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"EXAMINING THE CASE FOR THE CALIFORNIA WAIVER"

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BEFORE THE
SENATE COMMITTEE ON ENVIRONMENT
AND PUBLIC WORKS
MAY 22, 2007

Thank you, Madame Chairman and members of this Committee, for the invitation to testify on the state of California's request for a waiver of preemption under Section 209(b) of the Clean Air Act for its regulations controlling greenhouse gas emissions from new motor vehicles

My name is Jonathan H. Adler, and I am a Professor of Law and Director of the Center for Business Law and Regulation at the Case Western Reserve University School of Law, in Cleveland, Ohio. I teach courses in environmental, administrative, and constitutional law. For over fifteen years I have researched and analyzed federal environmental regulatory policies, and have focused extensively on air pollution control, climate change policy, and the relationship between federal and state regulatory programs. I appreciate the opportunity to share my views California's waiver application and the proper role of federal and state efforts to address the issue of climate change.

To summarize my testimony today, California's request for a waiver of preemption under Section 209(b) of the Clean Air Act (CAA) raises several interesting and legal and policy issues. California has a long and proud history of leading the nation in the development of environmental control strategies generally, and vehicle emission controls in particular. While the

CAA generally precludes states from developing their own vehicle emission controls, the Act acknowledges California's special place in the development of environmental law by providing for a waiver of preemption, provided that certain conditions are met.

The Environmental Protection Agency (EPA) has granted numerous waiver requests from California in the past, recognizing California's need for more stringent emission controls. This does not mean that the EPA should – or is even permitted – to grant California a waiver for its regulatory controls on vehicular emissions of greenhouse gases under Section 209(b) of the CAA, however. Global climate change raises many important policy questions, but its global nature makes the case for a waiver less strong – on both legal and policy grounds – than it has been in traditional air pollution contexts.

In December 2005, the state of California submitted a request for a waiver of preemption under Section 209(b) of the Clean Air Act to the EPA for California's newly adopted regulations controlling vehicle emissions of greenhouse gases. These regulations will impose increasingly stringent emission limitations on vehicles produced for the 2009 model year and thereafter. Without a waiver from the EPA, California may not enforce these regulations.

Federal vehicle emission standards were explicitly adopted to prevent the proliferation of variable state standards. As a general matter, states are precluded from adopting their own vehicle emission standards. Section 209(a) of the Clean Air Act provides that no state may adopt or enforce "any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines" subject to regulation under the Act. The purpose of this provision was to maintain a national market for motor vehicles. Any automobile that rolled off an assembly line meeting federal emission control requirements would be able to be sold anywhere in the United States. This would prevent the balkanization of the national automobile market and consequent increase in consumer prices and decline in consumer choice that could result if automakers were required to design and sell different vehicles in different states.

The CAA contains one exception to this general policy of preemption, however, that provides special consideration for the state of California. In recognition of its particularly severe air pollution problems and the effort it had already expended in developing emission control policies before the federal government intervened, Congress created the waiver provision in Section 209(b), so as to allow California to maintain its preexisting vehicle emissions standards, and adopt additional emissions controls that could become necessary in the future. Once a waiver is granted to California, other states are permitted to adopt California vehicle emission standards in lieu of the federal standard as well.

The waiver provision is not a blank check. Section 209(b) imposes some limitations on the EPA's authority to approve a waiver of preemption for California's vehicle emission standards. Specifically, Section 209(b)(1) provides first that California must make a threshold determination that its proposed standards "will be in the aggregate, at least as protective of public

health and welfare as applicable Federal standards." Once California has made such a determination, and seeks a waiver, Section 209(b) provides that the EPA must deny a waiver if the EPA finds that:

> "(A) the determination of the State is arbitrary and capricious,
>
> "(B) such State does not need such State standards to meet compelling and extraordinary conditions, or
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> "(C) such State standards and accompanying enforcement procedures are not consistent with section 202(a) of this part."

Should the EPA conclude that any one of these three criteria has been met, it would be justified, indeed required, to deny California's waiver request.

The first and third criteria are unlikely to present much difficulty for California's waiver request. The California Air Resources Board has analyzed the proposed greenhouse gas emission reductions and concluded that they are no less protective than applicable federal standards. The EPA is obligated to give substantial deference to this determination. It can only reject California's waiver request if it concludes that this determination was arbitrary and capricious. Such a conclusion is certainly possible, but unlikely.

In the support document to its request for a waiver, CARB noted that "since U.S. EPA has declined to set federal standards for greenhouse gases, California's Greenhouse Gas Regulations are unquestionably at least as protective as the applicable federal standards since the latter do not exist." This is true at present. After the Supreme Court's decision in *Massachusetts v. EPA*, however, the EPA is reconsidering whether to adopt some emission controls. Yet to render CARB's determination arbitrary and capricious, the EPA would have to adopt greenhouse gas emission controls more stringent than those adopted by California.

It is conceivable that the EPA could conclude that CARB underestimated or unreasonably discounted the effect of the greenhouse gas emission standards on fleet turnover, and therefore underestimated the extent to which such emission controls could retard reductions in other air pollutants. It is also possible that the California standards could further impair air pollution control efforts if they result in increased driving (due to increased fuel economy). Such conclusions could provide the basis for finding the protectiveness determination was arbitrary and capricious, but this seems unlikely given the deference the EPA must give to California's initial determination.

It also seems unlikely that the EPA will conclude that the California regulations governing greenhouse gas emissions are not consistent with CAA Section 202(a). CARB appears to have given adequate consideration to the technological feasibility of and required lead time for its

greenhouse gas emission reduction standards. For instance, CARB maintains that its emission standards may be met with "off-the-shelf" technologies. Unless opponents of California's standards can demonstrate with clear and compelling evidence that this determination is inaccurate, the EPA would be unlikely to deny a waiver on these grounds.

If the EPA were to deny California's waiver request, it is most likely to do so because California's regulation of greenhouse gas emissions from motor vehicles is not necessary to meet "compelling and extraordinary conditions." In the past, California has been able to argue that more stringent controls on vehicular emissions regulated by the EPA were necessary due to California's uniquely severe urban air pollution problems, the difficulty some California metropolitan areas would otherwise have meeting applicable National Ambient Air Quality Standards, and the comparatively large contribution mobile source emissions made to California's air pollution problems. None of these arguments are applicable in the context of global climate change. Global climate change is, by definition, global. It is the result of an increase in greenhouse gas emissions global atmosphere. California is but one contributor of greenhouse gas emission to the global climate commons, and the degree of warming experienced by California is a consequence of global atmospheric concentrations, not local policies or controls.

CARB argues that the EPA must show as much, if not more, deference to California's policy determination that greenhouse gas emission reductions are necessary, as it would to other emission control policies. There is little basis for this argument. If anything, the EPA is less likely to defer to California's determination because climate change is not an environmental problem that presents a threat that is any more "compelling or extraordinary" in California than anywhere else. In the context of particulate matter or ozone pollution, California could argue that the adoption of more stringent vehicle emission controls would enable California to address its particular environmental problems. No such claim can be made about greenhouse gas emission controls.

Nor can CARB maintain that regulatory controls on greenhouse gas emissions adopted in California alone (or even in conjunction with a dozen other states) will have any meaningful effect on future projections of climate change. Dr. T.M.L. Wigley of the National Center for Atmospheric Research demonstrated that were *all developed nations* – those on "Annex B" of the Kyoto Protocol – to fully comply with the greenhouse gas emission reduction targets established by the Kyoto Protocol, and maintain such controls through 2100, this would only change the predicted future warming by 0.15ºC by 2100.[1] The reductions modeled in the Wigley study are several times greater than the complete elimination of *all* greenhouse gas emissions from the entire U.S. transportation sector, of which California represents only a fraction. The effect of California's standards on greenhouse gas emissions from new motor vehicles – again

[1] T.M. L. Wigley, *The Kyoto Protocol: CO2, CH4 and Climate Implications*, 25 GEOPHYSICAL RESEARCH LETTERS 2285 (1998).

representing only a fraction of the automotive fleet – is smaller still. Thus, California cannot plausibly maintain that its vehicle emission controls would do much of anything to address any threat posed by climate change to the state.

Because California cannot demonstrate that controls on vehicular emissions of greenhouse gases are necessary to meet any "compelling and extraordinary conditions," the EPA would have ample justification for denying California's waiver request. This does not necessarily mean that the EPA is obligated to deny the waiver -- courts give substantial deference to such agency determinations if they are supported by a reasonable explanation – but it does suggest that a decision by EPA to grant this waiver could be subject to court challenge. The waiver provision in Section 209(b) was designed to allow California to address environmental problems *in California*, not to provide a single state with unconstrained, roving authority to second-guess national environmental policies by adopting any vehicle emission controls it deems worthwhile.

To complement the legal discussion above, I think it is worth briefly addressing the relevant policy considerations concerning California's waiver request. As members of this Committee may know, I have been very supportive of decentralized approaches to environmental protection, and have argued at length that states should be given greater flexibility in meeting environmental standards.[2] Specifically, I have argued that the principle of "subsidiarity" – the principle that problems should be addressed at the lowest level at which they can be practically addressed – is particularly appropriate in the context of environmental policy.[3] Because most environmental problems are local or regional in nature, there is a strong case that state and local governments should be given the flexibility to design and implement their preferred approaches to such environmental concerns.

A preference for decentralization or subsidiarity does not mean there should be no federal environmental regulation. It simply it creates a rebuttable presumption toward decentralization – a presumption that can be overcome with a demonstration that more centralized action is necessary or likely to produce a more optimal result. For example, the presumption may be overcome where there is an identifiable *federal* interest, or some reason to believe that state and local governments will be systematically incapable or unwilling to adopt publicly desired environmental measures.

The principle of subsidiarity suggests that states should have ample leeway to address localized concerns, such as land-use, drinking water, and even metropolitan air pollution. The arguments for state flexibility and control are less strong, however, where a given environmental problem or proposed solution extends across jurisdictional lines. Subsidiarity is not a license for one

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[2] See, for example, Jonathan H. Adler, *Letting Fifty Flowers Bloom: Using Federalism to Spur Environmental Innovation*, *in* THE JURISDYNAMICS OF ENVIRONMENTAL PROTECTION: CHANGE AND THE PRAGMATIC VOICE IN ENVIRONMENTAL LAW (Jim Chen, ed., Environmental Law Institute, 2004).

[3] See, for example, Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 NYU ENVIRONMENTAL LAW JOURNAL 130 (2005).

jurisdiction to impose its environmental policy preferences on other jurisdictions, whether such imposition results from cross-boundary pollution or the externalization of regulatory compliance costs.

California's regulation of greenhouse gas emissions from motor vehicles touches upon two identifiable federal interests that would justify a national standard. First, global climate change is, by definition, global concern. It effects the nation, indeed the world, as a whole. Emissions of greenhouse gases, such as carbon dioxide, disperse throughout the atmosphere without regard for any jurisdictional limits. Because global climate change requires measures that address global atmospheric concentrations of greenhouse gases, there is little reason to believe that state governments are capable of adopting effective or efficient polices in this area. Effective policies are more likely to be developed at a "higher" level – through international institutions or the cooperation of national governments, rather than independent actions by states.

State governments are simply incapable of adopting policies that will have a significant impact on climate change trends. This does not mean that state governments should always be precluded from adopting localized climate measures. But given the relatively minimal benefits that such policies are capable of producing, their should be adequate attention paid to the potential of such policies to externalize costs on to other jurisdictions. If states wish to adopt largely symbolic measures demonstrating their commitment to reducing greenhouse gases, they should be allowed to do so, provided that they do not adopt policies the costs of which are largely borne by those in other jurisdictions. By imposing a standard on new motor vehicles, products largely manufactured in other states, California may be imposing significant costs on people in other jurisdictions, and yet will have little to show for it, as the policy will no have measurable effect on environmental quality in California;

Another national interest that could justify federal preemption of state standards in this area would be the economies of scale in the manufacture of products that produced for and distributed national markets, making a single federal standard more efficient than a multiplicity of state standards. Specifically, a single set of regulations may make more sense for a single, integrated national economy. This argument is strongest in the case of product regulation. Where a given product is bought and sold in national markets, and will travel throughout interstate commerce, it is less costly to design and produce the product so as to conform with a single national standard. While it is not clear why siting standards for an ethanol plant in Illinois should match those for one in Oklahoma or Montana, if commercial goods are going to be produced on a national scale for national markets, producers may be best served if there is a single product standard that applies nationwide. In addition, consumers may benefit from national product standards, insofar as lower compliance costs result in lower consumer prices.

Allowing states to adopt more stringent product standards of their own poses the risk of one state externalizing the costs of its environmental preferences onto out-of-state market participants. For instance, if California and several northeastern states adopt more stringent emission

standards for automobiles, and this produces a de facto national standard that increases production costs, consumers and workers in other states may end up bearing a portion of the costs of more polluted states' preference for cleaner vehicles.

It is likely that the inherent economies of scale from the adoption of a single national standard for products sold in interstate commerce, such as automobiles, have declined since the adoption of Section 209(b). The costs of meeting variable state standards has declined with the development of customized manufacturing processes and just-in-time inventory. Insofar as manufacturers are capable of tailoring production for different markets, state-specific product standards may not necessarily allow one state to externalize the costs of its environmental preferences on another. This does not mean that such concerns are wholly unwarranted, however. Nor does it alter the fundamental policy choice made by Congress that is reflected in Section 209(b) of the Clean Air Act. If Congress believes the relevant trade-offs are different today than when 209(b) was adopted, then it should amend the statute.

Were the EPA to deny a waiver of preemption under Section 209 of the Clean Air Act, this would not prevent California and other states from moving forward to adopt and implement climate change policies. Nor will "further delay . . . result in California losing its right as a state to develop forward-thinking environmental policies," as claimed by Governor Arnold Schwarzenegger. Regardless of how or when the EPA acts, California and other states would remain free to adopt greenhouse gas emission controls on sources other than motor vehicles, and adopt other policies to encourage reduced energy use and conservation. In short, nothing in the Clean Air Act would prevent states from adopting policies to reduce greenhouse gases, the costs of which would be born by those states that decided to act.

Conversely, were the EPA to grant California's request for a waiver, this would not necessarily prevent the federal preemption of California's greenhouse gas emission controls under other laws, such as the Energy Policy and Conservation Act (EPCA). The National Highway Transportation and Safety Administration has argued with some force that federal fuel economy standards preempt state regulation of greenhouse gas emissions. While the Supreme Court concluded in *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007), that the existence of federal fuel economy program under the EPCA did not preclude the conclusion that the EPA had authority to regulate greenhouse gas emissions, it also noted that greenhouse gas emission controls and fuel economy regulations could "overlap." *Massachusetts v. EPA* does not establish the proposition follow that *state* efforts to control greenhouse gas emissions are not preempted by federal fuel economy rules. If California's standards are preempted by the EPCA, the grant of waiver under Section 209(b) would not cure this defect.

Given recent news accounts suggesting that the EPA has been unusually sluggish in evaluating California's waiver request. Prior to the Supreme Court's decision in *Massachusetts v. EPA*, the Agency had ample reason to defer action on California's waiver request. First, the EPA's legal position in that litigation suggest that the waiver provision was inapplicable. Equally important,

it would have been perfectly reasonable for the EPA to decide to defer any action until the resolution of the litigation and a judicial clarification of the scope of EPA's authority and the applicability of the waiver provision.

Massachusetts v. EPA was decided less than two months ago. In that time, the EPA has opened public comment on California's waiver request. If the past is any guide, it could take several months or more for the EPA to review the applicable comments, reach a final determination, and publish a final rule along with a reasoned explanation of its decision. This is not unreasonable delay – and certainly not delay sufficient to justify legal action. It is the standard, deliberate pace of federal administrative action – a pace that has not seemed to trouble California in the past.[4] The only apparent difference here is the desire for California to have an EPA waiver as a defense in ongoing litigation. Given the issues at stake, it is entirely reasonable for the EPA to take its time to carefully consider the legal and policy questions presented by California's request for a waiver under Section 209(b).

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Madame Chairman and members of this committee, I recognize the importance of these issues to you and your constituents. I hope that my perspective has been helpful to you, and will seek to answer any additional you might have. Thank you.

[4] In the past, as with CARB's ZEV emission regulations, California has begun implementing its regulations before submitting, let alone receiving approval for, a waiver request.