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Dear Senator:

The U.S. Senate has a unique opportunity to overturn what may well be the most egregious case of unlawful bureaucratic overreach of the past 50 years or more. The EPA's recent grant of three Clean Air Act (CAA) preemption waivers to California transform the state's environmental agency, the California Air Resources Board (CARB) into a non-authorized National Industrial Policy Czar for Climate and Cars.

The waivers, in varying degrees, expressly or effectively ban sales of gas- and diesel-powered cars and trucks. This agenda threatens to price millions of Americans out of the market for new cars, undermine US auto industry competitiveness by forcing manufacturers to phase out most of their top-selling models, and rob Americans of their freedom to purchase the types of vehicles that best meet their needs.

The big picture becomes clear when we recall that the US Constitution aims "to secure the blessings of liberty to ourselves and our posterity." Automobility is the principal mode by which Americans exercise and enjoy the liberty of directing their own movements and going about their lawful pursuits. Regulations that significantly reduce vehicle affordability and automotive choice erode that bedrock American liberty. Practically, the waivers will make it more difficult for Americans to get around and especially hurt the poor by limiting their options for going to work, visiting family, or getting to medical appointments, among other things.

The Congressional Review Act (CRA) empowers a simple majority in the Senate to overturn a rule through a joint resolution of disapproval, but only within a brief period that starts when an agency transmits the rule to Congress. The House in a bipartisan manner has already passed CRA resolutions of disapproval to overturn the EPA waivers at issue. The CRA "lookback window" on the waivers will close soon. Failure by the Senate to pass the disapproval resolutions will empower proponents of the radical Green New Deal agenda. That is not what most Americans voted for in November 2024.

The waivers at issue are for three California motor vehicle programs: Advanced Clean Cars II (ACC II), which requires 100 percent of new passenger car and pickup truck sales to be zero emission vehicles (ZEVs) by 2035; Advanced Clean Trucks (ACT), which imposes increasing percentage-of-sales requirements on manufacturers of medium- and heavy-duty trucks during 2024-2035; and Heavy-Duty Low $NO_X$ Omnibus Regulation, which puts pressure on manufactures to accelerate compliance with the ACT program.

There are three Senate resolutions of disapproval to overturn those waivers: S.J. Res 45 (addressing ACC II), S.J. Res. 46 (addressing ACT) and S.J Res. 47 (addressing the Heavy-Duty Low $NO_X$ Omnibus Regulation). The Senate should follow the House's lead and pass these resolutions of disapproval.

There is opposition to the waivers on both sides of the aisle, especially the ACC II waiver, which purports to authorize California's gas-car ban. Thirty-five Democrats in the House voted to overturn the ACC II waiver, granted by the EPA in December under Clean Air Act Section 209(b).

The unpopularity of California's gas-car ban may explain why there have been last ditch efforts to claim the waivers are not "rules" for purposes of the CRA and thereby ineligible to be the subject of resolutions.

The Government Accountability Office concluded the waivers are "orders" not "rules," publishing "observations" on the matter even though GAO has no role in the CRA process once an agency has submitted a rule to Congress. That unprecedented action has drawn the ire of legislators and undermines GAO's nonpartisan bona fides. The House Oversight Committee sent a letter to GAO identifying numerous problems with its intervention. The Senate parliamentarian reportedly deferred to GAO's legal opinion and agreed the waivers are not rules.

Some Democratic Senators warn that overruling the parliamentarian would amount to a nuclear option and imperil the filibuster. That is ironic since many Senate Democrats have voted to abolish the filibuster.

The Senate does not undermine the filibuster by disagreeing with the parliamentarian about a statute—in this case, the CRA—the Senate did not authorize the parliamentarian to interpret in the first place. When Congress enacted the CRA in 1996, it exempted CRA resolutions from the filibuster. Voting on the waivers consistent with the statutorily prescribed procedures under the CRA has no effect on how the filibuster operates outside of the CRA context. CRA resolutions are distinct from regular legislation.

Nor does applying the CRA to a waiver open Pandora's Box, as some Democratic Senators claim in a letter to Senate leadership. They warn that "the CRA could be weaponized to retroactively invalidate decades of agency actions—including adjudications, permits, and licensing decisions that were never previously considered 'rules' and effectively hijack the Senate floor." It would do nothing of the sort.

The Senate CRA managers were very clear on what types of actions are excluded from CRA review. In their joint statement of April 18, 1996, Sens. Don Nickles (R-OK), Harry Reid (D-NV), and Ted Stevens (R-AK) explained that CRA resolutions apply only to rules of general applicability and future effect, not to actions of particular applicability such as "import and export licenses, individual rate and tariff approvals, wetlands permits, grazing permits, plant licenses or permits, drug and medical device approvals, new source review permits, hunting and fishing take limits, incidental take permits and habitat conservation plans, broadcast licenses, and product approvals."

Note that the EPA waivers at issue differ fundamentally from any of those exempt actions in the following critical respect. The recipient of a hunting license, grazing permit, or drug approval is not authorized thereby to impose rules of general applicability and future effect on anyone else.

In contrast, for example, California's ACC II program directly regulates all automakers producing vehicles for sale in the state and directly affects all motor vehicle consumers in the state.

Moreover, under CAA Section 177, once California has received a waiver under 209(b) of the Clean Air Act, other states may adopt the identical emission standards. In fact, 11 other states and the District of Columbia had already committed to adopt California's gas-car ban *before* EPA approved the waiver. In addition, the ACC II gas-car ban does not sunset in 2035 but continues in perpetuity. The ACC II waiver is the requisite first step of a regulatory agenda of boundless general applicability and future effect. The CRA was enacted to address such large-scale unauthorized infringements of the people's liberties.

The Senate CRA managers' statement also clarifies the broad scope of CRA review:

> The [CRA] authors' intent in these subsections is to exclude matters of purely internal agency management and organization, but to include matters that substantially affect the rights or obligations of outside parties. *The essential focus of this inquiry is not on the type of rule but on its effect on the rights or obligations of non-agency parties* (emphasis added).

The waivers undeniably have a substantial effect on the rights or obligations of non-agency parties. Note too that the "effect on the rights or obligations of non-agency parties," and not disputes over regulatory typology, are to be the "essential focus of this inquiry."

By passing the resolutions of disapproval, the House has made it clear that it deems the waivers to be rules under the CRA. This includes the 35 Democrats who voted for the resolution getting rid of the waiver for the California car ban.

Even for those who question such a conclusion, no one can reasonably deny there is a compelling argument the waivers are generally applicable rules. This is not a situation where a regulatory action that is clearly a rule of particular applicability, like a permit affecting one party, is misclassified as a rule of general applicability.

If there is a slippery slope here, it is more likely to result from a decision by the Senate to be overruled by the advice of GAO and the parliamentarian. That decision could set a precedent inviting GAO and the parliamentarian to assume quasi-judicial powers over the Senate's use of the CRA and prevent the Senate from considering agency actions that are unambiguously rules, in conflict with the plain language and intent of the CRA.

Finally, as the Senate considers the resolutions, it should pay particular attention to the legal defects of the EPA waivers, especially the ACC II waiver.

Whether automakers should be forced to shift production and sales from liquid-fueled to battery-powered cars and trucks is a major question. As the Supreme Court held in *West Virginia v.* EPA (2022), an agency must have a clear statement of congressional authorization before deciding a question of major political and economic significance. The CAA does not come close to authorizing the EPA to approve electric vehicle (EV) mandates. Indeed, the only federal statute

to address the issue is 49 U.S.C. 32902(h), which *prohibits* the Department of Transportation from adopting fuel economy standards that compel EV sales.

More importantly, the ACC II program is preempted by Section 32919(a) of the Energy Policy and Conservation Act (EPCA), the nation's fuel economy statute. EPCA prohibits states from adopting or enforcing laws or regulations "related to" fuel economy standards. State-level policies that regulate or prohibit tailpipe carbon dioxide ($CO_2$) emissions are directly or substantially related to fuel economy standards, because vehicular $CO_2$ emissions are proportional to fuel consumption (75 FR 25324, 25327). Hence, the ACC II ZEV mandates are expressly preempted by EPCA (84 FR 51310, 51311-51328).

Federal preemption statutes derive their authority from Article VI, Clause 2 of the Constitution and automatically void conflicting state policies. EPCA 32919(a) turned California's tailpipe $CO_2$ standards and ZEV mandates into legal phantoms, mere proposals without force or effect, before the EPA even began to review them.

The ACC II waiver is unlawful for another reason. When challenged to explain why ACC II is not preempted under EPCA 32919(a), the EPA claims it has no authority (or at least no duty) to grant or deny a waiver on any basis except the decision criteria set forth in Section 209(b). That is incorrect. As California and its allies emphasize, the waiver authorizes them to incorporate ACC II into their National Ambient Air Quality Standards (NAAQS) State Implementation Plans (SIPs) And there's the rub.

Under CAA Section 110(E), each SIP "shall .... provide necessary assurances" that no "portion" of it "is prohibited by any provision of Federal or state law." But, as discussed above, EPCA prohibits state policies directly or substantially "related to" fuel economy standards, which includes any state policies that regulate or prohibit tailpipe $CO_2$ emissions. The EPA is responsible for ensuring state compliance with Section 110 SIP requirements. The EPA's refusal to consider EPCA preemption when reviewing California waiver requests guts CAA Section 110(E). The CRA was made to expedite Senate review of such unlawful regulatory actions.

Some Senators may believe they need not act to stop the EPA's unlawful elevation of CARB into a national industrial policy czar because Administrator Zeldin will eventually repeal the California waivers. That would be unwise. EPA repeal of each waiver would require the equivalent of a separate rulemaking, and each decision would occasion litigation that could drag on for years. In the meantime, California and allied states would burden the US auto industry with costly mandates that would increase consumer prices while shrinking consumer choices.

In stark contrast, the CRA provides a quick and permanent solution to the perilous waivers. Once a CRA resolution has overturned a rule, it "may not be reissued in substantially the same form." Moreover, a CRA resolution of disapproval avoids years of litigation because it is not subject to judicial review.

The Senate should take courage from the House CRA votes, and use the CRA to safeguard vehicle affordability, automotive choice, and the rule of law. They should quickly act to pass S.J. Res. 45, S.J. Res. 46, and S.J Res 47.

There is no overstating the importance of passing these resolutions. The expansive scope and devastating effects of the waivers have aroused bipartisan opposition. Fortunately, the CRA gives the Senate a real chance to protect Americans from an unlawful, harmful, anti-consumer choice agenda. A failure to seize this opportunity would be tragic. Passing the resolutions of disapproval would be one of the most meaningful actions the Senate has taken in recent memory to reassert Congress's authority to make the laws of the land and stop agency overreach.

Sincerely,

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