Comments for the Record

Addressed to the

U.S. Environmental Protection Agency

In response to the

Notice of Opportunity for Public Hearing and Comment entitled:

"California State Motor Vehicle Pollution Control Standards; Advanced Clean Fleets Regulation; Request for Waiver of Preemption and Authorization"

Docket ID No. EPA–HQ–OAR–2023–0589-0001

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Submitted by

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Steven G. Bradbury, a Distinguished Fellow at The Heritage Foundation, submits these comments in response to the following notice of opportunity for public hearing and comment from the U.S. Environmental Protection Agency (EPA):

> **"*California State Motor Vehicle Pollution Control Standards; Advanced Clean Fleets Regulation; Request for Waiver of Preemption and Authorization*," Docket ID No. EPA–HQ–OAR–2023–0589-0001, published in the Federal Register on July 12, 2024.**[1]

California is seeking a waiver of preemption and authorization from EPA under sections 209(b) and 209(e) of the Clean Air Act[2] to implement the *Advanced Clean Fleets Regulation* promulgated by the California Air Resources Board (CARB).[3] These comments explain why EPA must reject California's request.

About the Commenter

As a Distinguished Fellow at The Heritage Foundation, Steven G. Bradbury frequently addresses public policy questions involving proposed regulatory actions by EPA and other federal agencies, including through published articles, congressional testimony, television and radio spots, and the filing of formal comments. Before joining Heritage, Mr. Bradbury served under President Trump and Secretary of Transportation Elaine L. Chao as the Senate-confirmed General Counsel of the U.S. Department of Transportation, as the Acting Deputy Secretary of Transportation (by designation of the President), and briefly as the Acting Secretary of Transportation. Previously, during the administration of George W. Bush, he served as the Acting Assistant Attorney General and Principal Deputy Assistant Attorney General for the Office of Legal Counsel in the U.S. Department of Justice.

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[1] 89 FR 57,151 (July 12, 2024), https://www.govinfo.gov/content/pkg/FR-2024-07-12/pdf/2024-15343.pdf.

[2] 42 U.S.C. §§ 7543(b) & 7543(e), available at https://www.law.cornell.edu/uscode/text/42/7543.

[3] CARB, Final Regulation Orders, *Advanced Clean Fleets Regulation & Advisories* (effective Oct. 1, 2023) (to be codified in title 13 of the California Code of Regulations (CCR) at 13 CCR §§ 2013-2016), https://ww2.arb.ca.gov/our-work/programs/advanced-clean-fleets/advanced-clean-fleets-regulation-advisories; *see* Letter from Steven S. Cliff, Executive Officer, CARB, to Hon. Michael S. Regan, Administrator, EPA, re *Request for Waiver and Authorization Action Pursuant to Clean Air Act Sections 209(b) and 209(e) for California's Advanced Clean Fleets Regulation*, Nov. 15, 2023, https://www.epa.gov/system/files/documents/2023-12/ca-waiver-carb-req-acf-cvr-ltr-2023-11-15.pdf; CARB, *Clean Air Act § 209(b) Waiver and § 209(e) Authorization Request Support Document*, Nov. 15, 2023, https://www.epa.gov/system/files/documents/2023-12/ca-waiver-carb-req-acf-2023-11-15.pdf.

Mr. Bradbury is submitting these comments in his personal capacity, and the views expressed here should not be construed as representing the official position of The Heritage Foundation.

Introduction

California's request for a waiver of preemption and authorization for CARB's *Advanced Clean Fleets Regulation*, or "ACF rule," must be denied. Though directed mostly at the operators of truck fleets rather than truck manufacturers, the ACF rule is a regulation "relating to the control of emissions from new motor vehicles" and new off-road vehicles under binding Supreme Court precedent and therefore is expressly preempted by sections 209(a) and 209(e)(1) of the Clean Air Act. No waiver of that preemption could properly be approved for this rule under section 209(b) or authorization under section 209(e) for four reasons:

- **First**, if implemented, the ACF rule would have devastating consequences for the American public and for the entire U.S. economy and would impose far-reaching transformational obligations that go far beyond the scope of EPA's authority to approve under the Clean Air Act.
- **Second**, the rule does not qualify for a waiver or authorization under the terms of section 209(b) or 209(e).
- **Third**, although not identified as such, the ACF rule constitutes a State-proposed "clean-fuel vehicle program" for fleet operators for purposes of section 246 of the Clean Air Act,[4] but it fails to meet the specific requirements Congress has mandated for approval of such a program.
- **Finally**, much of the rule is expressly barred by the federal Motor Carrier Act, which prohibits States from enacting or enforcing legal requirements affecting the prices, routes, or services of motor carriers,[5] and it would be arbitrary and capricious of EPA to disregard the Motor Carrier Act's separate preemptive mandate when considering California's request.

Background on CARB's ACF Rule

The ACF rule is the latest in a series of regulations from CARB aimed at mandating the rapid conversion of medium- and heavy-duty trucks from conventional diesel engines to so-called "zero-emission" drivetrains. Under CARB's rules, "zero emission" means

[4] 42 U.S.C. § 7586, available at https://www.law.cornell.edu/uscode/text/42/7586.

[5] 49 U.S.C. § 14501(c)(1), available at https://www.law.cornell.edu/uscode/text/49/14501.

trucks that would emit no carbon dioxide when operated—something only possible if the trucks could be powered entirely by battery-stored electricity or hydrogen fuel cells.

Previously, in its Advanced Clean Trucks Regulation, or "ACT rule," finalized in 2021,[6] CARB directed truck manufacturers to convert increasing percentages of the new trucks they produce for sale in California to zero-emission vehicles ("ZEVs") beginning in 2024. According to the ACT rule, subject to a system of regulatory credits and deficits applied to each manufacturer, 55 percent of new on-road trucks sold in California with a gross-weight rating of between 8,500 and 14,000 pounds (not including buses) were supposed to be ZEVs by model year 2035; for new trucks rated to haul more than 14,000 pounds (other than tractor-trailer rigs), the 2035 target mark was 75 percent; and for new tractors rated to haul more than 26,000 pounds, it was 40 percent.[7]

Now, in the ACF rule, CARB has decreed that by 2036 a full 100 percent of all new on-road trucks produced for sale in California with a gross-weight rating of greater than 8,500 pounds (other than emergency vehicles) will have to be ZEVs.[8]

Because these requirements, like CARB's emissions regulations for passenger cars and light trucks, would override environmental emissions controls established for new vehicles by the EPA under the Clean Air Act, California cannot enforce its truck rules without a waiver of preemption (for on-road trucks) or authorization (for off-road trucks) granted by the EPA.[9] Following a contested proceeding, the EPA approved California's request for a waiver of preemption to implement the ACT rule on April 6, 2023.[10] That waiver decision is currently under challenge by several States and various private entities—

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[6] CARB, Final Regulation Order, *Advanced Clean Trucks Regulation* (March 15, 2021) (codified at 13 CCR §§ 1963-1963.5), https://ww2.arb.ca.gov/sites/default/files/2023-06/ACT-1963.pdf.

[7] *See ibid.* (13 CCR § 1963.1(b), Table A-1).

[8] *See* CARB, Final Regulation Order, Advanced Clean Fleets Regulation, Appendix A-4, *2036 100 Percent Medium- and Heavy-Duty Zero Emissions Vehicle Sales Requirements* (effective Oct. 1, 2023) (to be codified at 13 CCR § 2016), https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2022/acf22/ac/acffro41.pdf.

[9] *See* 42 U.S.C. §§ 7543(b), 7543(e)(2)(A) (authorizing EPA to grant California—and only California—a waiver from federal preemption or authorization under the Clean Air Act to enforce separate vehicle emissions standards, provided the standards are not arbitrary and capricious, are consistent with the goals of federal emissions regulations, and are needed to address compelling and extraordinary conditions in California), available at https://www.law.cornell.edu/uscode/text/42/7543.

[10] *See* EPA, Notice of Decision, *Waiver of Preemption for various California State Motor Vehicle and Engine Pollution Control Standards, including Advanced Clean Trucks Regulation*, 88 Fed. Reg. 20,688 (April 6, 2023), https://www.govinfo.gov/content/pkg/FR-2023-04-06/pdf/2023-07184.pdf.

including trucking companies, fuel refiners, and others—in the U.S. Court of Appeals for the D.C. Circuit.[11]

The primary obligations of the ACF rule fall on fleet operators—the thousands of trucking businesses and other entities throughout the U.S. that own or operate at least one medium- or heavy-duty truck in California. The rule is designed to force these operators to retire their diesel-powered trucks from service on an aggressive schedule imposed by California—in many cases, well before the end of a typical truck's actual useful life—and to divert capital instead to the acquisition of zero-emission trucks, with a goal of making sure that all trucks and buses operated in California will be ZEVs by some point in the 2040s.

To achieve these objectives, the rule would impose three sets of requirements on four different categories of fleet operators (in addition to the 2036 100-percent ZEV sales mandate for truck manufacturers[12]):

1. The "**High Priority and Federal Fleet Requirements**"[13] would apply to (i) large trucking companies, truck rental firms, and other significant commercial entities that earn $50 million or more in gross revenue from whatever source or that control a total global fleet of 50 or more trucks (so-called "High Priority" fleet operators), and (ii) federal government agencies. These requirements would cover vehicles owned or operated by these entities with a gross-weight rating greater than 8,500 pounds, lighter-duty package delivery trucks, and so-called yard tractors (used to move cargo containers and truck trailers around a storage yard or other facility),[14] with various types of trucks exempt from coverage for now, including, among others, school buses, emergency vehicles, dedicated snow removal trucks, and tactical military vehicles.[15]

2. The "**State and Local Government Agency Fleet Requirements**"[16] would apply to state and local government agencies with jurisdiction in California. And

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[11] *Western States Trucking Ass'n, Inc. v. EPA*, Case No. 23-1143 & consolidated cases (D.C. Cir.) (Petitions for Review filed June 5, 2023)—docket available at https://climatecasechart.com/case/western-states-trucking-association-inc-v-epa/.

[12] *See* footnote 8 above.

[13] CARB, Final Regulation Order, Advanced Clean Fleets Regulation, Appendix A-2, *High Priority and Federal Fleet Requirements* (to be codified at 13 CCR §§ 2015-2015.6), https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2022/acf22/ac/acffro21.pdf.

[14] *See* 13 CCR § 2015(a).

[15] *See id.* § 2015(c).

[16] CARB, Final Regulation Order, Advanced Clean Fleets Regulation, Appendix A-1, *State and Local Government Agency Fleet Requirements* (to be codified at 13 CCR §§ 2013-2013.4), https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2022/acf22/ac/acffro11.pdf.

3. The "**Drayage Truck Requirements**"[17] would apply to any entity that owns, operates, or contracts for the use of on-road "drayage trucks"—defined to mean trucks with a gross-weight rating exceeding 26,000 pounds that haul cargo to or from California seaports or intermodal railyards.

The rule would impose the following substantive obligations on these fleet operators:

***For High Priority and federal fleet operators*—**Each operator would be required to follow one of two alternative regulatory paths for retiring and replacing the diesel trucks in its fleet—either the "Model Year Schedule" or the "ZEV Milestones Option."[18] In addition, each operator would have to ensure, at a minimum, that any diesel-powered truck added to its California fleet going forward has a 2010- or later-model-year engine and satisfies all California emissions standards applicable to new trucks.[19]

If selected, the Model Year Schedule would further limit the operator to adding only zero-emission trucks or (through model year 2035) near-zero-emission alternatives to its California fleet[20] and, beginning in 2025, would require it to retire from use in California any internal-combustion-engine (ICE) truck that is past a certain age (as little as 13 years old) or whose mileage exceeds 800,000 miles.[21]

Alternatively, if it chooses the ZEV Milestones Option, the operator would be required to commit that specified percentages of its California fleet will be ZEVs by certain years, as laid out in the rule. The progression of milestones differs by type and size of truck, from lighter duty to heavier duty, but the milestones would reach 100 percent for all of the covered trucks between 2035 and 2042.[22]

Whichever compliance option is selected, there are two aspects of the rule that would amplify the practical impact it would have on many High Priority operators. First, a truck would be considered added to an operator's California fleet, and thus subject to the requirements of the rule, whenever the truck is used in California on any day during the relevant calendar year. And, second, the rule would fully apply to leased and rental trucks—both

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[17] CARB, Final Regulation Order, Advanced Clean Fleets Regulation, Appendix A-3, *Drayage Truck Requirements*, (to be codified at 13 CCR §§ 2014-2014.3), https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2022/acf22/ac/acffrod31.pdf.

[18] *Id.* § 2015(d). The requirements of the Model Year Schedule are set forth in 13 CCR § 2015.1, and those of the ZEV Milestones Option are found in 13 CCR § 2015.2.

[19] *Id.* § 2015(r).

[20] *See id.* § 2015.1(a) ("ZEV Addition"); *id.* § 2015(e) ("NZEV Flexibility"); *id.* § 2015(b), at pp. A-2–10-11 (defining "Near-zero-emissions vehicle" or "NZEV").

[21] *See id.* § 2015.1(b) ("ICE Vehicle Removal"); *id.* § 2015(b), at p. A-2–10 (defining "Minimum useful life" and "Model year").

[22] *See id.* § 2015.2(a).

those that may be leased or rented by High Priority or federal fleet operators for use in California and those that are owned by High Priority truck rental companies and rented to customers that use them in California.[23] As a result of these scoping provisions, some of the larger trucking companies and truck rental firms across the U.S. that meet the definition of High Priority fleet operator would have to ensure, as a practical matter, that all or nearly all of their trucks nationwide satisfy CARB's requirements, because they may not be able to control when a given truck will need to be used in California.

***For state and local government fleet operators*—**Each would be required to comply with one of two options: Either they would have to ensure that by 2027 100 percent of the new trucks they purchase for their fleets will be zero emission, or, alternatively, they would have to satisfy the ZEV Milestones Option described above.[24] The state and local government requirements would be subject to many of the same conditions and coverage terms applicable to the High Priority and federal fleet operators.

***For drayage truck fleet operators*—**The rule would require (i) that beginning in 2024, all the new drayage trucks an operator registers for use at California seaports and intermodal railyards would have to be zero emission, (ii) that beginning in 2025, the diesel-powered drayage trucks in an operator's fleet must be retired from service when they reach what CARB defines as their "minimum useful life" (basically meaning once they reach 13 years old or 800,000 miles traveled, whichever is later), and (iii) that by 2035, all of their drayage trucks operated in California must be ZEVs and only zero-emission trucks will be allowed to provide drayage service in the State.[25]

To support the substantive requirements described above, the ACF rule includes provisions that would impose extensive reporting and recordkeeping obligations,[26] and it incorporates enforcement authorities and penalties for violations.[27]

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[23] *See id.* § 2015(a)(2) ("Vehicle scope") & (a)(3) ("Hiring Entities"); *id.* § 2015(b), at p. A-2–5 (defining "California fleet") & p. A-2–7 (defining "Fleet" and "Fleet owner"); *id.* § 2015.2(d) ("Rental Vehicle Option").

[24] *See id.* § 2013(d) ("General Requirements") & (e) ("ZEV Milestones Option Flexibility").

[25] *Id.* § 2014.1(a)(1) & (2) (Phase 1 and Phase 2 requirements for on-road heavy-duty drayage trucks); *see id.* § 2014(b), at pp. A-3–8-9 (definition of "Minimum useful life").

[26] *See id.* §§ 2015.4 & 2015.5 (reporting and recordkeeping requirements for High Priority and federal fleets); *id.* §§ 2013.2 & 2013.3 (same for state and local government agency fleets); *id.* § 2014.1(a)(3)-(8) (disclosure, registration, and recordkeeping requirements relating to drayage fleets); *id.* § 2016(d)-(f) (certification, reporting, and record-retention requirements supporting the model year 2036 100-percent ZEV sales mandate).

[27] *See id.* § 2015.6 (enforcement and penalty provisions for High Priority and federal fleets); *id.* § 2013.4 (for state and local government fleets); *id.* § 2014.3 (for drayage fleets); *id.* § 2016(g) (for the 2036 100-percent ZEV sales mandate).

In addition, CARB has included in the ACF rule several provisions allowing operators to apply for potential exemptions and extensions of compliance deadlines, which could be granted unilaterally by CARB's executive officer on an *ad hoc* basis.[28]

While the decisional standards and scope of discretion for granting these exemptions and extensions are vague, most of these provisions appear narrow and difficult to satisfy. For example, High Priority operators could apply for an exemption allowing the purchase of a diesel truck, but only if they could show that no battery-electric truck is available to meet their "demonstrated daily usage needs" according to strict criteria and only if 10 percent of their California fleet were already ZEVs or near ZEVs.[29] And they could ask for an extension of deadlines for retiring diesel trucks if there were delays in the construction of charging infrastructure necessary to support the replacement ZEVs, but only for trucks used at the site where the delay occurred or for particular locations where the operator had previously contracted for charging services.[30]

It is also unclear whether the exemption or extension decisions of the executive officer would be challengeable in state court; the rule does not mention the possibility of judicial review. There is an obvious potential that the executive officer could exercise his exemption and extension discretion unevenly and that these decisions would be made for the sake of expediency or based on favoritism or undisclosed policy considerations.

Discussion

CARB may not implement its Advanced Clean Fleets Regulation in the absence of a waiver of preemption (with regard to the on-road trucks covered by the rule) and an authorization (with regard to off-road trucks) granted by the EPA, but no such waiver or authorization may be approved consistent with federal law.

The ACF Rule Is Preempted by Sections 209(a) and 209(e)(1) of the Clean Air Act and Cannot Be Enforced Without a Waiver of Preemption and Authorization.

The substantive provisions of the ACF rule are all designed to force fleet operators to replace their diesel-powered trucks with new zero-emission trucks. Because the purpose and intended effect are to ensure that all new trucks purchased or leased for use in California will satisfy CARB's preferred emissions standard (zero emissions), the rule undeni-

[28] *See id.* §§ 2015.1(c), 2015.2(f), & 2015.3 (exemption and extension provisions for High Priority and federal fleets); *id.* § 2013.1 (for state and local government fleets); *id.* §§ 2014(c) & 2014.2 (for drayage fleets).

[29] *See id.* § 2015.3(b).

[30] *See id.* § 2015.3(c).

ably "relat[es] to the control of emissions from" new motor vehicles and falls within the scope of preemption under sections 209(a) and 209(e)(1) of the Clean Air Act.[31]

It does not matter that the rule's mandates are primarily directed at the use of trucks by fleet operators, rather than their manufacture. As the Supreme Court held in *Engine Manufacturers Association v. South Coast Air Quality Management District*, "A command . . . that certain purchasers may buy only vehicles with particular emission characteristics is as much [a standard preempted under section 209] . . . as a command . . . that a certain percentage of a manufacturer's sales volume must consist of such vehicles."[32]

The Court reasoned that a state emissions standard directed for enforcement purposes at the purchasers or users of a new vehicle falls within the preemptive scope of section 209 just as surely as does a standard enforced against the manufacturers. The manufacturers' right to sell vehicles that satisfy federal emissions standards would be "meaningless" if state law could prohibit operators from buying or using them.[33] Either way, the need for new vehicles that satisfy the operational requirements imposed by the State on users "would effectively coerce manufacturers into meeting the artificially created demand."[34]

Thus, as the Supreme Court has held, even though CARB's ACF rule would impose most of its obligations only on truck operators, because the rule is aimed at creating artificial demand for new zero-emission trucks, it is "effectively" the same as a production mandate imposed on manufacturers for preemption purposes.[35]

As the rule is preempted by sections 209(a) and 209(e)(1) of the Clean Air Act, it cannot go into force without a waiver of preemption under section 209(b) for on-road trucks and an authorization under section 209(e)(2)(A) for off-road trucks. That does not mean, however, that a waiver or authorization is legally available. For the reasons discussed below, EPA cannot properly approve the requested waiver or authorization.

California's Request Must Be Denied Because the ACF Rule Far Exceeds EPA's Authority to Approve.

If enforced, CARB's ACF rule would impose seismic costs and inefficiencies on the Nation's trucking industry—impacts that would inevitably ripple throughout the economy and would be felt by all Americans in all regions of the country. The political, social, and

[31] 42 U.S.C. §§ 7543(a), 7543(e)(1).

[32] 541 U.S. 246, 255 (2004), available at https://www.oyez.org/cases/2003/02-1343.

[33] *Ibid.*

[34] *Id.* at 256.

[35] *See ibid.*

economic implications of this rule would be starkly disruptive and transformational for the United States.

While the technologies necessary to produce what CARB terms zero-emission trucks are under development, they are not yet practical for real-world use. Zero-emission trucks have not proven safe, affordable, reliable, or capable of performing the full range of work tasks required by commercial operators[36]:

- **Efficiency and performance**—Whereas most truck drivers drive 8-12 hours in a day and make runs of 250-300 miles at a stretch, and many trucking firms need to operate their trucks night and day in multiple shifts to maximize utilization, electric trucks can only operate 6 to 8 hours at most on a single charge (depending on conditions and weight carried), and they have a maximum range of only 100 to 150 miles on flat land with a light load before needing a time-consuming recharge.

- **Price**—Whereas new diesel sleeper trucks cost around $170,000, electric trucks cost around $450,000-$500,000 (plus charging stations, which cost another $50,000-$150,000), and hydrogen-fuel-cell trucks cost upwards of $700,000 (plus extra equipment, permitting, and insurance costs).

- **Weight**—Whereas diesel trucks weigh 15,000-20,000 lbs. without cargo, electric trucks weigh 26,000-29,000 lbs., and hydrogen-fuel-cell trucks weigh around 22,000 lbs., which means that the maximum cargo load zero-emission trucks can carry is 25 percent less than diesel trucks', translating into a 25-percent higher operating cost relative to diesel trucks.

Even if electric trucks could in theory perform on a par with conventional diesel trucks, there is little or no prospect that functional charging infrastructure will be installed on the national scale required to support their widespread use. One recent study estimates costs of nearly $1 trillion to install the charging infrastructure necessary to electrify the Nation's trucking industry.[37] Who will pay these costs? And who will pay for the enormous investments needed to expand the electricity grid and build the additional power-generation capacity to serve these charging stations? Similar questions arise with the infrastructure required to support hydrogen-fuel-cell trucks.

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[36] The following discussion is taken from Steven G. Bradbury, The Heritage Foundation, Legal Memorandum No. 350, *California's Ruinous (and Unlawful) Assault on America's Trucking Industry*, pp. 3-4 (Feb. 13, 2024), https://www.heritage.org/sites/default/files/2024-02/LM350.pdf (hereinafter "Heritage Legal Memo").

[37] *See* Roland Berger Study Report, Clean Freight Coalition, *Forecasting a Realistic Electricity Infrastructure Buildout for Medium- & Heavy-Duty Battery Electric Vehicles*, March 19, 2024, https://www.cleanfreightcoalition.org/sites/default/files/2024-03/RB%20Study%20Report_final%5B111225%5D.pdf.

If trucking companies are forced to bear these costs, either directly or indirectly through targeted fees and taxes, their continued operations will depend on the ability to pass the costs on to customers through higher shipping rates. The costs of shipping for all Americans will skyrocket as will the costs of all economic activities whose supply chains depend on efficient shipping. The predictable result of this forced transition will decimate the commercial trucking industry, driving many carriers out of business and leaving the industry served by only a handful of large national carriers. Every American will lose out in that scenario.

For the foreseeable future, the U.S. economy—fundamentally dependent on efficient, low-cost transportation services provided by America's thousands of motor carriers—cannot function productively in reliance on zero-emission trucks. And to the extent unrealistic regulatory mandates like California's cause trucking companies to continue operating older, dirtier diesel-powered trucks longer than they otherwise would because the new technologies are impractical and unaffordable, the net effect on air quality will be decidedly negative.

Nothing in section 209 or any other part of the Clean Air Act can support the conclusion that Congress gave EPA license to authorize such a sweeping transformation of the U.S. economy.[38] EPA has no such mandate. For that reason alone, California's request must be denied.

At a minimum, EPA cannot rationally overlook how profoundly disruptive would be the impact of CARB's ACF rule in considering California's request. Any failure to take account of the rule's catastrophic consequences and any decision to approve a waiver under section 209(b) or authorization under section 209(e)(2)(A) notwithstanding those consequences would be arbitrary and capricious.

In addition, quite apart from any consideration of the ACF rule's practical consequences, it must be acknowledged that many of the substantive requirements of the rule, such as the ZEV mandates and the forced retirement of diesel trucks before the true end of their useful lives, exceed any emissions-control restrictions for new trucks and new truck engines that EPA has authority to impose under section 202 of the Act.[39] They also go further than EPA's authority to set regulatory standards for cleaner-burning fuels.[40] If EPA has no authority of its own under federal law to impose requirements like those in the ACF

[38] *Cf. West Virginia v. EPA*, 597 U.S. ___ (2022), available at https://www.oyez.org/cases/2021/20-1530 (applying "major questions doctrine" analysis in concluding that Congress did not grant EPA authority to restructure the Nation's energy market).

[39] *See* 42 U.S.C. § 7521, available at https://www.law.cornell.edu/uscode/text/42/7521.

[40] *See* 42 U.S.C. § 7545, available at https://www.law.cornell.edu/uscode/text/42/7545.

rule, EPA presumptively lacks authority to grant CARB a waiver of section 209 preemption or an authorization to enable CARB to impose the ACF requirements itself.

The Rule Fails to Satisfy the Terms of Sections 209(b) and 209(e)(2)(A).

Even if EPA's waiver and authorization authority under sections 209(b) and 209(e) could in theory extend to regulatory mandates like those approved by CARB in the ACF rule, California cannot make the showing needed to obtain a waiver or authorization. Sections 209(b) and 209(e)(2)(A) require the State to show that the rule is necessary "to meet compelling and extraordinary conditions," implicitly meaning conditions that involve local air quality in California.[41] The ACF mandates are aimed at addressing the putative global effects of carbon dioxide emissions, not any compelling and extraordinary conditions that are unique or special to California.

The emphasis on eliminating carbon dioxide emissions confirms that CARB's goal in issuing the ACF rule is to end the use of fossil fuels in the trucking industry in California (and potentially across the U.S.) because of concerns about possible global warming. Unlike traditional emissions restrictions, these rules are not primarily focused on controlling the release of pollutants that cause smog and harm local air quality (the so-called "criteria air pollutants," including unburned hydrocarbons, particulate matter, oxides of nitrogen, and ozone, for which national ambient air quality standards are established under the Clean Air Act[42]).

The diesel trucks manufactured today are up to 95-percent cleaner than those produced just 15 years ago in terms of the emission of criteria pollutants. If CARB were truly committed to reducing smog and improving air quality in the L.A. basin and other local areas of California, CARB should want to incentivize carriers to invest in newer, cleaner-burning diesel trucks, rather than expensive, unreliable alternatives.[43]

Further, even ignoring criteria pollutants and focusing just on the production and release of carbon dioxide, electric trucks are not really "zero emission." The process of manufacturing the large batteries needed to power these trucks generates as much or more carbon dioxide than driving a conventional-fuel vehicle for several years.[44] And that does

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[41] *See* 42 U.S.C. §§ 7543(b)(1)(B), 7543(e)(2)(A)(ii).

[42] *See* 42 U.S.C. § 7409, available at https://www.law.cornell.edu/uscode/text/42/7409.

[43] *See* Heritage Legal Memo, cited above in footnote 36, p. 3.

[44] A 2022 automotive engineering analysis estimated that the amount of carbon dioxide emitted in producing the battery used in one electric passenger car (a Tesla Model S) was equivalent to driving a diesel-powered vehicle 60,000 miles. *See* Tristan Burton, et al., Convergent Science, Inc., "A Data-Driven Greenhouse Gas Emission Rate Analysis for Vehicle Comparisons," *SAE Int'l Journal of Electrified Vehicles*, April 13, 2022, https://doi.org/10.4271/14-12-01-0006 (also available at

not account for the great volume of "upstream" carbon dioxide released in generating the additional electricity that would be needed to charge an electric truck over its working life.

On the other side of the ledger, the potential environmental benefits of the ACF rule in terms of mitigating the potential for global warming will be trivial. CARB has made no claim that the ACF rule will produce any measurable reduction in global temperatures. That is not surprising. Research by Dr. Kevin Dayaratna, chief statistician and senior research fellow at The Heritage Foundation, has shown that even if we completely eliminated all fossil-fuel use from the United States (an impossibility), that would result, at most, in less than 0.2 degrees Celsius in temperature mitigation by the year 2100.[45]

Similarly, using the UN Climate Panel's own model for global average temperature effects, environmental economist Bjorn Lomborg has calculated that if every country in the world successfully achieved its stated electric vehicle targets by 2030, the total savings in carbon dioxide emissions would be expected to reduce global temperature by only 0.0002 degree Fahrenheit by the year 2100.[46]

California's Request Is Barred by Section 246 of the Clean Air Act.

EPA should also decline to approve California's request because the ACF rule is impliedly barred by section 246 of the Clean Air Act.[47] That provision establishes federal requirements for a State-proposed "clean-fuel vehicle program" applicable to fleet operators in States like California that fail to meet federal clean air standards in one or more areas. If enforced, the clean-fleet mandates in CARB's rule would constitute a clean-fuel vehicle program within the meaning of section 246, and yet these mandates have not gone through the necessary process and do not meet the standards mandated by Congress in section 246.

Section 246 specifies that any proposed state clean-fuel vehicle program must be submitted to EPA for review as part of the State's Clean Air Act implementation plan and must provide that covered fleet operators, including operators of heavy-duty trucks, will transition to using clean alternative fuels in a certain percentage of their fleets on a phased-

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https://www.sae.org/publications/technical-papers/content/14-12-01-0006/). Producing the larger batteries needed for an electric truck would generate far greater volumes of carbon dioxide.

[45] *See* Kevin D. Dayaratna, Ph.D., Katie Tubb, and David Kreutzer, The Heritage Foundation, Backgrounder No. 3713, *The Unsustainable Costs of President Biden's Climate Agenda* (June 16, 2022), https://www.heritage.org/sites/default/files/2022-06/BG3713_0.pdf.

[46] *See* Bjorn Lomborg, "If Electric Vehicles Are So Great, Why Mandate Them?," *Wall Street Journal*, September 10, 2022, https://www.wsj.com/articles/policies-pushing-electric-vehicles-show-why-few-people-want-one-cars-clean-energy-gasoline-emissions-co2-carbon-electricity-11662746452.

[47] 42 U.S.C. § 7586, available at https://www.law.cornell.edu/uscode/text/42/7586.

in basis, subject to a system of credits administered under regulations issued by EPA.[48] Most importantly, section 246(d) expressly provides that the state program must ensure "that the choice of clean-fuel vehicles and clean alternative fuels shall be made by the covered fleet operator," subject to the requirements of federal law, not by state regulators.[49]

There is a clear and obvious implication from these federal statutory requirements that Congress did not intend for any State, including California, to impose environmental requirements on truck fleet operators, like those in the ACF rule, that are different and more onerous than what is contemplated in section 246. Because CARB's ACF rule does not satisfy the required criteria specified in section 246, EPA must reject California's request for a waiver and authorization to implement the rule.

The Request Must Be Rejected Because the Rule Violates the Federal Motor Carrier Act.

Moreover, California's request must be denied for the independent reason that the ACF rule is barred as applied to commercial trucking companies by the express preemption provision of the federal Motor Carrier Act. Subject to certain exceptions not applicable here, the Motor Carrier Act prohibits States from enacting or enforcing any legal requirement "related to a price, route, or service of any motor carrier … or any motor private carrier, broker, or freight forwarder with respect to the transportation of property."[50]

Congress added this broad preemption provision to the Motor Carrier Act to ensure that the prices, routes, and services of America's trucking companies will be determined by competitive market forces and will remain subject to uniform federal regulation, not to the vagaries and inefficiencies of disparate state rules.[51]

A premise of American federalism is that each State is free to experiment with different solutions to issues of local concern. But the benefits of federalism disappear when one State's regulations override the policy judgments of other States or of Congress and threaten to dictate the market conditions and commercial opportunities available to citizens throughout the Nation, as would the ACF rule. There is no doubt that a lack of uniformity in the regulation of motor carriers will impose an unacceptable impediment to the flow of goods in interstate commerce, and it was to avoid exactly that outcome that Congress man-

[48] *See id.* § 7586(a), (b), (c), & (f).

[49] *Id.* § 7586(d).

[50] 49 U.S.C. § 14501(c)(1), available at https://www.law.cornell.edu/uscode/text/49/14501.

[51] *See Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 371 (2008); *see also American Airlines, Inc. v. Wolens*, 513 U.S. 219, 229-30 (1995) (construing the parallel preemption provision that bars state regulation of air carriers).

dated uniform federal regulation of commercial trucking, a key instrumentality of interstate commerce.

If permitted to go into effect, CARB's Advanced Clean Fleets Regulation would undercut Congress's design. In this rule, CARB is attempting to regulate how motor carriers use and manage their fleets. The regulatory mandates CARB wishes to impose on motor carrier operations will inevitably have pervasive effects on the services carriers are able to offer, the routes they serve, and the costs of their operations. These regulatory burdens will increase the prices motor carriers charge customers to cover their costs. In all respects, the regulatory requirements the rule would impose on High Priority and drayage fleet operators would be manifestly "related to" the prices, routes, and services of the covered motor carriers for purposes of preemption under the Motor Carrier Act.[52]

The rule will require massive capital investments in new trucks and in charging infrastructure that will raise the costs of shipping in nearly every commercial sector of the U.S. economy nationwide, almost certainly driving a large portion of interstate motor carriers out of business. And it will cause many smaller out-of-state carriers to avoid doing business in California at all.[53]

The ACF rule would also impose far-reaching burdens on the interstate business of truck rental firms. Because rental fleet owners cannot, as a practical business matter, control where renters take their vehicles, implementation of the ACF rule will effectively require such firms to ensure that all the trucks in their rental fleets, whether sold and registered in Florida or Texas or Maine, satisfy California's mandates.

Altogether, the rule will impose huge economic burdens on interstate commerce that cannot be justified by any local regulatory need. These burdens will impact everyone whose quality of life depends on the economical supply of goods and services, which means all Americans, not just the residents of California.

In exercising its authority under section 209, EPA cannot ignore the conclusion that CARB's rule is barred by the federal Motor Carrier Act and must deny the waiver and authorization request on this ground. Although EPA has no authority to regulate the prices, routes, and services of commercial carriers, it would be arbitrary and capricious for EPA to disregard the Motor Carrier Act's sweeping preemption mandate when ruling on California's request. CARB's ACF rule could never hope to be "at least as protective of public

[52] *See* 49 U.S.C. § 14501(c)(1).

[53] *See* CARB, Public Hearing to Consider the Proposed Advanced Clean Fleets Regulation, *Staff Report: Initial Statement of Reasons*, pp. 59, 90-91 (Aug. 30, 2022) (recognizing some of these likely effects), https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2022/acf22/isor2.pdf.

health and welfare as applicable Federal standards" within the meaning of sections 209(b)(1) and 209(e)(2)(A)[54] if the rule is separately preempted by another federal law.

At a minimum, EPA should conclude that CARB itself acted arbitrarily and capriciously in adopting the rule in direct contravention of the Motor Carrier Act's preemptive bar. Because CARB failed to address and grapple with, let alone act in accordance with, the Motor Carrier Act's prohibition on state regulation of motor carriers when it finalized the rule, "the determination of [California]" that CARB's rule could ever be enforced as framed and therefore "will be, in the aggregate, at least as protective" as federal law is certainly "arbitrary and capricious" in violation of sections 209(b)(1)(A) and 209(e)(2)(A)(i).[55] For that reason alone, EPA must reject the request.

Conclusion

For all the reasons discussed above, I respectfully urge EPA to deny California's request for a waiver of preemption and authorization for CARB to enforce its Advanced Clean Fleets Regulation.

[54] 42 U.S.C. §§ 7543(b)(1), 7543(e)(2)(A).

[55] *See id.* §§ 7543(b)(1)(A) & 7543(e)(2)(A)(i) (providing that no waiver or authorization shall be granted if EPA finds that "the determination of the State is arbitrary and capricious").