



**Testimony of
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**Before the
Environment and Public Works Committee
United States Senate**

**Oversight of EPA Administrator Johnson's Denial of
Waiver for California's Global Warming Standards**

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Thank you, Chairman Boxer, for the opportunity to testify today on behalf of the Natural Resources Defense Council (NRDC). My name is David Doniger and I am Policy Director and senior attorney for NRDC's Climate Center. NRDC is a national, nonprofit organization of scientists, lawyers and environmental specialists dedicated to protecting public health and the environment. Founded in 1970, NRDC has more than 1.2 million members and online activists nationwide, served from offices in New York, Washington, Los Angeles and San Francisco, Chicago and Beijing.

The focus of my testimony will be to outline just how far Administrator Stephen Johnson has departed from law, science, and even basic arithmetic in denying California a waiver under Clean Air Act Section 209(b) for its landmark emission standards for global warming pollutants from new cars, SUVs, and other light trucks.

In the absence of leadership from Washington, the states have stepped up to the challenge of curbing global warming pollution. California's clean cars law (known as

AB 1493 or the Pavley law, after its chief sponsor Fran Pavley) is their flagship effort. California's vehicle emission standards, if allowed to go into effect, will be the single most effective step yet taken to curb global warming pollution. Ramping up over eight years starting in model year 2009, they will cut the combined heat-trapping emissions of new vehicles by 30 percent in model year 2016. Already, 17 other states have adopted California's standards, or set the administrative wheels in motion to adopt them, and that number is likely to grow. (States that have completed adoption are: Connecticut, Maine, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. States that are currently adopting California's standards are: Arizona, Colorado, Florida, Iowa, and Utah. At least three other states are considering adoption: Delaware, Illinois, and Minnesota). Together, California and the other 17 states make up nearly half of the national sales of new vehicles.

Section 209(b) of the Clean Air Act recognizes the pioneering role California has played for four decades in the development and implementation of wave after wave of new vehicle pollution control innovations. As the U.S. Court of Appeals for the D.C. Circuit stated: "Congress intended the State to continue and expand its pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program; in short, to act as a kind of laboratory for innovation."¹ Virtually every feature of modern air pollution control technology now present on vehicles nationwide – indeed, worldwide – was implemented first in California.

Section 209(b) requires the EPA administrator to give California the green light for its standards unless he proves one of three disqualifying conditions. The

¹ *Motor & Equipment Mfrs. Ass'n, v. EPA*, 627 F.2d 1095, 1110-11 (D.C. Cir. 1979).

administrator can deny California a waiver if he demonstrates that the state's standards, in the aggregate, are not at least as stringent as the federal emission standards. He can deny the waiver if he proves that California's standards exceed the levels that are technically feasible, considering cost and lead-time. And he can deny the waiver if he proves California does not need the standards to meet compelling and extraordinary conditions.

On any of these issues, the law places the burden of proof on the administrator, or anyone else, who opposes granting California the waiver. Again in the words of the D.C. Circuit, California's standards "are presumed to satisfy the waiver requirements" and "the burden of proving otherwise is on whoever attacks them" during the waiver hearing.²

Other states have the right, under Section 177 of the Act, to adopt California's standards. Once California has its waiver, the other states need no further approval. As I mentioned, 17 other states are already following California's lead.

An EPA administrator who respected law and precedent, fact and science, would have granted California the waiver this time just as his predecessors did more than 50 times before over the last 40 years. But this administrator works for a White House with an unparalleled disregard for law and science. So it was not unexpected – if still profoundly disheartening – that Administrator Johnson would take orders from the White House, override the expertise of his agency's scientists, engineers, and lawyers, and veto California's standards for the first time ever, as he did on December 19, 2007.

² *Id.* at 1121.

Lest anyone think that the December 19th decision was approached with an open mind and taken on its merits, it is worth first reviewing the administration's three prior, but failed, attempts to block California's path.

First, in 2003, at White House direction, the EPA took the position that carbon dioxide and other greenhouse gases – even though obviously emitted from vehicles, power plants and factories – are not “air pollutants” under the Clean Air Act. Thus, the administration claimed, the Clean Air Act conferred no authority to regulate emissions that contribute to global warming. Though broadly written to disable *any* use of the Clean Air Act against global warming, EPA's 2003 decision was plainly targeted at stopping California, which had its clean cars legislation in 2002.

That ploy was struck down by the Supreme Court in *Massachusetts v. EPA*, the landmark global warming decision handed down April 2, 2007.³ Rejecting EPA's position, the Court held that carbon dioxide and other heat-trapping emissions are “air pollutants” just like any other, and are subject to regulation under the Clean Air Act. The Court noted that the Clean Air Act has specifically authorized protection of “climate” since 1970. The court also rejected an argument, made jointly by the administration and the auto industry, that regulating vehicle emissions of carbon dioxide was the sole province of the Department of Transportation under the nation's fuel economy law, called the Energy Policy and Conservation Act (EPCA). The Clean Air Act and EPCA, the court ruled, are “wholly independent” mandates. Nothing in EPCA restricts the pollution-control authority provided by the Clean Air Act.

This holding dealt the death blow to the auto industry's and the administration's second strategy for blocking California's standards. The auto companies attempted to

³ 127 S.Ct. 1438 (2007).

block the states with a series of federal court lawsuits claiming that California and other states are “preempted” by EPCA from setting greenhouse gas emission standards. The auto companies relied on a gratuitous pronouncement on preemption by the Department of Transportation in a 2006 fuel economy rulemaking. But following the Supreme Court’s ruling that the Clean Air Act and EPCA are “wholly independent,” two federal judges in Vermont and California ruled last fall that EPCA does *not* preempt the states’ emission standards. The two district courts correctly noted that the fuel economy law itself gives Clean Air Act standards – both standards issued by EPA itself and California standards that meet the waiver criteria under Section 209(b) – the status of “federal” standards for the purposes of EPCA. They are “other motor vehicle standards of the Government” that DOT must respect when setting fuel economy standards.

Having struck out three times in the federal courts in one year – four times, actually, counting the Ninth Circuit Court of Appeals’ rejection in November of the administration’s feeble 1.5 mile per gallon increase in light truck fuel economy – the White House tried yet a third line of attack on the California standards.

When Congress came to closure late last year on new fuel economy standards in the Energy Independence and Security Act, House and Senate negotiators agreed on Senate-passed language to protect the Clean Air Act. That language preserved the Supreme Court decision and the other court decisions I have mentioned. The savings clause in Section 3 of the new energy bill reflects the deliberate decision to maintain the “wholly independent” Clean Air Act mandate under which California and the other states have acted. Congressional negotiators rejected alternative language that would have prevented either EPA or California from setting emission standards that go beyond the

Transportation Department's miles-per-gallon standards, thereby effectively overturning the Supreme Court's decision in *Massachusetts* and restricting authority to curb global warming pollution under the Clean Air Act. This effort failed.

The decision to protect the Clean Air Act and the Supreme Court decision reflected the leadership of many members of Congress, especially the California Senate and House delegation of which you, Chairman Boxer, are a key member.

But the story did not end there. After Congressional negotiations closed on the new law's fuel economy provisions, the White House twice threatened to veto the entire energy bill unless the previously rejected language subordinating EPA and California to DOT was included. But although Congress gave ground on other issues, Congress once again rejected this change.

Thus, the final energy legislation, which President Bush signed on December 19, 2007, rejects the administration's and the auto industry's attack on the Clean Air Act and the leadership of California and the other states in combating global warming.

But no matter. The fix was in. Plainly acting on White House orders, Administrator Johnson that same day unveiled the administration's fourth – and weakest yet – line of attack on the California standards.

The December 19th letter is a masterpiece of factual error, scientific manipulation and disregard for the law. Let's start with the oddest aspect of all: the claim that California's emission standards are weaker, not stronger than the mileage standards in the new energy law. California has shown, with full documentation, that this is just plain wrong. The administrator got caught red-handed comparing the stringency of California's emission standards for 2016 with the federal mileage standards for 2020. As

I said in my blog (“Facts are Stupid Things,” attached to this testimony⁴): “That might be okay in fantasy baseball. It may be fun to ask if Babe Ruth could have hit 60 home runs against today's pitching. But the EPA administrator shouldn't be playing fantasy carbon regulation.”

Anyway you slice it, on an apples-to-apples basis, California’s emission standards will cut global warming pollution far more than the federal mileage standard. The California Air Resources Board has shown that in California, the state’s standards reduce global warming pollution *more than twice as much* as the federal standards in 2016. Looking at cumulative reductions from 2009 through 2016, California’s standards cut heat-trapping gases *three times as much* as the federal standards. You get the same result for the national fleet mix (50 percent cars, 50 percent light trucks). For example, if applied across the country, in 2016 the California standards would cut heat-trapping gases *75 percent more* than the federal mileage standards.⁵

Mr. Johnson also mimed the auto industry’s claim that the California standards are a “patchwork” – a word used to conjure the specter of 50 different states doing 50 different things. In fact – as he knows – the Clean Air Act permits only two standards: federal emission standards and the California standards. Other states may choose standards identical to California’s, but they are expressly prohibited from deviating from these standards in any way. In this way, the car companies are subject to only two emission standards. They lost the argument for only one standard 40 years ago, when Congress recognized California’s role as the pioneer of new standards. And they lost that

⁴ Also available at http://switchboard.nrdc.org/blogs/ddoniger/facts_are_stupid_things.html.

⁵ California Air Resources Board, Technical Assessment, January 2, 2008, Comparison Of Greenhouse Gas Reductions Under CAFE Standards and ARB Regulations Adopted Pursuant To AB1493, available at http://www.arb.ca.gov/cc/ccms/ab1493_v_cafe_study.pdf.

argument again last year in the energy bill, when Congress expressly rejected their effort to undo California's powers.

Administrator Johnson said he thought a single national standard adopted under the energy law would be a "better policy." But he's not paid to make "better policy." His job is to carry out the policy Congress adopted into law. This is exactly the sort of policy-based freelancing that the Supreme Court threw out in the Massachusetts case. There, EPA asserted various "policy" reasons for its conclusion that the Clean Air Act should not be used to curb global warming pollution. But the Supreme Court rejected EPA's "reasoning divorced from the statutory text." This is exactly what has happened again here.

So, finally, we get to something that faintly resembles a legal argument. Mr. Johnson claimed that California does not need these standards to meet "compelling and extraordinary conditions" because, he said, global warming impacts are not unique or exclusive to California. No other state, however, can claim a wider variety of severe impacts than California: including more intense health-damaging smog, greater risks of catastrophic wildfires, damage to the state's agricultural output, and loss of the Sierra snowpack that serves as the state's vital water reservoir.

What's more, prior EPA administrators have rejected the contention that California even has to show unique effects. In 1984, Administrator William D. Ruckelshaus (who served under Presidents Nixon and Reagan) rejected an industry argument that "California must have a 'unique' particulate problem; i.e., one that is demonstrably worse than in the rest of the country. ... [A]s CARB points out, there is no indication in the language of section 209 or the legislative history that California's pollution problem must be the worst

in the country for a waiver to be granted.”⁶

Administrator Johnson made much of a supposed distinction between local and global pollutants. He may wish the statute read “compelling and extraordinary *local* conditions,” but it does not. In *Massachusetts*, industry parties got nowhere with a similar argument that the term “climate” must mean “*local* climate.” Rather, the Supreme Court recognized that Congress chose to use broad language that allows regulatory authorities to respond to the march of science and newly recognized threats to public health and welfare.

So now we must take EPA to court again. Given the Administrator’s repeated promises to Governor Schwarzenegger, this committee, and other congressional committees that he would decide the California waiver by the end of 2007, and given the unequivocal nature of the denial actually issued on December 19, 2007, we have taken that action at face value as the definitive denial of the waiver. Because the December 19th denial violates the Clean Air Act, California, together with other states and environmental organizations, has challenged the administrator’s decision in the Ninth Circuit Court of Appeals,

EPA’s lawyers are now contending that the December 19th letter was not actually a decision and that the waiver denial cannot be challenged until a notice is published in the Federal Register. As of the time of this writing, we have no idea when – or even if – a further written explanation will be forthcoming. As a necessary backstop against the government’s theory that the December 19th letter is not reviewable, the states and environmental coalition is also suing in the federal courts here for a deadline to publish the elusive Federal Register notice.

⁶ 49 Fed. Reg. 18877, at 18891 (May 3, 1984).

One way or the other, the administrator is going to be held to account in the courts. He and his White House masters may have bought the auto companies some delay, but they will not win. California's authority is clear and they and the other states will prevail. It's time for the auto companies to lock up their lawyers and turn loose their engineers. We desperately need cleaner cars to help avoid the coming climate catastrophe. They can do it. And they must.

With the spotlight on Administrator Johnson's denial of the California waiver, less attention has been paid to the Administrator's failure to follow through on the commitments made by the President and by him to implement the Supreme Court's decision in *Massachusetts v. EPA*. That case, of course, directly concerned *federal* responsibilities to regulate global warming pollution from vehicles. The Supreme Court ordered EPA to make a fresh decision whether vehicle emissions of carbon dioxide and other heat-trapping pollutants "may reasonably be anticipated to endanger public health or welfare." If the answer is yes – and how could the answer be otherwise give President Bush's embrace last year of the IPCC's definitive scientific conclusions – then EPA is required to set federal emission standards for these pollutants.

On May 14, 2007, President Bush entered the Rose Garden and announced that his administration would respond to the Supreme Court by directing EPA to issue vehicle and fuel standards for global warming emissions by the end of his term. To do this, Administrator Johnson announced that EPA would make an endangerment determination and propose vehicle and fuel standards by the end of 2007. Mr. Johnson repeated this promise over and over in the months that followed, to Congress, to other countries, and to the public. And a huge amount of work was done to ready the proposed standards and

the accompanying endangerment determination for proposal by the end of the year. According to trade press reports, hundreds of pages of Federal Register notices and support documents were written, reviewed at the highest levels of EPA, other agencies, and White House offices, and were ready to go.

But the end of the year came, and nothing happened. And neither the Administrator nor White House officials have said what will happen. It is as if the whole project disappeared into a black hole in an undisclosed location.

We know that various auto companies, trade associations and other companies weighed in with the Vice-President Cheney, urging him to deep-six the endangerment determination. And as I have described, we know that the White House tried unsuccessfully to get Congress to override the Clean Air Act and the Supreme Court decision.

But Congress refused, and so EPA still owes a response to the Supreme Court decision. For this reason, the state and environmental coalition that prevailed in *Massachusetts* is serving notice on Mr. Johnson this week that he still owes that response. We have asked him to tell us when he will issue the decisions that he had promised to issue last December.

I urge this Committee to expand the scope of its oversight inquiry to include the administrator's failure to carry through on his promises to respond to the Supreme Court by the end of last year. In particular, I encourage you to seek the extensive documentation prepared on the vehicle and fuel proposal, including the documentation prepared on endangerment. I hope you will request documentation of all interagency and White House contacts that EPA has had in the course of this project.

Thank you for the opportunity to testify, and I look forward to your questions.