a)(1); *see also Massachusetts v. EPA*, 127 S. Ct. at 1447. As the Supreme Court recently observed, these two statutory mandates are "wholly independent." *Massachusetts v. EPA*, 127 S.Ct. at 1462. The inclusion of language referring to carbon dioxide *emissions* appears to serve no legitimate statutory purpose.

We are concerned that the language will be used by those challenging the state greenhouse gas emission standards originally adopted by California (the Pavley regulations). Thirteen States have now adopted those standards, and many others are considering adoption. These thirteen States – representing over 40% of the American population – have adopted them because the Clean Air Act's cooperative federalism structure allows them to do so, and their citizens are seeking action on global warming. The current system of allowing two (and only two) sets of motor vehicle emission standards has worked well over the last four decades. Indeed, most of the technological innovations needed to reduce air pollutant emissions have been made because of California's standards.²¹⁵

The *Washington Post* editorialized against the proposal on July 26, 2007, stating that the legislation would undermine California's greenhouse gas tailpipe standards by "getting the Department of Transportation which deals with fuel economy, into the business of regulating carbon emissions, which the Supreme Court ruled in the spring is within the purview of the Environmental Protection Agency."²¹⁶

Because of the strong opposition to H.R. 2927, it was never voted upon in subcommittee, committee, or on the floor of either chamber of Congress.

4. Explicit Protection for EPA and State Authority Included in EISA Legislation

When the Senate passed its omnibus energy bill in July of 2007, included in the legislation was a prominent provision entitled "Relationship to Other Law" that was drafted to ensure that nothing in the legislation relating to automobiles or fuel economy would inadvertently impact EPA's or the states' authority to address greenhouse gases.²¹⁷ The provision stated:

215. Letter from the Attorneys General of the States of Cal., Ariz., Conn., Del., Ill., Iowa, Me., Md., Mass., N. M., N. Y., Or., R. I., and Vt., and the Corp. Counsel for the City of N. Y. to the Hon. Nancy Pelosi, Speaker of the House of Representatives (August 1, 2007) (on file with the Office of Attorney General of Cal.).

216. Editorial, *Leadership Needed; Higher Fuel Economy Standards May Be Doomed Without Nancy Pelosi's Support*, WASH. POST (July 26, 2007), <https://perma.cc/LU5N-KLEV>.

217. S. Amdt. 1502 to H.R. 6, 110th Cong. § 2 (2007) <https://perma.cc/QCX3-QRRR>.

Except to the extent expressly provided in this Act or an amendment made by this Act, nothing in this Act or an amendment made by this Act supersedes, limits the authority provided or responsibility conferred by, or authorizes any violation of any provision of law (including a regulation), including any energy or environmental law or regulation.²¹⁸

The text of this provision remained unchanged as the legislation ping ponged back and forth between the House and Senate and would ultimately become section 3 in the enacted law.²¹⁹ With this provision, Congress provided that the new law did not supersede or limit the authority of any other provision of law unless expressly stated. EISA does not contain language that expressly supersedes or limits either section 202 or section 209 of the Clean Air Act.

5. Congress Rejected Behind-the-Scenes Efforts to Weaken or Constrain EPA and State Authorities

In addition to the explicit legislative efforts described above that could have directly or indirectly revoked the EPA's authority to regulate greenhouse gas emissions under section 202 of the Clean Air Act and California's authority to do so pursuant to section 209(b) of the Clean Air Act, there were also multiple behind-the-scenes efforts to weaken or constrain EPA and state authorities during congressional consideration of EISA. An informal, bipartisan, House-Senate negotiation began after the Senate and House each passed their own omnibus energy bills in the summer of 2007.²²⁰ During this informal process, opponents of EPA and state authorities to regulate greenhouse gases made at least two efforts to get congressional negotiators to agree to legislative language that would weaken or constrain EPA or the states.

First, in late 2007, negotiators rejected a proposal that was supported by the automobile industry, some members of Congress and the Bush Administration.²²¹ This proposal would have made three major changes to current law. First, it would have changed the decision-making criteria of Clean Air Act Section 202 (a) to mirror those of EPCA §32902.²²² Second, it would have required the EPA Administrator to coordinate intensively with NHTSA when setting greenhouse gas emission standards.²²³ Third, it would have limited states to regulating the

218. *Id.*

219. Energy Independence and Security Act of 2007, 110 P.L. 140, § 3, 121 Stat. 1492, 1498 (2007).

220. CONG. RSCH. SERV., RL34294, ENERGY INDEPENDENCE AND SECURITY ACT OF 2007: A SUMMARY OF MAJOR PROVISIONS (2008).

221. See Letter from Sens. Tom Carper, Dianne Feinstein, and Edward J. Markey to Sec'y Elaine L. Chao and Acting Administrator Andrew Wheeler (October 25, 2018) (on file with the Office of Senator Tom Carper).

222. Attachment entitled "Draft Amendment" (dated November 20, 2007) to Letter from Sens. Tom Carper, Dianne Feinstein, and Edward J. Markey to Sec'y Elaine L. Chao and Acting Administrator Andrew Wheeler (October 25, 2018), <https://perma.cc/5HQW-T6HF>.

223. *Id.*

greenhouse gas emissions of vehicles acquired for a state's own use.²²⁴ This proposal was not included in EISA.

Additionally, in December 2007, Sen. Carl Levin attempted one last "11th hour gambit" to add language to ensure that any EPA emission standard was "fully consistent" with NHTSA's CAFE standards.²²⁵ This proposal was similarly rejected. The press reported at the time that "Levin's unsuccessful push came after a week in which the White House has threatened to veto the energy bill in part over the jurisdictional issue, and after several industry groups likewise pushed lawmakers to alter the energy bill on that issue."²²⁶ Importantly, this unsuccessful legislative effort came just days after a federal court had ruled in *Central Valley Chrysler-Jeep* that California's greenhouse gas emissions standards were not preempted by EPCA if those standards were granted a waiver of preemption under the Clean Air Act.²²⁷ The push also occurred less than one hundred days after a federal court in Vermont had also rejected the preemption argument.²²⁸ This timing indicates that opponents of California's standards saw the courts rejecting their arguments and sought a legislative change to preempt the state standards.

6. Congress Established a New Federal Fleet Requirement that Adopted California's Greenhouse Gas Tailpipe Standard as a Baseline for Federal Fleet Purchases

Congress explicitly embraced California's greenhouse gas emissions standards for cars and trucks in a separate provision of EISA. Congress established a new federal fleet requirement in section 141 of EISA.²²⁹ Section 141 amended the Energy Policy Act of 1992 to prohibit federal agencies from acquiring light duty motor vehicles or medium duty passenger vehicles that are not "low greenhouse gas emitting vehicles."²³⁰ Additionally, section 141 charges EPA with identifying "low greenhouse gas emitting vehicles," taking into account "the most stringent standards for vehicle greenhouse gas emissions applicable to and enforceable against motor vehicle manufacturers for vehicles sold anywhere in the United States."²³¹ A low greenhouse gas emitting vehicle must emit less greenhouse gases than such standards allow for the manufacturer's fleet average.²³² Because

224. *Id.*

225. Ben Geman and Alex Kaplun, *Senate Energy Showdown On Tap This Morning*, E&E DAILY (Dec. 13, 2007), <https://perma.cc/XJ4Z-2EAH>.

226. *Id.*

227. *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. Dec. 11, 2007).

228. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. Sept. 12, 2007).

229. Energy Independence and Security Act of 2007, 110 P.L. 140, § 141, 121 Stat. 1492, 1517 (2007).

230. *Id.*

231. *Id.*

232. *Id.*

California's greenhouse gas emissions standards are the only alternative standards to the federal standards set by EPA, this is a clear reference to California's standards. Furthermore, the legislative history of the provision unequivocally supports this interpretation.

Section 141 originated in the House Committee on Oversight and Government Reform as part of the "Carbon-Neutral Government Act."²³³ Rep. Henry A. Waxman, Chair of the Committee, introduced this legislation on June 7, 2007.²³⁴ The Committee contemporaneously released a fact sheet summarizing the legislation that explained, "Nearly two thirds of all energy consumed by the federal government in 2005 was for fuel used for mobility."²³⁵ To help address the emissions associated with mobility, the legislation required federal agencies to "purchase vehicles that meet the California motor vehicle standards for greenhouse gas emissions. . . ."²³⁶

The Committee held a hearing on the legislation on May 17, 2007. In his opening statement at the hearing, Rep. Waxman explained that the legislation would require federal vehicles to comply with California's greenhouse gas standards.²³⁷ The Committee received testimony from Emily Figdor of the U.S. Public Interest Research Group. She explained the policy rationale for requiring federal fleets to comply with California's greenhouse gas standards.²³⁸ Her testimony stated:

Vehicle Fleet Requirement

Among the most significant steps in the Carbon-Neutral Government Act is the adoption of global warming emission standards for federal vehicle fleets.
...

The federal government is a large purchaser of vehicles, and its vehicle purchases have the potential to influence the broader market. There were more than 630,000 vehicles in the federal vehicle fleet in 2006. Nearly 30 percent of the almost 63,000 vehicles acquired by the government in 2006 were dedicated alternative fuel vehicles – the vast majority E85 vehicles. The need to supply

233. Sec. 201, H.R. 2635, 110th Cong. (2007), <https://www.congress.gov/bill/110th-congress/house-bill/2635/text?q=%7B%22search%22%3A%5B%22h.r.2635+110th+Congress%22%5D%7D&r=4&s=8>.

234. *Id.*

235. Bill Summary, Carbon-Neutral Government Act, Rep. Henry A. Waxman, Chairman, H. Comm. on Oversight and Gov't Reform (June 2007) <https://web.archive.org/web/20070609101438/http://oversight.house.gov/documents/20070608171815.pdf>.

236. *Id.*

237. *The Carbon-Neutral Government Act of 2007: Hearing on H.R. 2635 Before the H. Subcomm. on Gov't Mgmt., Org., and Procurement, H. Comm. on Oversight and Gov't Reform*, 110th Cong. 1-2 (May 17, 2007) (statement of Rep. Henry A. Waxman, Chairman, H. Comm. on Oversight and Gov't Reform), <https://perma.cc/YA2N-5TG7>.

238. *The Carbon-Neutral Government Act of 2007: Hearing on H.R. 2635 Before the H. Subcomm. on Gov't Mgmt., Org., and Procurement, H. Comm. on Oversight and Gov't Reform*, 110th Cong. (May 17, 2007) (statement of Emily Figdor, MPH, Fed. Global Warming Program Director, U.S. Public Interest Research Group), <https://perma.cc/J92L-P5NS>.

alternative fuel vehicles to federal agencies and state government purchasers – established in the Energy Policy Act of 1992 – has helped spur the development and marketing of vehicles capable of running on E85.

The Carbon-Neutral Government Act would require federal agencies to purchase vehicles for federal fleets that meet the California global warming emissions standards for light- and medium- duty vehicles. The California standards require a 30 percent reduction in global warming pollution by model year 2016. Because the standards have already been adopted by 12 states, comprising one-third of the nation's vehicle market, manufacturers will be producing a variety of vehicles with lower global warming emissions. Moreover, automakers have access to many off-the-shelf technologies that . . . can reduce vehicle global warming emissions and be used to comply with the standards.

By putting the purchasing muscle of the federal government behind the drive for cleaner cars, the Carbon-Neutral Government Act would achieve significant reductions in global warming emissions from vehicles. In addition, the federal fleet standards send a clear message to automakers that a significant market will exist for energy-efficient and low-global warming pollution vehicles in the United States, when and if manufacturers bring those vehicles to the market. Finally, investing in low-emission vehicles likely will reduce oil consumption by federal fleets – enhancing America's energy security and protecting the interests of taxpayers.²³⁹

The Oversight Committee considered the legislation on June 12, 2007 and voted to approve the legislation on a voice vote.²⁴⁰ In his opening statement at the markup, Chairman Waxman reiterated, “The Carbon-Neutral Government Act requires government vehicles to meet the California standards for motor vehicle greenhouse gas emissions.”²⁴¹

Further, the Committee report accompanying the Carbon-Neutral Government Act explained:

EPA must issue guidance identifying the makes and model numbers of low greenhouse gas emitting vehicles. In identifying such vehicles, the Administrator shall take into account the most stringent standards for vehicle greenhouse gas emissions applicable to and enforceable against motor vehicle manufacturers for vehicles sold anywhere in the United States. The Administrator shall not identify any vehicle as a low greenhouse gas emitting vehicle if the vehicle emits greenhouse gases at a higher rate than such

239. *Id.*

240. H.R. Rep. No. 110-297, at 22 (2007).

241. *The Carbon-Neutral Government Act of 2007: Comm. Markup for H.R. 2635 Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. (June 12, 2007) (Opening Statement of Rep. Henry A. Waxman, Chairman, H. Comm. on Oversight and Gov't Reform), <https://perma.cc/B8Y2-T34F>.

standards allow for a manufacturer's overall fleet average emissions for that class of vehicle.

*Currently, the only applicable greenhouse gas emissions standards are those adopted by California and other states. Those standards will be enforceable if and when EPA grants the waiver requested by the state of California under the Clean Air Act.*²⁴²

The Committee record clearly documents that the legislation was seeking to leverage California's tailpipe standards to reduce emissions from the federal fleet, and this was reported in the press at the time.²⁴³ California had requested that the EPA waive federal preemption for the California GHG emission standards in 2005—a year and a half earlier.²⁴⁴ The Committee operated under the assumption that the EPA would indeed grant the waiver given that the agency had a historical practice of granting waivers on a routine basis.²⁴⁵

This fleet provision of the Carbon-Neutral Government Act was subsequently incorporated into EISA without controversy.²⁴⁶ This provision demonstrates Congress's understanding that California could in fact regulate GHG emissions from mobile sources. Congress anticipated that the California standards could be more stringent than the EPA's standards and hoped to realize greater emissions reductions by benchmarking the federal fleet to those standards.²⁴⁷

7. Floor Debate Reflects Legislative Intent to Protect EPA and State Authority

As the legislative process on EISA drew to a close, members explained during floor debate that the legislation protected the EPA's authority to regulate

242. H.R. Rep. No. 110-297, at 17 (emphasis added).

243. Lauren Morello, *House Panel Approves Bill to Cut Federal Emissions*, E&E NEWS PM (June 12, 2007), <https://perma.cc/EGB2-YFZU> (reporting that the bill “would also require the government to adopt California tailpipe emissions standards for light- and medium-duty passenger vehicles”).

244. Letter from Catherine Witherspoon, Exec. Dir., CARB, to Stephen L. Johnson, Adm'r, U.S. EPA, Re: Regulations to Control Greenhouse Gas Emissions from Motor Vehicles; Request for Waiver of Preemption Under Clean Air Act Section 209(b) (Dec. 21, 2005) (on file with the author).

245. See Dotson, Part 1, *supra* note 7, at 11040.

246. Ben Geman, *Renewables, Taxes the Main Features as Energy Bill Hits House Floor*, E&E DAILY (Aug. 3, 2007), <https://perma.cc/B5WU-NHZ2>.

247. The EPA did not issue guidance to implement section 141 until February 2010. U.S. ENV'T PROT. AGENCY, EPA-420-B-10-008, GUIDANCE FOR IMPLEMENTING SECTION 141 OF THE ENERGY INDEPENDENCE AND SECURITY ACT OF 2007: FEDERAL VEHICLE FLEETS AND LOW GREENHOUSE GAS-EMITTING VEHICLES (2010). By the time this guidance had been issued, the Obama Administration had completed its harmonized rulemaking resulting in a single compliance approach for standards issued by the EPA, the NHTSA and the state of California. Therefore, there were not differing state standards to compare with federal standards. The EPA directed federal agencies to use the EPA's Green Vehicle Guide to determine which vehicles were low greenhouse gas-emitting vehicles. The EPA explained with regard to that vehicle guide that the “EPA and the California Air Resources Board are working together so that that [sic] this rating system continues to be harmonized and effective nationwide.” *EPA Green Vehicle Guide, About the Ratings*, <https://perma.cc/CWF6-PM35?type=image>.

greenhouse gas emissions under section 202 of the Clean Air Act and states' authority to do the same pursuant to sections 209 and 177 of the Clean Air Act.²⁴⁸

On December 6, 2007, the House passed the near final version of H.R. 6 (technically a House amendment to the Senate amendment of H.R. 6).²⁴⁹ During floor consideration of this amendment, Rep. Waxman briefly explained the strengths of the bill.²⁵⁰ As a member who had bird-dogged the issue of authority to establish greenhouse gas emissions standards for cars and trucks throughout consideration of the bill, he praised the final outcome:

With this bill, we will turn from the past to the future. We have begun the process of adopting energy policies that recognize the science of global warming and the threat to our Nation's energy security.

This legislation will finally give Americans the fuel-efficient automobiles they want, saving families \$700 to \$1,000 a year. That is money we won't be sending to dangerous regimes in the Middle East. . . .

And there are some things this legislation will not do. It won't diminish the EPA's authority to address global warming, which the Supreme Court has recognized. It won't seize authority from the States to act on global warming.²⁵¹

However, the Bush White House objected to this approach. The White House issued a Statement of Administration Policy (SAP) highlighting seven areas of concern with the legislation and stating that the President's advisors would recommend that he veto the House-passed legislation.²⁵² Specifically, the SAP identified the EPA's authority to regulate greenhouse gas emissions as an area of concern:

H.R. 6 leaves ambiguous the role of the Environmental Protection Agency (EPA) in regulating vehicle fuel economy, and as a result would likely create substantial regulatory uncertainty, confusion, and duplication of efforts. The bill could also delay effective implementation of new fuel economy requirements due to inevitable litigation. The double regulation that would result from this failure to clearly identify the relative roles of EPA and DOT in national fuel economy regulations could greatly undermine our shared objective of rapidly reducing gasoline consumption. The bill needs to clarify one agency as the sole entity, after consultation with other affected agencies, to be responsible for a single national regulatory standard for both fuel economy and tailpipe greenhouse gas emissions from vehicles.²⁵³

248. See Waxman Statement, *supra* note 183.

249. See FRED SISSINE, CONG. RSCH. SERV., RL34294, ENERGY INDEPENDENCE AND SECURITY ACT OF 2007: A SUMMARY OF MAJOR PROVISIONS 4 (2007).

250. See Waxman Statement, *supra* note 183.

251. *Id.*

252. Exec. Office of the President, Office of Mgmt. and Budget, Statement of Administration Policy, H.R. 6 – Energy Independence and Security Act of 2007 (Dec. 6, 2007), <https://perma.cc/T8ZW-6Q5D>.

253. *Id.*

President Bush's Press Secretary called upon the Senate to "take a more cooperative approach."²⁵⁴

This stepped-up engagement by the White House came at a critical time in which it was becoming clear that the courts were not receptive to the EPCA preemption arguments. On September 12, 2007, a federal court in Vermont ruled in *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie* that once state greenhouse gas emissions standards were approved by the EPA, those state standards were not preempted by EPCA.²⁵⁵

The Senate did, in fact, respond to some of the President's concerns, but it did not amend the language governing tailpipe standards or the provision governing "Relationship to Other Law."²⁵⁶ Instead, the Senate removed other provisions identified in the SAP that were unrelated to the EPA's authority over tailpipe greenhouse gas emissions, such as tax incentives for energy efficiency and renewable energy.

As the Senate took final action to approve EISA, Sen. Levin, whose amendment to require EPA standards be "fully consistent" with the NHTSA's standards had been rejected, acknowledged that the EPA and California retained their authorities.²⁵⁷ He stated that the EPA "has authority under the Clean Air Act to regulate greenhouse gas emissions from vehicles and to delegate that authority, as the agency deems appropriate, to the State of California. This authority was recently upheld by the U.S. Supreme Court, and it is not our purpose today to attempt to change that authority or to undercut the decision of the Supreme Court."²⁵⁸

254. Dana Perino, White House Press Secretary, Statement by the Press Secretary on Energy Security (Dec. 6, 2007), <https://perma.cc/53ZC-URLF>.

255. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 343–44 (D. Vt. 2007).

256. See FRED SISSINE, CONG. RSCH. SERV., RL34294, ENERGY INDEPENDENCE AND SECURITY ACT OF 2007: A SUMMARY OF MAJOR PROVISIONS 4 (2007).

257. See 153 CONG. REC. 34177 (Dec. 13, 2007) (statement of Sen. Carl Levin).

258. *Id.* Sen. Levin entered into a colloquy with Sen. Daniel Inouye, then-Chair of the Senate Commerce Committee, and Sen. Dianne Feinstein, the author of the Senate legislation to improve fuel economy. In this colloquy, the Senators briefly discussed fuel economy standards. Both Sens. Inouye and Feinstein agreed that "all Federal regulations in this area be consistent." Although Sen. Levin stated that he hoped to obtain "certainty" about future EPA regulations for automobile manufacturers, Sen. Inouye and Sen. Feinstein explained later that day what they meant by consistency. 153 CONG. REC. 34177-8 (Dec. 13, 2007). Sen. Inouye stated, "The DOT and the EPA have separate missions that should be executed fully and responsibly." *Id.* Sen. Feinstein stated:

The legislation increasing the fuel economy standards of vehicles by 10 miles per gallon over 10 years does not impact the authority to regulate tailpipe emissions of the EPA, California, or other States, under the Clean Air Act.

The intent was to give NHTSA the ability to regulate fuel efficiency standards of vehicles and increase the fleetwide average to at least 35 miles per gallon by 2020.

There was no intent in any way, shape, or form to negatively affect, or otherwise restrain, California or any other State's existing or future tailpipe emissions laws or any future EPA authority on tailpipe emissions.

Rep. Markey provided the most detailed articulation of the adopted provisions during the final debate in the House:

As the principal House proponent of the fuel economy Title in this legislation, I also wish to briefly discuss several of its provisions in order to more fully explain the statutory language and to provide context for what we are accomplishing with this historic energy bill.

Section 3 of the bill states: “Except to the extent expressly provided in this Act, or in an amendment made by this Act, nothing in this Act or an amendment made by this act supersedes, limits the authority or responsibility conferred by, or authorizes any violation of any provision of law (including a regulation), including any energy or environmental law or regulation.”

The laws and regulations referred to in section 3 include, but are not limited to, the Clean Air Act and any regulations promulgated under Clean Air Act authority. It is the intent of Congress to fully preserve existing federal and State authority under the Clean Air Act.

The two issues are separate and distinct.

As the Supreme Court correctly observed in *Massachusetts v. EPA*, the fact “that DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public’s health and welfare, a statutory obligation wholly independent of DOT’s mandate to promote energy efficiency. The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.”

I agree with the Supreme Court’s view of consistency. There is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.

The U.S. District Court for the Eastern District of California in *Central Valley Chrysler-Jeep v. Goldstone* has reiterated this point in finding that if approved by EPA, California’s standards are not preempted by the Energy Policy Conservation Act.

Title I of the Energy Security and Independence Act of 2007, H.R. 6, provides clear direction to the Department of Transportation, in consultation with the Department of Energy and the Environmental Protection Agency, to raise fuel economy standards.

By taking this action, Congress is continuing DOT’s existing authority to set vehicle fuel economy standards. Importantly, the separate authority and responsibility of the U.S. Environmental Protection Agency to regulate vehicle greenhouse gas emissions under the Clean Air Act is in no manner affected by this legislation as plainly provided for in Section 3 of the bill addressing the relationship of H.R. 6 to other laws.

I fought for Section 3. I have resisted all efforts to add legislative language requiring “harmonization” of these EPA and NHTSA standards. This language could have required that EPA standards adopted under section 202 of the Clean Air Act reduce only the air pollution emissions that would already result from NHTSA fuel economy standards, effectively making the NHTSA fuel economy standards a national ceiling for the reduction of pollution. Our legislation does not establish a NHTSA ceiling. It does not mention the Clean Air Act, so we certainly do not intend to strip EPA of its wholly separate mandate to protect the public health and welfare from air pollution.

To be clear, Federal standards can avoid inconsistency according to the Supreme Court, while still fulfilling their separate mandates. *Id.*

In addition, Congress does not intend, by including provisions in Title I of the bill that reform and alter the authority of the Secretary of Transportation to increase fuel economy standards for passenger automobiles, non-passenger automobiles, work trucks, and medium and heavy duty trucks, to in any way supersede or limit the authority and/or responsibility conferred by sections 177, 202, and 209 of the Clean Air Act. For section 202 of the Clean Air Act, this includes but is not limited to the authority and responsibility affirmed by the Supreme Court's April 2, 2007 decision in *Massachusetts v. EPA*, No. 05-1120. For sections 177 and 209 of the Clean Air Act, this includes but is not limited to the authority affirmed by the September 12, 2007 decision of the U.S. District Court for the District of Vermont in *Green Mountain Chrysler Dodge Jeep et al. v. Crombie et al.*, No. 2:05-cv-302, and the December 11, 2007 decision of the United States District Court for the Eastern District of California in *Central Valley Chrysler-Jeep, Inc. et al. v. Goldstone, et al.*, No. 1:04-cv-06663-AWIGSA.²⁵⁹

On December 19, 2007, President George W. Bush signed EISA into law.²⁶⁰ The President touted the attribute-based standards that the NHTSA would now use to set CAFE standards, but he did not assert that either state or federal authorities under the Clean Air Act were affected.²⁶¹

F. CONGRESS HAS REPEATEDLY DEMONSTRATED ITS UNDERSTANDING THAT EPA AND STATE AUTHORITY WERE PROTECTED BY EISA

The ink was barely dry on EISA before Congress's understanding of the law's effect on California's authority was tested. The same day that President Bush signed EISA into law, EPA Administrator Stephen Johnson announced that he had decided to deny California's waiver request.²⁶²

Administrator Johnson told reporters that the agency rejected California's waiver request in large part because EISA strengthened fuel efficiency standards, eliminating the need for California and other states to adopt greenhouse gas standards.²⁶³ In his formal communication with the California Governor, Johnson did not state that EISA preempted California state law, but he did indicate his support of EISA as an alternative to California's regulations, stating:

Congress has recognized the need for very aggressive yet technically feasible national standards to address greenhouse gases and energy security by passing the Energy Independence and Security Act. Just today the President signed

259. 153 CONG. REC. 35927 (Dec. 18, 2007) (statement of Rep. Edward J. Markey).

260. President Bush Signs H.R. 6, the Energy Independence and Security Act of 2007 (Dec. 19, 2007), <https://perma.cc/9FLX-32N2>.

261. *Id.*

262. Letter from Stephen L. Johnson, Adm'r, U.S. EPA, to Arnold Schwarzenegger, Governor of California (Dec. 19, 2007).

263. Alex Kaplun, *EPA Rejects Calif. Effort to Regulate GHG; Hill, Court Fights Ahead*, E&E DAILY (Dec. 20, 2007), <https://perma.cc/9JSC-PLL4>.

these national standards into law, providing environmental benefits and economic certainty for Californians and all Americans. I strongly support this national approach to this national challenge which establishes an aggressive standard of 35 miles per gallon for all 50 states, as opposed to 33.8 miles per gallon in California and a patchwork of other states.²⁶⁴

Speaker Pelosi vigorously disagreed with the Administrator's rationale for the decision. She wrote to Administrator Johnson:

I find implausible your inference that the passage this week of the "Energy Independence and Security Act" eliminated the need for the waiver requested by California. Surely you and others in the Bush Administration were aware that the Congress rejected requests from the Administration to waive the Environmental Protection Agency's longstanding authority to regulate emissions and to grant states waivers under the Clean Air Act. Citing the passage of our new law as a justification for denying California's request defies the legislative history as well as the explicit language of the "Energy Independence and Security Act."²⁶⁵

Professor Lisa Heinzerling of Georgetown Law Center testified before Congress in 2008 that the "Relationship to Other Law" language was effective at preserving the regulatory authority described by *Massachusetts*, stating:

EISA does not in any way change EPA's obligations on remand from *Massachusetts v. EPA*. EISA affects neither EPA's legal obligations with respect to determining whether greenhouse gases may reasonably be anticipated to endanger public health or welfare or the regulatory obligations that flow from such a determination.²⁶⁶

This understanding was shared by many in Congress and in the states and became abundantly clear with the reaction to NHTSA's Earth Day 2008 proposed rule on fuel economy standards.²⁶⁷ The proposal included language to preempt California's greenhouse gas standards.²⁶⁸

The understanding that EISA had protected state authority to regulate greenhouse gases was so pervasive that the day after NHTSA proposed to preempt California, the governors of 12 states, including three Republican governors, wrote to the President to express their disappointment in the proposal and to urge

264. Letter from Stephen L. Johnson, Adm'r, U.S. EPA, to Arnold Schwarzenegger, Governor of California (Dec. 19, 2007).

265. Letter from Nancy Pelosi, Speaker of the House, to Stephen L. Johnson, Adm'r, U.S. EPA (Dec. 21, 2007).

266. *Massachusetts v. U.S. EPA Part II: Implications of the Supreme Court Decision Before the H. Select Comm. on Energy Indep. and Glob. Warming*, 110th Cong. 5 (2008) (statement of Lisa Heinzerling, Professor, Geo. Univ. L. Ctr.).

267. Average Fuel Economy Standards, Passenger Cars and Light Trucks; Model Years 2011-2015, 73 Fed. Reg. 24352 (proposed May 2, 2008).

268. *Id.* at 24478-79.

the President to reconsider the rulemaking.²⁶⁹ The governors stated that the proposal was an “end run around 40 years of precedent” and, in an apparent reference to EISA, noted that Congress had “rejected NHTSA’s claim to such authority” to preempt states from regulating greenhouse gases.²⁷⁰ The governors also wrote to congressional leaders, describing the NHTSA proposal as “a cynical attempt by the U.S. Department of Transportation (DOT) to unilaterally rewrite the Clean Air Act and claim authority over greenhouse gas emissions” and “a direct assault on the authority of the United States Congress and the states.”²⁷¹

The EPA ultimately reversed its position and, on July 8, 2009, issued a decision granting California a waiver of preemption.²⁷² Then, in May 2010, the EPA and NHTSA promulgated greenhouse gas emissions standards and fuel economy standards for cars and trucks for the model years 2012-2016.²⁷³ Instead of preempting California, these standards were the result of deep collaboration with California, such that standards issued by the EPA, NHTSA, and California were harmonized. President Obama immediately directed the EPA and NHTSA to again work with the state of California and undertake a process to develop standards for 2017-2025 that would again be “harmonized” with state standards.²⁷⁴

Congress also understood that EPCA, as amended by EISA, did not revoke the EPA’s authority to regulate greenhouse gas emissions under section 202 of the Clean Air Act; nor did it interfere with the authority of California to establish greenhouse gas standards for light-duty cars and trucks pursuant to section 209(b) of the Clean Air Act. This has been demonstrated by the legislation Congress has chosen to consider since the enactment of EISA. There are numerous examples of legislation introduced in Congress to overturn California’s waiver of preemption. Some of these bills received no legislative action and may therefore be given little weight as to Congress’s understanding of the law. For instance, S. 228 in the 112th Congress sought to explicitly overturn the California waiver as a package

269. Letter from Gov. Arnold Schwarzenegger (Cal.), Gov. Janet Napolitano (Ariz.), Gov. M. Jodi Rell (Conn.), Gov. Martin O’Malley (Md.), Gov. Deval Patrick (Mass.), Gov. Jon S. Corzine (N.J.), Gov. Bill Richardson (N.M.), Gov. David A. Paterson (N.Y.), Gov. Theodore R. Kulongoski (Or.), Gov. Edward G. Rendell (Pa.), Gov. James H. Douglas (Vt.), and Gov. Christine O. Gregoire (Wash.) to President George W. Bush (Apr. 23, 2008).

270. *Id.*

271. Letter from Gov. Arnold Schwarzenegger (Cal.), Gov. Janet Napolitano (Ariz.), Gov. M. Jodi Rell (Conn.), Gov. Martin O’Malley (Md.), Gov. Deval Patrick (Mass.), Gov. Jon S. Corzine (N.J.), Gov. Bill Richardson (N.M.), Gov. David A. Paterson (N.Y.), Gov. Theodore R. Kulongoski (Or.), Gov. Edward G. Rendell (Pa.), Gov. James H. Douglas (Vt.), and Gov. Christine O. Gregoire (Wash.) to Sen. Harry Reid, Majority Leader, Sen. Mitch McConnell, Minority Leader, Rep. Nancy Pelosi, Speaker of the House, and Rep. John A. Boehner, Minority Leader (Apr. 23, 2008).

272. Decision Granting a Waiver of Clean Air Act Preemption, 74 Fed. Reg. 32,744, 32,783 (July 8, 2009).

273. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25324 (May 7, 2010).

274. President Barack Obama, Memorandum of May 21, 2010, Improving Energy Security, American Competitiveness and Job Creation, and Environmental Protection Through a Transformation of Our Nation’s Fleet of Cars And Trucks (May 21, 2010), <https://perma.cc/VUT3-Z2A5>.

of deregulatory provisions, but no hearing or markup was ever held on the proposal.²⁷⁵ However, some bills seeking to overturn the EPA and states' authorities were debated and voted upon by one or both chambers of Congress. This section discusses such bills.

1. The 2010 Resolution of Disapproval Attempted to Undermine EPA and State Authority

In January 2010, Sen. Lisa Murkowski introduced a resolution of disapproval, pursuant to the Congressional Review Act, relating to the EPA's endangerment finding and the cause or contribute findings for greenhouse gases under section 202(a) of the Clean Air Act.²⁷⁶ These findings are a prerequisite for issuing emissions standards for cars and trucks under section 202 of the Clean Air Act.²⁷⁷ In June 2010, Sen. Murkowski moved to proceed to consideration of the resolution on the Senate floor.²⁷⁸ In arguing for the Senate to pass the resolution, she explained her view that EPA regulations would be expensive, inefficient, and better suited for a congressional response.²⁷⁹ She argued against the EPA's authority to set emissions standards for greenhouse gases and explained that disapproving the EPA's endangerment finding and cause or contribute findings would also prevent states from regulating.²⁸⁰ Sen. Murkowski said:

[W]e now have two national standards set by two Federal agencies driven by California's standards. . . . [I]t in no way helps us to have, again, two national standards set by two Federal agencies. The best way to avoid a messy patchwork would be to pass our disapproval resolution, revoke California's waiver, and allow one Federal agency to set one standard that works for all 50 States.²⁸¹

If this motion had passed both chambers of Congress and had been signed by the President, the EPA's findings would have been overturned. This would have removed the legal predicate for EPA's greenhouse gas emissions standards and undermined the basis for granting California a waiver for its emissions standards. However, the resolution was defeated in a procedural vote when the motion to proceed to vote on the resolution of disapproval was defeated on a vote of forty-seven yeas to fifty-three nays.²⁸² Therefore, Congress did not disapprove of the key findings for EPA to regulate greenhouse gas emissions from cars and trucks. This event demonstrates that three years after passage of EISA, it was understood

275. S. 228, 112th Cong. § 4(a)(4) (2011).

276. S.J. Res. 26, 111th Cong. 111th Cong. (2010).

277. *Id.*

278. 156 CONG. REC. 10387 (June 10, 2010) (statement of Sen. Lisa Murkowski).

279. *Id.*

280. *Id.*

281. *Id.*

282. 156 CONG. REC. 10436 (June 10, 2010) (Roll vote no. 184: On the Motion to Proceed to S.J. Res. 26).

in the Senate that legislation would be necessary to remove EPA's or California's authority to regulate greenhouse gas emissions. There is no evidence that any Senator or anyone else suggested that EPCA had preempted state authority or that EISA had revoked these authorities.

2. The Energy Tax Prevention Act of 2011 Sought to Repeal EPA and State Authority

When control of the House of Representatives changed hands after the 2010 elections, the new Republican majority repeatedly attempted to prevent the EPA from abiding by the *Massachusetts v. EPA* ruling and further regulating greenhouse gas emissions. As part of this effort, the House considered legislation to repeal California's authority to adopt GHG emissions standards for mobile sources.

In 2011, Congressional Republicans advanced H.R. 910, the "Energy Tax Prevention Act," to overturn *Massachusetts v. EPA* and thoroughly excise authority to address greenhouse gases from the Clean Air Act.²⁸³ The legislation recognized that both EPA and the states had adopted greenhouse gas standards for cars and trucks.²⁸⁴ If enacted, the Energy Tax Prevention Act would have terminated both federal and state authority to establish tailpipe standards for greenhouse gases after vehicle model year 2016. The legislation would have created a new section 330 of the Clean Air Act to establish a sweeping prohibition on using the Clean Air Act to address climate change.²⁸⁵ The proposed section 330(b)(1)(A) stated, "The Administrator may not, under this Act, promulgate any regulation concerning, take action relating to, or take into consideration the emission of a greenhouse gas to address climate change."

The majority in Congress understood that this was a significant change in the law and included a provision to provide a transition from a world in which EPA was authorized to regulate greenhouse gas emissions from cars and trucks to a world in which the agency was prohibited from doing so. The proposed section 330(b)(2)(A) prevents "further revision" of the 2010 greenhouse gas tailpipe standards, which applied to vehicle model years 2012 to 2016.²⁸⁶ Thus, if the legislation had been enacted, there would have been no federal greenhouse gas tailpipe standards for cars and trucks after model year 2016.

283. The legislation had a misleading name as it contained no tax provisions and "would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues." H.R. Rep. No. 112-50, 29 (2011-2012), <https://www.congress.gov/congressional-report/112th-congress/house-report/50>.

284. *Id.*

285. *Id.*

286. *Id.*

The Energy Tax Prevention Act, in section 3, also included an amendment to section 209 of the Clean Air Act.²⁸⁷ This amendment would have added a new paragraph to section 209 to prohibit EPA from granting a waiver of preemption for state greenhouse gas emissions standards for cars and trucks.²⁸⁸ The proposed paragraph provided as follows:

Section 209(b) of the Clean Air Act (42 U.S.C. 7543) is amended by adding at the end the following:

“(4) With respect to standards for emissions of greenhouse gases (as defined in section 330) for model year 2017 or any subsequent model year new motor vehicles and new motor vehicle engines—

“(A) the Administrator may not waive application of subsection (a);

and

“(B) no waiver granted prior to the date of enactment of this paragraph may be construed to waive the application of subsection (a).”²⁸⁹

This proposal would not have been necessary if California had been preempted by EPCA, as amended by EISA, from setting its own greenhouse gas emission standards with a Section 209 waiver from EPA.

The House Committee report for the Energy Tax Prevention Act revealingly explains that the proposed legislation would allow the greenhouse gas emissions standards agreed to by EPA, NHTSA, and the State of California in 2009 to remain in effect.²⁹⁰ That constituted a clear acknowledgment—from members who were not supporters of greenhouse gas regulation either by EPA or states—that existing law allowed both EPA and states to regulate vehicular greenhouse gas emissions. The House bill would have left already-adopted EPA and California regulations in place while restricting the authority of EPA to grant California a waiver to regulate GHGs from future model year vehicles.

Rather than arguing that EPA lacked statutory authority to establish greenhouse gas emissions standards, the Committee report stated that EPA was exercising its authority in a manner that the majority of the Committee believed to be

287. *Id.* at Sec. 3.

288. *Id.*

289. Sec. 3, H.R. 910, 112th Cong. (2011), <https://www.congress.gov/bill/110th-congress/house-bill/6/text>; Sec. 3, S. 482, 112th Cong. (2011), <https://www.congress.gov/bill/112th-congress/senate-bill/482/text?q=%7B%22search%22%3A%5B%22s.482+112th+Congress%22%5D%7D&r=5&s=8>.

290. H.R. Rep. No. 112-50, at 8 (2011–2012), <https://www.congress.gov/congressional-report/112th-congress/house-report/50>.

unwise as a matter of policy.²⁹¹ The report explains that the Supreme Court in *Massachusetts v. EPA* “did not mandate that the EPA make an endangerment finding” and thus begin to regulate greenhouse gas emissions. Therefore, the report states Congress would be “remiss if it ignored the deleterious impact of EPA’s regulatory agenda.”²⁹² The Committee’s majority did not want EPA to use the Clean Air Act to address global warming, but it did not assert that such action was preempted by EPCA or EISA or make a claim that EPA and California lacked authority to regulate greenhouse gas emissions. To the contrary, even members of Congress who opposed greenhouse gas regulation understood that EISA had protected EPA’s authority to regulate greenhouse gas emissions from cars and trucks and the related ability of states to regulate those emissions pursuant to section 209(b) of the Clean Air Act.²⁹³

The Energy Tax Prevention Act passed the House of Representatives on April 7, 2011.²⁹⁴ However, the Senate rejected the legislation when Sen. Mitch McConnell offered it as an amendment to a small business bill on April 6, 2011.²⁹⁵ In offering the amendment, Sen. McConnell argued that greenhouse gas emissions standards were unwise but made no indication that he—or anyone—believed that the EPA and state regulations he was seeking to overturn were invalid.²⁹⁶ Ultimately, the Energy Tax Prevention Act was not enacted.

However, the following year, the language to block implementation of vehicle tailpipe standards from the Energy Tax Prevention Act was resurrected in H.R. 3409, the “Stop the War on Coal Act of 2012.”²⁹⁷ This legislation contained language identical to H.R. 910 to repeal EPA and state authority to regulate greenhouse gas emission standards from automobiles.²⁹⁸ Like the “Energy Tax Prevention Act,” the “Stop the War on Coal Act” would have allowed the standards adopted by EPA and NHTSA in 2010 to remain in effect.²⁹⁹ However, the proposed legislation would have overturned the standards adopted by EPA and NHTSA in 2012 for model years 2017-2025.³⁰⁰ Rep. Lois Capps, a Democrat from California, offered a prominent motion to prohibit the bill from nullifying

291. It is unclear that EPA could have chosen not to issue an endangerment finding after *Massachusetts v. EPA* given the scientific understanding of climate change.

292. H.R. Rep. No. 112-50, at 14-15 (2011-2012), <https://www.congress.gov/congressional-report/112th-congress/house-report/50>.

293. H.R. Rep. No. 112-50, at 14-15 (2011-2012), <https://www.congress.gov/congressional-report/112th-congress/house-report/50>.

294. Roll Call 249, (April 7, 2011) (approved on a vote of 255-172), <https://perma.cc/757D-6ME9>.

295. S.Amdt.183 to S.493, 112th Cong. (2011), <https://www.congress.gov/amendment/112th-congress/senate-amendment/183?q=%7B%22search%22%3A%5B%22s.amdt.183+112th+Congress%22%5D%7D&s=2&r=2>.

296. 157 CONG. REC. 4022 (2011) (statement of Sen. McConnell).

297. H.R. 3409, 112th Cong. § 201 (1st Sess. 2012).

298. *Id.*

299. *Id.*

300. *Id.* § 202.

the standards for 2017 to 2025 model year vehicles.³⁰¹ The Capps' motion was rejected by the House.³⁰²

H.R. 3409 passed the House of Representatives on September 21, 2012.³⁰³ The Senate did not consider the legislation. Therefore, the legislation was never enacted.

3. The FAST Act Acknowledged the Legitimacy of California Greenhouse Gas Emissions Standards

In 2015, Congress enacted Fixing America's Surface Transportation Act, a sprawling transportation bill.³⁰⁴ The FAST Act included provisions designed to facilitate the manufacture and sale of low-volume replica vehicles— such as new production of vintage automobiles.³⁰⁵ In order to assist this small market, Congress exempted the vehicles from federal safety standards, average fuel economy standards, country of origin labeling, bumper standards, and certain label and entry requirements.³⁰⁶ However, Congress did not exempt these vehicles from emissions standards for criteria air pollutants or greenhouse gas emissions issued by EPA or the state of California.³⁰⁷ By the time the legislation passed, the greenhouse gas emissions standards issued by EPA and California had been in effect for five years. If Congress had had any misgivings about the state's authority or was concerned that the state's standards were essentially the same as average fuel economy standards, Congress could have easily taken this opportunity to express a different policy. Instead, Congress chose to waive application of federal fuel economy standards but retain application of California's greenhouse gas emissions standards.

II. ASSESSING THE LEGISLATIVE AND STATUTORY HISTORY

The history detailed above lays the foundation for powerful arguments that the state of California is not preempted from adopting and enforcing GHG emissions standards for mobile sources by EPCA based upon the relevant legislative and statutory history. In this section, we explore these arguments in greater detail.

The Supreme Court has long looked to the purpose of Congress in determining the scope of federal preemption.³⁰⁸ Although there is no evidence that Congress considered the potential for California to establish GHG emissions standards

301. 158 CONG. REC. 14707 (2012) (statement of Rep. Capps).

302. 158 CONG. REC. 14708 (2012) (rejected on a vote of 173-233).

303. 158 CONG. REC. 14709 (2012) (approved on a vote of 233-175).

304. Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015) (codified in scattered sections of 23 U.S.C. and 49 U.S.C.).

305. *Id.* § 24405.

306. *Id.* § 24405(a).

307. *Id.* § 24405(b).

308. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted); *see Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963).

during consideration of EPCA, there is abundant evidence that Congress understood California's emissions standards could have significant effects on fuel economy. Notwithstanding those effects, Congress has consistently acted to ensure that California's authority to establish emissions standards were protected from preemption in the subsequent 40 years.

Importantly, this evidence is not limited to the ample legislative history, which includes statements made by key legislators, congressional committees, and the President during consideration of key legislation. The evidence also includes what Professor William Eskridge calls statutory history, "the formal changes in the Code made by the legislature when it enacts new laws and amends them over time."³⁰⁹ While the interpretative value of *legislative* history has been discounted by some in recent years due to the arguments of Justice Antonin Scalia and others, *statutory* history remains relevant in the interpretation of law to even the staunchest textualist.³¹⁰ For the purposes of this article, this section applies the principles and canons of statutory interpretation promoted by Justice Antonin Scalia in his book with Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*.³¹¹ While the views of Justice Scalia represent just one approach to statutory interpretation, a full discussion of the range of judicial approaches is beyond the scope of this article.³¹² Attempting to apply Scalia's interpretative approach to the history described in Part I of this article is useful for two reasons. First, given his well-known skepticism toward the importance of legislative history, if the history in Part I is compelling under Justice Scalia's approach, it would likely be compelling beyond those who share his judicial philosophy, effectively demonstrating the powerful arguments that the history animates. Second, Scalia's approach is inarguably relevant. Both of the two most recent Republican Presidents have stated their desire to nominate judges that are in the mold of Justice Scalia.³¹³

A. LEGISLATIVE HISTORY DOES NOT SUPPORT A BROAD INTERPRETATION OF PREEMPTION

As made abundantly clear from the history provided above, Congress intended to preserve state authority over tailpipe emissions even when those standards

309. WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 204 (2016).

310. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

311. *Id.*

312. See WILLIAM D. POPKIN, *THE JUDICIAL ROLE: STATUTORY INTERPRETATION & THE PRAGMATIC JUDICIAL PARTNER* (2016) (describing a range of pragmatic and anti-pragmatic approaches to statutory interpretation).

313. Transcript of the Second Debate, N.Y. TIMES (Oct. 9, 2016), <https://perma.cc/8MD5-2HKC> (quoting Presidential candidate Donald Trump saying, "I am looking to appoint judges very much in the mold of Justice Scalia"); *Bush picks Alito for Supreme Court*, N.Y. TIMES (Oct. 31, 2005), <https://perma.cc/S222-B8GQ> (describing President George W. Bush's "commitment to appoint judges in the mold of Scalia and Thomas").

affected fuel economy. That is apparent from the 1975 consideration of EPCA where Congress documented the impact of California emissions standards on fuel economy and from the 2007 consideration of EISA where Congress repeatedly rejected proposals to curb California's authority.

While the legislative history associated with EPCA does not provide direct explanations of the intended scope of that statute's preemption provision, the kinds of concerns lawmakers had as they drafted the law to establish a fuel economy program are quite evident. A dominant concern expressed was the feasibility for automakers to comply with both fuel economy standards and emissions standards.³¹⁴ These goals conflicted to some degree. There were questions about whether the technology was available for both air quality goals and fuel economy goals to be pursued simultaneously. Even if so, concerns remained about whether the auto industry had sufficient capital resources to do so.³¹⁵ With greenhouse gas emissions standards, however, these concerns are greatly ameliorated. Achievement of reduced greenhouse gas emissions and improved fuel economy are sympathetic goals – efforts to achieve one goal helps to achieve the other.

In 1977, Congress passed the Clean Air Act Amendments of 1977.³¹⁶ The history of these amendments demonstrates the deference Congress offered the State of California. As discussed above, the amendments also show that Congress considered emissions standards to be legally dominant to fuel economy standards rather than constrained by them. Instead of intending to preempt California's authority, Congress's paramount concern was protecting California's autonomy to set its own tailpipe standards.³¹⁷ As Chief Judge J. Skelly Wright of the D.C. Circuit Court of Appeals wrote in 1979, "Congress consciously chose to permit California to blaze its own trail with a minimum of federal oversight."³¹⁸

In the Energy Policy Act of 1992,³¹⁹ which in part amended EPCA, Congress enlisted state and local governments to promote the adoption and use of electric vehicles and other alternative fueled vehicles.³²⁰ Rather than preempting state authorities, Congress sought to accelerate the rate of deployment of lower emitting vehicles by encouraging state action. One provision authorized the Department of Energy to draft model state laws to increase the use of such vehicles.³²¹ The Department of Energy subsequently proposed to evaluate state proposals to implement this program by assessing how much petroleum a state plan would displace and what percentage of alternative fueled vehicles the state would help get on the

314. See *supra* notes 102–17, and accompanying text.

315. *Id.*

316. Clean Air Act Amendments of 1977, PL No. 95-95, 91 Stat. 685 (1977).

317. See *supra* notes 118–43, and accompanying text.

318. *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1297 (D.C. Cir. 1979).

319. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992).

320. *Id.* at § 409.

321. *Id.*

road.³²² This legislation demonstrated that rather than inhibiting or preempting state efforts to reduce fossil fuel consumption and deploy zero emission vehicles, Congress was actually interested in promoting both.

In 2007, Congress again revisited federal fuel efficiency policy in the Energy Independence and Security Act.³²³ During the development of the legislation, the Supreme Court issued its landmark ruling *Massachusetts v. EPA*, providing that greenhouse gases were air pollutants under the Clean Air Act. Moreover, two federal district courts rejected industry arguments that state greenhouse gas emissions standards were preempted by EPCA.³²⁴ The President urged Congress to remove Clean Air Act jurisdiction over greenhouse gas emissions for both the U.S. Environmental Protection Agency and for the State of California.³²⁵ Congress rebuffed the President's request.

Additionally, Congress included in the Act an explicit provision to utilize the California greenhouse gas standards as a benchmark for achieving better than minimally required emissions reductions in the federal fleet.³²⁶ Section 141 of EISA charges EPA with identifying "low greenhouse gas emitting vehicles" for the federal fleet taking into account "the most stringent standards for vehicle greenhouse gas emissions applicable to and enforceable against motor vehicle manufacturers for vehicles sold anywhere in the United States."³²⁷ The congressional hearing, statement of the congressional committee chair, the committee report, and contemporaneous press reports all indicate that this reference to "standards" was meant to refer to California's greenhouse gas emission standards.³²⁸

There is no indication of any alternative interpretation of section 141 of EISA. In this situation, perhaps even Justice Scalia would concede that the legislative history is useful. During his testimony before the Senate Judiciary Committee, Scalia, in discounting the value of a committee report that rebutted a court decision, described an alternative scenario in which he would find a committee report to be useful.³²⁹ He testified that "if the act had been amended in some respect, and

322. DEP'T OF ENERGY, OFFICE OF TRANSPORTATION TECHNOLOGIES, REPLACEMENT FUEL AND ALTERNATIVE FUEL VEHICLE TECHNICAL AND POLICY ANALYSIS (1997).

323. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (2007).

324. See *Massachusetts v. EPA*, 549 U.S. 497 (2007).

325. Executive Office of the President, *supra* note 252.

326. CONG. RSCH. SERV., RL34294, ENERGY INDEPENDENCE AND SECURITY ACT OF 2007: A SUMMARY OF MAJOR PROVISIONS (2008).

327. Energy Independence and Security Act of 2007, 110 P.L. 140, § 141, 121 Stat. 1492, 1517 (2007).

328. See U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA-420-B-10-008, GUIDANCE FOR IMPLEMENTING SECTION 141 OF THE ENERGY INDEPENDENCE AND SECURITY ACT OF 2007, FEDERAL VEHICLE FLEETS AND LOW GREENHOUSE GAS-EMITTING VEHICLES (2010); FRED SISSINE, CONG. RESEARCH SERV., RL34294, ENERGY INDEPENDENCE AND SECURITY ACT OF 2007: A SUMMARY OF MAJOR PROVISIONS (2007).

329. *Testimony of Hon. Antonin Scalia, to be U.S. Supreme Court Justice Before the Senate Judiciary Committee*, 99th Cong. 66 (1986) (statement of Hon. Antonin Scalia).

if this statement in the committee report were an explanation of why that amendment which came out of the committee was suggested, then it would have had more weight.”³³⁰ The Committee report for EISA’s section 141 fits this description precisely by providing an un rebutted explanation that the section sought to use the more stringent California emissions standard to achieve additional emissions reductions from the federal fleet.

Congress understood that California had authority to set greenhouse gas emissions standards, rejected proposals to repeal that authority and even acknowledged the legitimacy of those standards in legislation. In numerous examples after 2007, Congress considered legislative proposals to preempt California’s authority to establish greenhouse gas standards.³³¹ Although such proposals were debated and voted upon in both the House and the Senate, and some even passed the House, none were enacted into law.³³²

The Murkowski resolution discussed in section II.E.1 is particularly noteworthy because it may even be the type of legislative history that Justice Scalia could have found compelling. In his famous speeches about the use of legislative history in 1985 and 1986, Justice Scalia was negative about the value of legislative history.³³³ However, he noted that Courts relied upon legislative history and stated that:

[I]t seems to me we can at least be more selective in the sorts of legislative history we employ – requiring some indication that it at least genuinely reflects the intent of one of the houses of Congress. For that purpose, I suppose I would rank most highly legislative history consisting of amendments defeated on the floor – where it seems clear that the reason for the defeat was rejection of a particular course now said to be contained in the unamended text.³³⁴

In the case of the Murkowski resolution, there was a clear floor debate on whether to reject California’s authority to regulate greenhouse gas emissions from cars and trucks,³³⁵ and the resolution was rejected by the U.S. Senate.

For those receptive to arguments relating to legislative history, the evidence is compelling. First, Congress understood that California emissions standards could have significant effects on fuel economy but never exhibited an intent to interfere with the state’s authority to establish them and seek a waiver under the Clean Air Act. Second, Congress repeatedly considered proposals to repeal California’s authority to adopt and enforce greenhouse gas emissions standards yet repeatedly

330. *Id.* at 66.

331. *See* The Energy Tax Prevention Act of 2011 H.R. 910, 112th Cong. (2011); The Energy Tax Prevention Act of 2011, S. 482, 112th Cong. (2011).

332. *Id.*

333. Antonin Scalia, Speech on Use of Legislative History (transcript available in the Harvard archives) (delivered between Fall 1985 and Spring 1986 at various law schools).

334. *Id.* at 19.

335. Statement of Sen. Lisa Murkowski, Congressional Record Vol. 156, No. 87, S4791 (Jun. 10, 2010), <https://www.congress.gov/111/crec/2010/06/10/CREC-2010-06-10-pt1-PgS4789.pdf>.

declined to enact such proposals. Third, both proponents and opponents of California's emissions standards in Congress repeatedly demonstrated an understanding that the law would have to be changed in order to remove California's authority to set those standards.

B. STATUTORY HISTORY PRECLUDES BROAD PREEMPTIVE INTERPRETATION

The legislative history described above provides many details about the consideration of the relevant statutes and the relationship of California's greenhouse gas emissions standards to those statutes. However, adherents to a textualist approach of statutory interpretation might not find this evidence to be persuasive. In their book detailing the textualist principles and canons of statutory interpretation, Justice Scalia and Bryan A. Garner argue that it is a "false notion" that committee reports and floor speeches are useful in interpreting statutory language.³³⁶ They argue that focusing on these sources of legislative history inappropriately puts an unrealizable congressional intent above the language of the law itself.³³⁷ Additionally, the use of legislative history "creates mischief" by providing arguments for all sides.³³⁸ Therefore, legislative history around Congress's 1975 consideration of EPCA would likely be particularly unpersuasive to adherents of Justice Scalia's interpretative approach. Even though there is no mention of an intent for EPCA to preempt California authority in hundreds of pages of legislative hearings or in the President's archives, Scalia and Garner are particularly dismissive of theories of legislative history where Congress does not "say the thing the language does."

However, even under a textualist approach of statutory interpretation, the agencies' 2019 interpretation of EPCA's preemption provision comes up short. The text of EPCA's provision is the start of the analysis, not the end. As Scalia and Garner write, "context is as important as sentence-level text."³³⁹ Scalia has said that the role of a judge is "[t]o interpret all provisions, to the extent the language will bear it, so as to reconcile each section of a statute with the others, and yesterday's laws with today's."³⁴⁰ The Whole-Text Canon calls upon the interpreter to "consider the entire text, in view of its structure and of the physical and logical relation of its many parts."³⁴¹ Drawing upon 17th century English jurisprudence, early Supreme Court rulings and even modern state code, Scalia and Garner argue that understanding the meaning of a statute – particularly where a provision is

336. SCALIA & GARNER, *supra* note 310, at 369.

337. *Id.*

338. *Id.* at 375–77.

339. *Id.* at 323.

340. Antonin Scalia, "Use of Legislative History: Judicial Abdication to Fictitious Legislative Intent," Northwestern University law school, Chicago, September 12, 1991, from Antonin Scalia, *Scalia Speaks: Reflections on Law, Faith, and Life Well Lived*, edited by Christopher J. Scalia and Edward Whelan, at 241 (2017).

341. SCALIA & GARNER, *supra* note 310, at 167–69.

unclear – requires understanding the context of the law. Looking to the entire document provides the necessary context.³⁴² This canon is important in the present case.

In the larger context, the Supreme Court has made clear that EPA regulates air pollution, including greenhouse gases, through section 202 of the Clean Air Act.³⁴³ NHTSA regulates fuel economy pursuant to EPCA.³⁴⁴ While the laws are interrelated and may overlap in effect, the missions of the statutes are different and both laws can be carried out despite those interrelationships. Although Congress has at times contemplated curbing California’s authority, the legislature has always ended up supporting the state’s special role under section 209(b) of the Clean Air Act.

The Clean Air Act Amendments of 1990 provide an explicit statutory endorsement of California’s ZEV program. By recognizing California’s program in statute and directing EPA to follow the state’s approach in certain aspects,³⁴⁵ Congress created statutory history that exhibits approval of California’s efforts to deploy ZEVs through regulation. NHTSA’s claim, in 2019, that California’s ZEV program is preempted by a 1975 law does not appear to be reconcilable with Congress’s 1990 approving recognition of the program.

As demonstrated by the Energy Policy Act of 1992, Congress has seen an important state role in promoting electric vehicles as a technology to address smog, to mitigate climate change and to displace the use of oil.³⁴⁶ These are exactly the types of vehicles that California seeks to promote through the ZEV program. The ZEV program does not require all vehicles to be zero emission, just a certain small but increasing number of vehicles.³⁴⁷ This closely parallels the Energy Policy Act of 1992, which invited Governors to promote such vehicles by providing financial incentives, offering technical assistance and drafting state model laws.³⁴⁸ This 1992 law included a statutory provision to encourage states to adopt “any” program of their choosing and was not limited to state voluntary programs or state incentive programs.³⁴⁹ The Energy Policy Act of 1992 did not seek to have Governors require all cars to be electric or otherwise operate on alternative fuels. Instead, the Act encouraged them to adopt laws and programs to displace the use of conventional motor fuel and increase the “projected number of registered alternative fueled vehicles as a percentage of all registered vehicles.”³⁵⁰ This seems to closely describe California’s ZEV program. NHTSA’s claim, in

342. *Id.*

343. *See* Massachusetts v. EPA, 549 U.S. 497 (2007).

344. The Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat 871 (1975).

345. 42 U.S.C. § 7586(f)(4) (2020).

346. Energy Policy Act of 1992, Pub. L. No. 102-486, §§ 2025-27, 106 Stat. 2776 (1992).

347. CAL. AIR RESOURCES BOARD, Zero-Emission Vehicle Program (2018), <https://perma.cc/J64K-B3SU>.

348. Energy Policy Act of 1992 § 409.

349. *Id.*

350. *Id.*

2019, that any state program seeking to displace motor fuel is preempted by a 1975 law seems blatantly discordant with the Energy Policy Act of 1992.

As discussed above, Section 141 of EISA charges EPA with identifying “low greenhouse gas emitting vehicles,” taking into account “the most stringent standards for vehicle greenhouse gas emissions applicable to and enforceable against motor vehicle manufacturers for vehicles sold anywhere in the United States.”³⁵¹ This is an important part of the law’s statutory history, providing context for understanding the effect of EISA’s savings clause. Congress was so certain that California had authority to regulate greenhouse gases from vehicles that it passed a law directing EPA to use those state standards as a benchmark to achieve additional reductions from the federal fleet.

This statutory history is an important rebuttal to the agencies’ 2019 interpretation of EPCA’s preemption clause. In the 2019 final rule, EPA and NHTSA state that EISA’s savings clause sought to ensure that there were no changes to existing authorities unless expressly provided for in EISA.³⁵² The agencies argue that because California “lacked preexisting authority to set tailpipe greenhouse gas emissions standards, as a result of EPCA’s preemption provision, EISA’s savings clause did not give them that authority.”³⁵³ In short, the agencies claim that EISA simply preserved EPCA’s preemptive effect that had been in place since 1975.³⁵⁴ This interpretation deeply conflicts with the statutory language in Section 141 – an outcome that the Whole-Text Canon seeks to prevent.

Applying the Whole-Text Canon, Section 141 is a statutory manifestation of Congress’s informed view of California’s GHG authority. Congress, in 2007, clearly anticipated at least two sets of vehicle greenhouse gas emissions standards. That would necessarily mean that the EISA savings clause preserves the status quo as it was understood at the time of EISA’s enactment.

Textualists might also look to the Predicate-Act Canon with regard to Section 141. This canon provides that when a legislature authorizes an act, it also authorizes a necessary predicate act.³⁵⁵ Section 141 sought to use the California greenhouse gas emissions standards as a benchmark for requiring greater than minimal reductions in greenhouse gas emissions from the federal fleet.³⁵⁶ If there was a question about whether such state standards were authorized under EPCA, Section 141 could be interpreted as authorizing the standards as a necessary predicate act under the Predicate-Act Canon.

351. Energy Independence and Security Act of 2007, 110 P.L. 140, § 141, 121 Stat. 1492, 1517 (2007).

352. See SAFE rule, *supra* note 3, at 51313.

353. *Id.*

354. *Id.*

355. SCALIA & GARNER, *supra* note 310, at 192–94.

356. U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA-420-B-10-008, GUIDANCE FOR IMPLEMENTING SECTION 141 OF THE ENERGY INDEPENDENCE AND SECURITY ACT OF 2007, FEDERAL VEHICLE FLEETS AND LOW GREENHOUSE GAS-EMITTING VEHICLES (2010).

The latest statutory history that provides evidence of whether state regulation of greenhouse gas emissions are preempted by EPCA is the Fixing America's Surface Transportation Act of 2015. In that law, Congress expressly waived fuel economy standards for a small set of automakers while retaining application of California's greenhouse gas emissions standards – demonstrating *in statute* that Congress understood that the purposes of these two sets of standards were indeed different.³⁵⁷

The agencies argue that the EISA savings clause is deficient if its intent was to preserve California's authority.³⁵⁸ They state, “[i]f Congress had wanted to narrow the express preemption provision, it could have chosen to include such an amendment in EISA. It did not.”³⁵⁹ Yet, for this argument to be compelling, surely it is relevant what the dominant legal understanding was when Congress acted. Two federal courts had ruled that EPCA did not preempt California's standards within the one hundred-day period leading up to enactment of EISA. Congress had repeatedly, publicly and clearly rejected proposals to expressly or implicitly preempt the states from adopting and enforcing greenhouse gas emissions standards. Congress had even rebuffed a request for preemption from the office of the President. And although NHTSA had made some statements expressing a view about preemption, the agency had never taken final agency action to give those statements legal effect.

CONCLUSION

This article has examined the Energy Policy and Conservation Act of 1975, the Clean Air Act Amendments of 1977, the Clean Air Act Amendments of 1990, the Energy Policy Act of 1992, the Energy Independence and Security Act of 2007, and additional congressional actions to determine how the relevant legislative and statutory history informs EPA's and NHTSA's 2019 interpretation of the EPCA preemption provision.

The histories detailed in this article provide ample evidence that for more than four decades, Congress has sought to protect state authority to regulate emissions from cars and trucks. Throughout this period, it was common knowledge that state regulation of emissions could affect petroleum consumption. For more than half of this period, states have used regulation to promote ZEVs. For the last dozen years, states have explicitly regulated greenhouse gas emissions. Congress has, with full knowledge of the states' use of their authority, time and again supported state authority to regulate emissions from cars and trucks. This history stands in stark contrast to the agencies' 2019 argument that California's regulation of greenhouse gases is so closely “related” to fuel economy that EPCA

357. Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015) (codified in scattered sections of 23 U.S.C. and 49 U.S.C.).

358. See SAFE proposal, *supra* note 1.

359. *Id.*

preempts California from issuing *any* standard that controls greenhouse gas pollution, or that could have an ancillary effect of reducing petroleum consumption.³⁶⁰

This legislative and statutory history point to a more straightforward reading than the expansive preemption interpretation adopted by the Administration. Pursuant to the Clean Air Act, the EPA regulates air pollution from motor vehicles for the purpose of public health and environmental protection. California, upon meeting the requirements for a waiver of preemption, is free to innovate with more stringent standards to control air pollution for the purpose of public health and environmental protection. The Department of Transportation establishes fuel economy standards for the purpose of addressing the nation's dependence on oil and is authorized to factor in the effects of air pollution standards when relevant to fuel economy standards. While state and federal requirements may have some interaction or overlap, in effect, they serve different policy purposes. Congress values those purposes differently, and therefore has consistently acted to ensure that the legal mechanism for achieving EPCA's goals does not interfere with the legal mechanism for achieving the Clean Air Act's goals.

360. See SAFE proposal, *supra* note 1, at 43232–38.