

Free Market coalition comment on Environmental Protection Agency Proposed Rule  
California State Motor Vehicle Pollution Control Standards; Advanced Clean Cars II  
Regulations; Request for Waiver of Preemption; Opportunity for Public Hearing and Public  
Comment

Docket ID EPA–HQ–OAR–2023–0292

Comment submitted on behalf of:

The Institute for Energy Research

along with

American Commitment  
American Energy Institute  
Americans Lands Council  
Americans for Limited Government  
Americans for Tax Reform  
Association of Mature American Citizens Action  
The Caesar Rodney Institute  
Center for Individual Freedom  
Center of the American Experiment  
Committee for a Constructive Tomorrow  
Competitive Enterprise Institute  
Eagle Forum  
Energy & Environment Legal Institute  
FreedomWorks  
Garden State Initiative  
Heritage Foundation  
John Locke Foundation  
Mackinac Center for Public Policy  
Maine Policy Institute  
National Taxpayers Union.  
Rio Grande Foundation  
Roughrider Policy Center  
The Empowerment Alliance  
Western Energy Alliance

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The requested waiver for California’s Advanced Clean Cars II (ACCII) regulation must be rejected. Approving this regulation unconstitutionally privileges California above all other states. This regulation is expressly preempted by the Energy Policy And Conservation Act (EPCA). And this regulation attempts to mandate a major overhaul of the national motor vehicles market absent authorization from Congress.

## **The California waiver unconstitutionally privileges one state over the other 49**

Equal sovereignty among the states is a core constitutional principle and has been clearly articulated by the Supreme Court for more than 150 years. The most recent major case articulating this principle is *Shelby County vs. Holder* (2013), holding that the Voting Rights Act coverage formula impermissibly burdened certain states with regulations which were not applied to all states. But this was not a recent idea, over 100 years ago in *Coyle v. Smith* (1911) the Supreme Court stated “this Union was and is a union of States, equal in power, dignity and authority.” The equal sovereignty concept is clear: each state must be treated the same and have the same powers, the federal government cannot privilege one state over the others.

The California waiver, especially as interpreted by the EPA under the current administration, flies in the face of this basic principle. EPA’s waiver approach of automatically approving California’s increasingly sweeping regulatory actions makes glaringly clear that there is one rule for California, and another for the other 49 states. EPA has handed California de facto regulatory authority over the nation’s motor vehicles industry.

The California waiver under the Clean Air Act at its initial creation in the 1970s was probably unconstitutional at the outset. However, so long as the regulations sought by California were to address particular air quality issues within the state itself, it could at least be defended as not necessarily intruding on the sovereignty of other states, even if it granted California a sort of super-sovereignty above and beyond other states. But in recent years, California has increasingly sought waivers for regulatory policy aimed at global climate conditions that affect the nation as a whole and are not special to California. This proposed ban on internal combustion engines is another assertion by California of the power to dictate national vehicle regulations.

Even under the terms of the CAA, California regulations must only be waived if they address “compelling and extraordinary conditions” within California, for example smog in Los Angeles. But greenhouse gas emissions (GHGs), which are the target of ACCII, are not a phenomenon exclusive to California. GHGs dissipate globally, and climate change is a global phenomenon. Decisions about regulations of GHGs are a quintessentially national policy issue.

There is no particular justification for California’s being granted special authority to regulate GHGs above other states. California’s overreach in seeking to regulate GHGs exposes the waiver authority for the constitutional violation it always was. The waiver gives one state, and one state only, the power to make regulations that then impact all the other 49 states. This waiver for ACCII, privileging California above all others, must be rejected.

## **California’s attempt to regulate vehicle efficiency is expressly preempted**

In the 1970s, and continuously since then, Congress has clearly articulated that fuel economy standards must be set at the national level with the creation of the Corporate Average Fuel Economy (CAFE) standards. Under the EPCA which created the CAFE program, states are expressly preempted from creating regulations on fuel economy, or regulations related to fuel economy. ACCII seeks to reduce or eliminate GHGs emissions from vehicles, and the only way

to reduce or eliminate GHG emissions from vehicles is to reduce fuel use. This means that ACCII is fundamentally a fuel economy regulation, and it is thus expressly preempted by EPCA.

Unlike the California waiver authority under the CAA, there is no waiver authority under EPCA. Thus this waiver request must be rejected as contrary to statute.

### **This proposal to ban over 90% of the motor vehicle market is a major policy question**

California's proposal to ban internal combustion engine cars through ACCII, which in 2023 made up over 90% of vehicles sold, is a major departure from the historic waiver grants made to California under the CAA. This is no less than an attempt to reorder the national motor vehicles market. This attempt to reorder the motor vehicles market is directly analogous to the attempt to reorder the national energy market that was halted by the Supreme Court in *West Virginia v. EPA* (2022).

In order to grant this sweeping power to reorder the motor vehicles market to California, Congress must clearly authorize such grant of authority. Implying this power from a waiver authority granted to California to address local air quality issues such as smog in Los Angeles 50 years ago is not a clear grant of authority. Not only has Congress not specifically granted EPA the authority to cede such power to California, in the intervening decades Congress has passed numerous fuel economy regulations and updates, making clear that the national motor vehicle market was to be regulated at the national level.

Unless and until Congress specifically grants California the power to redesign the national motor vehicles market, EPA must reject any waiver request, such as this request for ACCII, which takes such action.