

THE CASE FOR THE CALIFORNIA WAIVER

HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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MAY 22, 2007
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COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ONE HUNDRED TENTH CONGRESS
FIRST SESSION

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THE CASE FOR THE CALIFORNIA WAIVER

TUESDAY, MAY 22, 2007

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee met, pursuant to notice, at 2:30 p.m. in room 406, Dirksen Senate Office Building, the Hon. Barbara Boxer (chairman of the committee) presiding.

Present: Senators Boxer, Inhofe, Lautenberg, and Whitehouse.

STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. The committee will come to order.

I am very pleased to welcome all the witnesses here today, including the Attorney General of California and our former Governor, Jerry Brown. Also former Mayor of Oakland, the city in which I reside, part of my time in California. I also welcome the Commissioner for the New York Department of Environmental Conservation, Pete Grannis, and Professor Jonathan Adler.

Today we will discuss California's important efforts to reduce global warming pollution from vehicles. We will hear about the EPA's crucial upcoming decision regarding whether to grant California a waiver that will authorize the State to proceed with this effort.

On April 2, 2007, the U.S. Supreme Court ruled that greenhouse gases are an air pollutant under the Clean Air Act and that EPA already has all the authority it needs to begin regulating greenhouse gas emissions from motor vehicles now. The Supreme Court's landmark decision has now cleared the way. The time to act is really long overdue.

The clearest example of this point is the case for the California waiver. In 2002, recognizing the threat posed by global warming, my home State of California passed a law to set aggressive greenhouse gas standards for motor vehicles. In 2005, California wrote rules to implement that law. These standards would cut greenhouse gas emissions by about 30 percent by 2016.

As provided for under Clean Air Act section 209(b), California asked EPA for a waiver approving the standard. Eleven other States, which together with California represent a third of the U.S. vehicle fleet—I think that is important, this isn't just about California, this is about a third of the vehicle fleet, 11 other States in addition to my State, have adopted the California standards. Since the transportation sector causes about a third of greenhouse gas emissions nationally, and about 40 percent of the emissions in Cali-

ifornia, a 30 percent reduction in vehicle greenhouse gas emissions would be a very significant step forward, a step toward reducing global warming pollution.

In light of the Supreme Court decision, EPA should approve the California waiver shortly after the close of the public comment period, which ends June 15, 2007. The application for waiver clearly meets the legal standards for approval and it should be granted.

This is one of the first steps our President and EPA could take to demonstrate a real commitment to reducing global warming pollution, to immediately grant California's request for a waiver so the State can regulate greenhouse gases from vehicles. California's plan has been ready for almost 2 years, and 11 other States are waiting for California's waiver so they can follow the lead.

I have asked EPA Administrator Johnson to return before our committee at that time to tell me his plans. We are now planning to have him appear before this committee on June 21. We will keep the pressure on EPA until they do the right thing.

In his previous appearance before this committee, Administrator Johnson repeatedly said that these issues are "complex," and need much further study. In fact, it is not the case. According to the Washington Post, EPA has granted California a waiver 40 times, 40 times in the past 30 years. EPA has never denied a California request to set its own standards under this provision of the law.

I take the use of the word complex by Administrator Johnson as a code word for delay. And delay is unacceptable.

Last week the Bush administration issued an Executive order which called for inter-agency consultation regarding any decision that will directly affect greenhouse gas emissions. While I do appreciate the President's indication that he wants to reduce global warming pollution, his statements in issuing the Executive order really shed little light on how he would make that happen. As a matter of fact, I expressed my concern that that alone could be a signal of a delay.

Further delay in this matter is simply unacceptable to the largest State in the Union and to 11 other States. The time has come for decisive action by EPA. That is why I asked Attorney General Brown of California to be here today. He is an eloquent spokesman. His leadership and the leadership of our Governor and the State legislature is really at stake here. They can only do so much. They need us to sign off on their efforts, and we should.

So if we can't begin the much-needed process of protecting our future and our kids and our grandkids from global warming, we will have failed. I say the California waiver is ripe for action and will send the right signal. So I applaud the Attorney General's leadership in this area. I welcome the initiative by New York and other States, who have adopted our greenhouse gas standards. Rather than sitting around and waiting for the Bush administration to do something, we are taking leadership, we are taking action.

So once again, I welcome the witnesses. For another perspective, I call on Senator Inhofe.

**STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM
THE STATE OF OKLAHOMA**

Senator INHOFE. Thank you, Madam Chairman.

As a general rule, I avidly support States' rights and believe in the principle of decentralization. States and localities are often in the best situation to assess their own problems. Somewhat like Mr. Brown, I have been at all levels of government, State, mayor of a city and here in Washington. I have always felt that the closer you are to the people, the better the decisions.

That does not mean that there is no room for Federal standards. Air quality and the Clean Air Act is one of those cases.

Air pollution knows no boundaries, and the Clean Air Act, for all its imperfections, has led to steadily improving air quality in this country. While the implementation of our clean air laws has been local, which is appropriate, the standards themselves have been national.

Now, it is true that California's air pollution problems are worse. So it is allowed to request a waiver to create even tighter standards. The problem, however, is that the State has not even made much progress complying with existing Federal laws, let alone more stringent ones that are now coming or may come in the future. For instance, California is violating Federal law to reduce the soot its citizens are forced to breathe every day. It is in violation of Federal particulate matter standards and shows few signs it will come into compliance.

The same is true for ozone. While EPA grapples with whether the Federal standards for ozone are tight enough or not, areas of California are not even complying with the existing rule. When I introduced legislation last year to tighten penalties for counties that have ignored our air pollution laws and are in serious non-attainment for ozone and particulate matter, it caused an uproar because people said I was selectively targeting California. At first, I was surprised by the reaction, but as I learned more about the efforts to control pollution in this country, I found that California is the only State in the Union that is extensively ignoring Federal law.

Now, I don't have an axe to grind against California. It is a great State. But it is the height of hypocrisy for California's State officials to sit here today condemning the Bush administration when it is violating multiple air quality standards. I am not introducing my legislation today, since it is not climate-specific. I don't want to confuse people. My bill is not a climate bill, it is a serious attempt to reign in the worst offenders of our Federal pollution laws.

But I take air pollution very seriously and do plan to introduce my legislation again in order to hold these areas accountable and to help make their air cleaner.

It is a hypocrisy for California policymakers to try to be the tail that wags the dog when it comes to the Clean Air Act. When it comes to the issue of whether climate fluctuations are natural or caused by man, you all know my views. The cycles we are now experiencing and have experienced for thousands of years or even millions of years are natural. But even if hypothetically speaking I were wrong in that assessment, California is not unique when it comes to greenhouse gases as it is for traditional air pollution.

Madam Chairman, I know many Californians proudly say that their State leads the Nation when it comes to the environment. While I disagree, when it comes to California's commitment to air quality, it may be true in one circumstance. According to the National Oceanic and Atmospheric Administration, over the last two decades, California's temperatures have cooled by $\frac{6}{100}$ th of 1 °C, or about a third of a degree per century. I guess you could say that California is going through a cooling period or has been going through it for the last two decades. So if Russia's top solar-scientist is correct that the Earth is heading into a cooling phase, California is indeed leading the Nation and even the world.

Today's call for an immediate decision on the waiver request is simply grandstanding. Granting California's waiver immediately would make no difference to global temperatures, even if the alarmists were right. It certainly would not benefit California.

Yet for political purposes, California's leadership is asking EPA to step aside, to sidestep its statutory responsibilities to first make a finding whether greenhouse gases endanger human health and the environment. This endangerment was supposed to be the first thing, before we did anything else. We had a hearing on this. Even if the EPA were to make such a finding, that still would not justify California's waiver request as it does not meet the necessary requirements for EPA to grant such a request.

So Madam Chairman, I have more to say on the subject of political grandstanding and hypocrisy, but I will reserve my comments for the question and answer period.

[The prepared statement of Senator Inhofe follows:]

STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE
STATE OF OKLAHOMA

As a general rule, I avidly support States' rights and believe in the principle of decentralization. States and localities are often in the best situation to assess their own particular problems and implement their own solutions. But that does not mean there is no room for Federal standards. Air quality and the Clean Air Act is one of those cases. Air pollution knows no boundaries and the Clean Air Act, for all its imperfections, has led to steadily improving air quality in this country.

While the implementation of our clean air laws has been local, which is appropriate, the standards themselves have been national. Now it is true that California's air pollution problems are worse, so it is allowed to request a waiver to create even tighter standards.

The problem, however, is that the State has not even made much progress complying with existing Federal laws, let alone more stringent ones. For instance, California is violating Federal law to reduce the soot its citizens are forced to breathe every day. It is in violation of Federal particulate matter standards and shows few signs it will come into compliance.

The same is true for ozone. While EPA grapples with whether the Federal standards for ozone are tight enough or not, areas of California are not even complying with existing law.

When I introduced legislation last year to tighten penalties for counties that have ignored our air pollution laws and are in serious nonattainment for ozone and particulate matter, it caused uproar because people said I was selectively targeting California. At first, I was surprised by the reaction. But as I learned more about efforts to control pollution in this country, I found out that California is the only State in the Union that is extensively ignoring Federal law.

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ously and do plan to introduce my legislation again in order to hold these areas accountable and to help make their air cleaner.

It is hypocrisy for California policymakers to try to be the tail that wags the dog when it comes to the Clean Air Act. When it comes to the issue of whether climate fluctuations are natural or caused by man, you all know my view that the cycles we are now experiencing—and have experienced for thousands and even millions of years—are natural. But even if, hypothetically speaking, I were wrong in that assessment, California is not unique when it comes to greenhouse gases, as it is for traditional air pollution.

Madam Chairman, I know many Californians proudly say that their State leads the Nation when it comes to the environment. While I disagree when it comes to California's commitment to air quality, it may be true in one circumstance. According to the National Oceanic and Atmospheric Administration, over the last two decades, California's temperature has cooled by .06 °C—or about a third of a degree per century. Yes, I said cooled. So if Russia's top solar scientist is correct that the Earth is heading into a cooling phase, California is indeed leading the Nation and even the world.

Today's call for an immediate decision on the waiver request is simply grandstanding. Granting California's waiver immediately would make no difference to global temperatures even if the alarmists were right. It certainly would not benefit California.

Yet for political purposes, California's leadership is asking EPA to sidestep its statutory responsibilities to first make a finding whether greenhouse gases endanger human health and the environment.

Even if EPA were to make such a finding, that still would not justify California's waiver request, as it does not meet the necessary requirements for EPA to grant such a request.

Madam Chairman, I have more to say on the subject of political grandstanding and hypocrisy, but will reserve my comments for the question and answer period. Thank you.

Senator BOXER. Senator, I will take the 25 seconds you went over your time to say a couple of things. No. 1, California is not in violation of the Clean Air Act. We have asked for, as is allowed under the law, extensions of time to deal with issues because, you may not know this, we have 37 million people, and we are probably the economic engine of the country, if you consider we would be the fifth largest country, given the size of our gross domestic product in our State.

No. 2, I don't think the word grandstand has any meaning at all. I don't think that our Attorney General is grandstanding. I asked him to come here. I don't think our Governor is grandstanding, and I don't think our legislature is. They just want to do something about global warming.

Now, I don't think EPA grandstanded 40 times before when it granted a waiver. This was an automatic, because California is out in front.

So that's where we are on this.

Senator INHOFE. We are talking about particulate matter and ozone. That is certainly an area where California has not been in compliance.

Senator BOXER. Well, I say, you can look at my State and you can look at our energy use. You can find out if you look there that while we have had an amazing per capital standard of energy use over the past 30 years, other States have, the average is double that. So yes, there are places where we have done better. There are places we have done worse, given our geography, given our industry and all the rest.

But I want to make it clear here, since my State has been attacked head on, nobody in my State is grandstanding. They are trying to step up to the challenge of global warming. I think that is

important. As far as arguing that we are out of our compliance, the fact is, we haven't met the standard, and you are right in pointing that out. We want to help them meet the standard. But they have followed the Clean Air Act and have asked for these extensions.

Senator Lautenberg, can we—

Senator LAUTENBERG. Just a few minutes, Madam Chairman.

Senator BOXER. You have 5 minutes.

Senator LAUTENBERG. Thanks very much, Madam Chairman.

Every time we hear the fact that there has been a cool day here, a cool day there and accused of grandstanding, when in this very room it was said that global warming is the greatest hoax ever perpetrated—

Senator INHOFE. No, man-made climate change.

Senator BOXER. Excuse me.

Senator LAUTENBERG. Now, that's not—

Senator BOXER. Could I just—one moment. We are going to speak one at a time. Senator Lautenberg, you have time. Senator Inhofe, if you would like time to respond, you will get it.

Senator LAUTENBERG. This hoax is overtaking place after place after place. We see Glacier Park no longer Glacier Park. We see Kilimanjaro without snow. We see polar bears floating on floes of ice. I have been to the South Pole and I watched, I wanted to see what the National Science Foundation was doing. What they were doing when I was there 6 years ago is complaining about the ice melt and the loss of fresh water supply that was going to take care of this world.

So we are here today because EPA has once again failed to act in the face of science. When we hear the rebuttals that say, well, no, we are facing a cooling stage, well, last year was the hottest year on record and this year is going to be even a hotter year on record. So I don't know where the head in the sand technique that we are using to respond to here works. But we are going to challenge it every time we have.

Madam Chairman, California has been courageous and leaderly in what they plan to do about greenhouse gases. New Jersey has followed along with them. We are waiting for the EPA to grant this waiver to the Clean Air Act. One estimate predicts that if all the States waiting to adopt it, if the standard were given a waiver today to adopt it, they could cut their emissions by 64 million metric tons of carbon dioxide by the year 2020. That is the equivalent of taking about 12 million cars off the highways.

But instead of making an impact, instead of improving our environment, the EPA is sitting on its hands. They have granted these kinds of waivers more than 50 times in history. But it has taken more than a year to consider this one. We are waiting for a waiver so our businesses can develop, build new technologies to help us reduce the emissions from our vehicles. We are waiting for the EPA to realize that its lack of regulation has harmed the health of the environment and of the men, women and children who breathe our air.

The committee is working to curb global warming. Senator Sanders has a bill to reduce the overall emissions of the economy by 80 percent by the year 2050. I hope I am not still having to run to make this happen in 2050. But I am proud to be a cosponsor of this

bill. The Commerce Committee, on which I sit, recently passed the first increase of CAFE standards since 1990. But the Bush administration is hindering our efforts to combat global warming. They have to act now to grant these Clean Air Act waivers. Madam Chairman, don't relent.

Thank you very much.

Senator BOXER. Thank you very much.

Senator Inhofe, would you like 60 seconds more for your opening statement?

Senator INHOFE. That would be fine.

Senator Lautenberg, I would have to say, it depends on where we want to start. If it is polar bears, the population has actually doubled in the last 50 years. We know about the 11 populations of polar bears in Canada and how they are enhancing their breed. There are some problems where the hunting laws were not, were enforced perhaps wrong. I think it was only one area where there is a reduction.

The thing that is interesting is, Senator Lautenberg, is that every day more scientists that were strongly on your side, I am talking about the leaders, I am talking about Claude Allegre in France and David Bellamy in the United Kingdom and Nir Shariv in Israel, are now over on the other side, saying, we have reevaluated the science, it is not there. So that is still up in the air as something that we are looking at. Certainly we have had more than enough hearings in this committee on climate change.

Senator BOXER. Senator Lautenberg, would you like an additional 60 seconds?

Senator LAUTENBERG. Well, I guess that the Union of Concerned Scientists must be worried that their organization is going to fall apart, as we see these individuals disagree. That is life. But how can you face every day and know that there are all kinds of disastrous things happening with children's health, as a result, asthma. I have an asthmatic grandchild, and it is painful to see what happens with him when the air is not pure and what he needs to do in case there is an attack, my daughter has to rush him to an emergency clinic. I see more and more children with asthma and other kinds of conditions that are affected by the environment.

So there are those who I guess will continue doubting the sights in front of their eyes, what reputable scientists say about global warming, and how they can challenge these very obvious things is beyond me.

But thanks very much. By the way, did anybody notice the ferocity of the storms in Oklahoma, the tornadoes suddenly coming up? Tornadoes.

Senator INHOFE. We set records out there for an unusually cold winter.

Senator BOXER. Well, let me say for my minute's worth that the IPCC convened the world's leading scientists and there is no disagreement whatsoever. You always have a few people saying, the world is flat and HIV doesn't cause AIDS and tobacco is not the cause of cancer. That is life. We always have a few people who don't see the world the way it really is. It is our job because we are not scientists to listen to the preponderance of scientists.

So every single time that Senator Inhofe says, your side is losing, I will just point to the fact that it is not about losing or winning at all. It is about reality. Reality is what is going to govern this committee as long as I happen to have the gavel at this point. As Senator Inhofe has said many times, that is a tenuous situation. I understand that. This is a very closely divided Senate, and we don't know. But today, and these days, we will continue to refute what is said.

The Bush administration, who we know has not been strong on the environment, has launched a study because it fears the polar bear is becoming extinct. So you can say all you want, how happy they are and everything else. The Bush administration launched this study. So I will stop and I will call on Hon. Jerry Brown, who at this point, I hope he still feels that he is very welcome. Because we certainly do all welcome you here. Attorney General Brown.

**STATEMENT OF HON. EDMUND G. BROWN, JR., CALIFORNIA
ATTORNEY GENERAL**

Mr. BROWN. Madam Chairwoman, thank you very much, and members of the committee.

First off, let me say something about soot, particulate matter, ozone, you are right. California has quite a problem. That is the reason why we are entitled to a waiver. We have extraordinary climactic conditions and topography that requires this waiver. That is why we have it.

By the way, soot and ozone are exacerbated by warming climates. That is precisely why we are so concerned about global warming, among other things.

By the way, just going back a little bit in time, this waiver was signed into law by President Nixon at the time that Ronald Reagan was Governor of California. Now we come full scale, many years, 40 years later, we have a Republican Governor in California, Republican President, and we are looking at the same problems. California has unique environmental challenges. It has more cars, more concentrations of cars and a climatic condition that exacerbates issues like soot and ozone. That is why we want to guard against them with this waiver.

I was at the hearing this morning. The technological and legal case is overwhelming. That case, whatever you think about global warming, the legal case for this waiver, to me, is about as strong as I have ever seen a legal case made. I am hoping that the EPA Administrator grants the waiver. If he doesn't, we will sue him forthwith. We will have the full support of the Executive Branch and the Legislative Branch in California.

Let me go back to the global summit in 2002, when I was in Johannesburg. One night, while they were discussing a measure, a resolution by Brazil to put more funding into solar and conservation, a group of people were caucusing on this. The group consisted of the representative of Iran, of Saudi Arabia, there were many oil companies in the room, and the representatives of the Bush administration. Here they were, Iran, Iraq under Saddam Hussein, oil companies and the Bush people, all agreed that this would be a horrible thing if solar energy and conservation were promoted at the expense of petroleum.

I went up to the Iranian representative, who was a well-dressed man, it was about 11:30 at night, and I said, "You have a lot of sun in your country. Don't you like solar energy?" He said, "No, we like oil." That is pretty much where we are today. The people fighting to prevent America from becoming energy independent are oil companies and automobile companies. Measured by carbon content, we import at last count 65 percent of the petroleum used in this country. If that were to be cut off, this economy would be dealt a devastating blow.

So just in terms of efficiency, nothing could be more important than having energy efficient cars. Our auto industry is very innovative. They have built up the weight and the horsepower. You can go from 0 to 60 faster than ever. But they have slowed down since 1985 in making their cars more efficient. They invoke safety, they invoke consumer choice, and both those are bogus claims. The consumer choice is shaped by billions of dollars of advertising propaganda, and safety is a function of design and other factors, not mere weight. Their argument is, put everyone in a big car to protect everyone from the big cars that are already there. In 1985, 9 percent of the cars were SUVs and minivans, now it is 50 percent. We are going in the wrong direction.

Now, maybe the Senator from Oklahoma, what if you have a chance you might be right? Even if the evidence on global warming was equivocal, and the IPCC says it is unequivocal, as a matter of risk protection, as a matter of insurance, the investment that you make in reducing the impacts on global climate is far less than the investment you have to make when you measure it against the consequences that may well ensue.

By the way, 90 percent of the scientists call it unequivocal. So there we are. Why does it make a difference? Because when California goes, 11 States go with it. That pushes the technology. Then as California goes, then the United States follows behind and other countries follow us. So when you measure the full impact of California going first, it would be quite considerable, even in terms of the reduction of global warming.

When I first started in politics, there were about 250 million automobiles in the world. There are now 600 million. Very soon, there is going to be a billion. Now, Mother Nature is quite productive and adaptive. But we have never had 6 billion people, 6½ billion, wanting, most of them, to drive automobiles. They can't go on in the way it is. We have to start to turn to an environment-friendly way of living and transporting ourselves. That is really at stake here.

The CAFE standards announced by the Bush administration are a joke. They are actually, some people think they are going to increase fuel mileage because they allow the bigger vehicle and the weaker mileage standard. That is all in the name of consumer choice. Well, there are a lot of things that consumers are restricted from because of morality and because of the social good of the country. Certainly, good will come from controlling climate disruption.

Eighteen of the last twenty years, since temperatures have been recorded, have been the highest in the history of recording temperatures. This is a very serious matter. We are not scientists, most of us here. But the probabilities, the peer reviews all tell us

we ought to not take such a risk and gamble with the future. The people who have the most to gain, of course, are oil companies and auto companies who make the big profits. Who has to lose are ordinary people in the future. I think we have to balance the risk, make appropriate investments. This Congress, I think, can go a long way toward getting the CAFE standards straightened out, shaping consumer choice based on real science and our best understanding of the risks and benefits. Also, encouraging the innovation that will make our cars of better materials, lighter and less consuming of the environment.

So this is bigger than Iraq, it is bigger than immigration. It is not tomorrow, but it is coming around. Unlike those two, they can be combatted within a certain clear time frame, whether it is a few years or 10 or 15 years. But combatting global climate change could take centuries. So the mistakes you make are more catastrophic, more long lasting and very hard to recover from. That is why the stakes here, I believe, have never been higher. I don't say the polls register this yet. But you in the Senate, I believe, have the ability to take the lead and protect our country from what is going to be the gravest threat that we face as people of this country and as members of the human race. Thank you.

[The prepared statement of Mr. Brown follows:]

STATEMENT OF EDMUND G. BROWN, JR., CALIFORNIA ATTORNEY GENERAL

Madam Chairperson and Members of the committee, I appreciate the opportunity to testify before you today. I'm here to talk about California's waiver petition now pending before U.S. Environmental Protection Agency. That petition seeks a waiver of federal preemption of regulations approved by California's Air Resources Board to reduce greenhouse gas emissions from motor vehicles.

The Air Resources Board approved these regulations more than 2½ years ago. California has been ready to go, ready to tackle one of the most significant sources of greenhouse gas emission in my State and in the Nation. California takes NASA's Jim Hansen seriously when he says that we have, at most, 10 years to drastically change our emissions levels or risk passing a "tipping point" where we won't have any control over the resulting environmental catastrophe.

As the committee is undoubtedly aware, California's regulations have been stymied. As soon as they were adopted, the auto industry, instead of taking responsibility for its substantial share of the problem, immediately sued the Air Resources Board. U.S. EPA, the Agency that would most logically take the lead at the Federal level to address global warming, instead decided that greenhouse gases weren't pollutants under the Clean Air Act. EPA's interpretation was, not surprisingly, enthusiastically endorsed by the auto industry.

EPA's reading of the Clean Air Act was ridiculous, ignoring the plain text of the statute. But it's typical of the "head-in-the-sand" approach that this Administration has taken on issues related to climate change. This Administration has too long hidden behind a "wait and see approach" as an excuse to do nothing. California isn't willing to "wait and see" if the sea level will rise by 1 foot or 10, or if the Sierra snow pack will shrink by 10 percent or 50 percent or more. California will take action today, even as this Administration shirks its responsibility.

The Supreme Court has now flatly rejected U.S. EPA's creative interpretation of the Clean Air Act designed to tie the Agency's hands. This is the right result. But it's unfortunate that the EPA's irresponsible reading of the Act has cost California and this country precious time in the fight against global warming.

California must now ask this same Agency for a waiver of Federal preemption. The Supreme Court in *Massachusetts v. EPA* has given the EPA a mandate to respond to the climate change crisis immediately—not tomorrow, not next week or next year. If the EPA in this Administration is not going to lead, it must step out of the way to allow California to continue its pioneering effort in the area of vehicle emissions controls.

If EPA follows the law, there's no question that it must grant California's waiver. The courts and EPA have liberally construed the waiver provision to permit California to proceed with its own regulatory program in accordance with the intent of

the Clean Air Act. There's no basis for EPA to deviate from its consistent findings in proceeding after proceeding that "compelling and extraordinary conditions" exist to justify California's continued need for its own mobile source program.

Let me tell the committee why this matters. I don't think I need to convince anyone on this committee that global warming is real. There is simply no question about it. Global warming is the most important environmental and public health issue we face today. It's of particular concern to California. In California, human-induced global warming has, among other things, reduced California's snow pack, caused an earlier melting of the snow pack, raised sea levels along California's coastline, increased ozone pollution in urban areas, increased the threat of wildfires, and cost the State millions of dollars in assessing those impacts and preparing for the inevitable increase in those impacts and for additional impacts.

Regulating auto greenhouse gas emissions is an essential part of the solution. The United States transportation sector emits an enormous quantity of carbon dioxide into the atmosphere, as the Supreme Court noted in the *Massachusetts* case, more than 1.7 billion metric tons in 1999 alone. In California, automobiles contribute 41 percent of all greenhouse gas emissions in the State. Passenger vehicles are the largest single source of heat trapping gas emissions in California. What we do in California on the regulatory front will undoubtedly affect the entire Nation—California has a long-standing history under the Clean Air Act of leadership, and the technology-forcing of its regulations is well recognized.

The auto industry will tell this committee that it can't be done. This is nothing new. Over the past 40 years, the domestic automobile industry has opposed just about every public health and welfare regulation—seat belts, turn signals, collapsible steering columns, catalytic converters, air bags, and fuel economy standards. They say the requirements will cost too much, can't be met, and won't work. Then, as now, they claim the sky is falling—the requirements will cost thousands of jobs and give unfair advantages to their foreign competitors. History shows that in every case they were wrong. They're wrong now.

California stands ready to work with the auto industry to do the right thing. But to this point, they've not been willing to step up and take responsibility. It's unfortunate that this industry must be dragged kicking and screaming into the 21st century, but if that's what needs to happen, then California is prepared to do the pulling.

I thank you for the opportunity to testify before this committee and stand ready to answer your questions.

SUMMARY AND KEY POINTS

NO MORE DELAY

- For years, President Bush and his Administration claimed the problem of global warming needed "more study."
- Although the President has finally conceded, as he must, that the days of "more study" are over—he now claims the problem of global warming is—complicated. So now he says let's coordinate—let's plan, so we can take "first steps." This is nothing but more delay.
- The President says regulations "should be developed"—California's regulations are already completed. He says let's take "first steps" to get something done—California has already done it.

EPA MUST APPROVE CALIFORNIA'S WAIVER

- The Supreme Court gave EPA a mandate in *Massachusetts v. EPA* to respond to the climate change crisis immediately—not tomorrow, not next week or next year.
- The first thing EPA can do to carry out that mandate is grant California this waiver so that California can enforce its own greenhouse gas emission limits. California has moved ahead and is now on the threshold of being able to implement this important program. EPA's responsibility is not to get in the way.
- Congress limited EPA's discretion in waiver determinations. EPA's inquiry must be focused on the statutory waiver requirements in the Clean Air Act, which have long been prescribed by Congress.

CALIFORNIA'S RIGHT TO ADDRESS GLOBAL WARMING

- Global warming has global consequences. It also has severe consequences to California. It is California's duty and obligation to address that.

- Global warming is real. It affects all of us and it affects California. There is simply no question about it. Global warming is the most important environmental and public health issue we face today.
- Automobiles are significant contributors to global warming. They contribute 41 percent of all greenhouse gas emissions in California.

LEAD TIME

- The automobile industry is going to complain that they do not have enough “lead time” to comply with the California regulations. This is nothing new. Just like they did in the 1970s, the automobile industry will tell you the regulation does not give them enough lead time. They’ll say they can’t do it. But they can. If anything, their executives’ recent public statements show that they have the technology and the know-how to comply.
- California’s regulations are the product of years of study and opportunities for public participation.
- Back in 2002, ARB invited the automobile industry to partner with it in developing these regulations. They refused to participate meaningfully. Now they complain.
- The regulations’ standards must be met first in 2009. The industry has had years to get ready for this. They knew in 2004, when ARB approved the regulation, that these standards would come into effect and they should have been working since 2004 to comply—instead of spending their time suing California and every single other State that adopted the standards—hoping for a court victory and more delay.
- The fact is that these GHG Regulations will not drive the U.S. automobile industry out of business. They are doing that to themselves already. Compliance with these regulations will help the domestic automobile industry survive into the future—because they will finally have to make efficient vehicles.

THE AUTO INDUSTRY WAS WRONG THEN AND IT’S WRONG NOW

- Over the past 40 years, the domestic automobile industry has opposed just about every public health and welfare regulation—seat belts, turn signals, collapsible steering columns, catalytic converters, air bags, and fuel economy standards.
- Taking a phrase from the Supreme Court, the automobile industry has “waged the regulatory equivalent of war” against these standards.
- The automobile industry says the requirements will cost too much, can’t be met, and won’t work. So it’s no surprise that now—instead of working to comply with the regulation, they are litigating it. Compliance is not their strategy—litigation is. Then, as now, they claim the sky is falling—the requirements will cost thousands of jobs and give unfair advantages to their foreign competitors. In every case they were wrong. They are wrong now.
- When the automobile industry opposed the Clean Air Act of 1970, they said the same things they are saying now. The American Automobile Manufacturers Association said that it would not be possible “to achieve the control levels specified in the bill. . . [M]anufacturers. . . would be forced to shut down.” Of course, the U.S. auto industry did meet the emissions requirements.
- In 1974, E.M. Estes, the president of General Motors stated that if Congress were to pass a law mandating corporate fuel economy, “absent a significant technological breakthrough. . . the largest car the industry will be selling in any volume at all will probably be smaller, lighter, and less powerful than today’s compact Chevy Nova. . . .”
- At about the same time, a Chrysler vice president for engineering, Alan Loofburrow, testified before a Senate committee that by 1979 new fuel economy standards would [in effect] “outlaw a number of engine lines and car models including most full-size sedans and station wagons. It would restrict the industry to producing subcompact-size cars—or even small ones—within 5 years. . . .”
- They are saying the same thing now. Executives from General Motors and Chrysler have testified in litigation over the California regulation that the California law would force them out of the market, leaving only small subcompact cars available to consumers. Well, they were wrong then and they’re wrong now.
- The U.S. automobile industry has already weakened itself by failing to pay attention to the world around them. While foreign automakers have responded to consumer desires and, importantly, positioned themselves to respond to the changing global climate—the former “Big 3” have resisted all of this, stubbornly continuing to build too many outsized vehicles in their search for outsized profits. Those days have been over for years—only the domestic industry doesn’t seem to get it.

CONCLUSION

- Based on the record before it, EPA must grant California's waiver. EPA must not come up with excuses to deny it. That will simply lead to more delay. The debate is over. The time for action is now.

Senator BOXER. Thank you so much for your very eloquent testimony.

Commissioner Grannis of New York, we welcome you.

STATEMENT OF ALEXANDER (PETE) B. GRANNIS, COMMISSIONER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Mr. GRANNIS. Thank you very much, Madam Chair.

I am half tempted to just agree with your opening statement and let it go at that. But I spent too long in politics to be able to do that, so I will present my statement to you.

I want to thank you for the opportunity to testify before you today on the greenhouse gas emission regulations that have been adopted by your home State and that are now pending for a waiver before the Federal EPA. Earlier today, New York State called on EPA to approve the waiver as quickly as possible. We joined with many other States in testimony before the EPA this morning with Governor Brown, among others on that mission.

EPA's approval of California's current waiver request will help both of our State meet the most important air quality challenge of the 21st century, as you enunciated, global climate change, global warming. For most professionals and common folks in this country and across the world, the debate about whether global climate change is real is over. Greenhouse gas emissions must be reduced to forestall catastrophic climate change. The only debate now is about what action should be taken to address the issue.

Global warming doesn't recognize geopolitical boundaries. It doesn't differentiate between those working to combat it and those choosing to ignore it. As Dr. Martin Luther King once said, "We are all caught in an inescapable network of mutuality, tied into a single garment of destiny. Whatever affects one directly, affects all indirectly." Global climate change is everyone's problem and to address it, we must work and act together. EPA's approval of your State's waiver request would be an important step in that regard.

By every measure, California's motor vehicle emission control program has been a success. Emissions in California today are a fraction of what they were in the past and continue to decline. Hybrid electric vehicles are now widely available in an increasing number of vehicle models and configurations. The technological hurdles have been enormous. But the auto industry has met the requirements, continue to provide automobiles that not only meet tailpipe standards, but also requirements for increased durability. Now it is time to turn our attention to greenhouse gases.

As everyone knows, the Clean Air Act specifically permits States to adopt California's more stringent motor vehicle emission standards. That is what we are waiting for. It is a right that we embrace, to be able to piggyback on California's standards. We are here today and I was here this morning before EPA to say we support that and obviously continue to hope to be able to exercise that right.

In 1990, New York became the first State to adopt California's motor vehicle emissions standards. Just as it has for conventional pollutions in the past, New York adopted California's regulations for reductions in greenhouse gases for motor vehicles effective December 2005. Reducing greenhouse gases in cars and trucks is crucial to our climate change efforts. Emissions from these vehicles account for roughly one-third of New York's greenhouse gas emissions and CO₂ is our greatest concern.

Studies show that CO₂ emissions from motor vehicles can be reduced by up to 30 percent, as Senator Lautenberg, I think, mentioned, by using various combinations of existing and emerging technologies. California's current emission control programs are critical to hastening the development of new technologies. California's regulations provide the automotive industry with the flexibility necessary to bring compliant vehicles to market. This approach would provide manufacturers with sufficient lead time to incorporate a vast array of existing and emerging technologies that are expected to be widely available within the next decade. Further, these regulations are cost-effective, since the reduced operating costs will completely offset the increased capital costs.

States across the country are exercising their authority under section 177 of the Clean Air Act and adopting the California emission standards to reduce greenhouse gas emissions for motor vehicles. In addition, many States, I think it is now 12, as you mentioned, Senator, not the EPA, are taking further actions to address greenhouse gas emissions. New York has a long list of trying to provide regulations for virtually every emissions source that we have been able to identify. For example, in New York, we have also joined with a number of other States in the northeast on a regional greenhouse gas initiative, regional cap and trade program for powerplant emissions for CO₂. In New York and across the country, States are implementing renewable portfolio standards, New York is no exception, to address the emissions associated with the power they purchase, along with a myriad of other programs to address climate change.

In April, New York State Governor Elliott Spitzer announced the most ambitious energy conservation goal in the Nation. By 2015, New York will reduce its demand for electricity by 15 percent, translating into fewer greenhouse gas emissions and more jobs for New Yorkers. To date, EPA has failed to show the resolve being demonstrated by the States and your committee and appears unwilling or unable to provide the necessary leadership to address global climate change.

Today, EPA has an opportunity to provide that long-missing leadership. Just as the fundamental scientific question regarding the need for reduction of greenhouse gas emissions has been answered, so too has the legal basis for taking action. Governor Brown and others mentioned it this morning, *Massachusetts v. EPA*, the Supreme Court came to the conclusion, unnecessary, should have been the unnecessary conclusion of not only telling Federal EPA what it can do but what it should do. EPA should exercise the authority now recognized by the Supreme Court, promulgating strong national standards.

California, New York and other States must be allowed to continue their leadership in the reduction of motor vehicle pollutants, including greenhouse gases. While New York and other States will continue to take strong actions to reduce these emissions, leadership from Congress is needed to fully address this issue. In that regard, I want to thank the committee for its strong interest in legislation to encourage public sector and private sector actions to reduce greenhouse gases nationwide. I also applaud you, Senator, and Senators Sanders and Clinton, for introducing S. 309, the Global Warming Pollution Reduction Act. This comprehensive legislation addresses on a national basis the issues which many States have already begun to implement, as well as pursuing measures that are beyond the purview of the States, such as setting a Federal research agenda on climate change and implementing new Federal fleet economy standards.

I want to thank you very much for giving me the opportunity to testify before you today.

[The prepared statement of Mr. Grannis follows:]

STATEMENT OF ALEXANDER (PETE) B. GRANNIS, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

I would like to thank the Committee for the opportunity to testify on behalf of New York State regarding the Greenhouse Gas (GHG) emission regulations for passenger cars, light-duty trucks, and medium-duty passenger vehicles that have been adopted by the State of California and are currently before the Environmental Protection Agency (EPA) for a waiver of Federal Preemption. New York State strongly urges EPA to grant the waiver.

California's leadership in motor vehicle emissions controls is critically important to New York and many other States in meeting air quality objectives. Over the years, New York and California have established a strong working relationship on mobile source emissions assessment and control. EPA's approval of California's current waiver request will help both of our States meet the most important air quality challenge of the twenty-first Century and the most pressing environmental issue of our time: Global Warming.

Except among a few stubborn skeptics—a few of whom reside in this municipality—the debate about whether global climate change is real is over. Two-thousand of the world's leading scientists aren't wrong. GHG emissions must be reduced to forestall catastrophic climate change. The only debate now is about what actions should be taken to address this issue.

Global warming doesn't recognize geopolitical boundaries. It doesn't differentiate between those working to combat it and those choosing to ignore it. As Dr. Martin Luther King once said, "We are all caught in an inescapable network of mutuality, tied into a single garment of destiny. Whatever affects one directly, affects all indirectly." Global climate change is everyone's problem, and to address it, we must work, and act, together.

EPA's approval of California's waiver of Federal Preemption is an important step in that regard.

By every measure, California's motor vehicle emissions control program has been a tremendous success. Emissions in California today are a fraction of what they were in the past, and continue to decline. Hybrid electric vehicles are now widely available, in an increasing number of vehicle models and configurations. The technological hurdles have been enormous, but the industry has met the requirements, continuing to provide automobiles that not only meet tailpipe standards, but also requirements for increased durability. Now it is time to turn our attention to greenhouse gases.

As you know, the Clean Air Act specifically permits States to adopt California motor vehicle emissions standards that are more stringent and protective of human health and the environment than federal standards. Section 209 of the Clean Air Act authorizes California to adopt its own new motor vehicle emission standards. Section 177 of the Act permits other States to adopt California's standards, as long as they are identical to the California requirements and provide 2 model years lead time. This is a right that we embrace, and continue to exercise. In 1990, New York became the first State to adopt California's motor vehicle emission standards. And,

just as it has for conventional pollutants in the past, New York adopted California's regulations for reductions of GHG from motor vehicles, effective December 2005.

Reducing GHG in cars and trucks is crucial to our climate change efforts. Emissions from these vehicles account for roughly one-third of New York's GHG emissions, and CO₂ is our greatest concern. An efficient means of reducing these emissions is through the use of advanced engine, transmission, and air conditioner technology to cause reductions at their source. In fact, studies show that CO₂ emissions from motor vehicles can be reduced by up to 30 percent by using various combinations of existing and emerging technologies.

California's current emissions control programs are critical to hastening the development of new technologies. California's regulations would provide the automotive industry with the flexibility necessary to bring compliant vehicles to market. The regulations would use phase-in periods to reach near and mid-term emissions standards. This approach would provide manufacturers with sufficient lead time to incorporate a vast array of existing and emerging technologies that are expected to be widely available within the next decade. Further, these regulations are entirely cost effective, since the reduced operating cost will completely offset the increased capital cost.

States across the country are exercising their authority under section 177 of the Clean Air Act and adopting the California motor vehicle standards to reduce GHG emissions from motor vehicles. In addition, many States—not the EPA—are taking further actions to address GHG emissions. For example, in New York we have joined with several other northeastern States on the Regional Greenhouse Gas Initiative—a regional cap and trade program for powerplant emissions of CO₂. In New York and across the country, States are implementing renewable portfolio standards to address the emissions associated with the power they purchase, along with myriad other programs to address climate change. And in April, New York State Governor Eliot Spitzer announced the most ambitious energy conservation goal in the Nation. By 2015, New York will reduce its demand for electricity by 15 percent, translating into fewer greenhouse gas emissions and more jobs for New Yorkers.

To date, EPA has failed to show the same resolve being demonstrated by the States and this committee, and appears unwilling or unable to provide the necessary leadership to address global climate change.

Now EPA has an opportunity to provide that leadership. Just as the fundamental scientific question regarding the need for reduction of greenhouse gas emissions has been answered, so too has the legal basis for taking action. In *Massachusetts v. EPA*, the United States Supreme Court made clear that EPA has the authority, and indeed the responsibility, to address emissions of greenhouse gases. EPA should exercise that authority by promulgating strong national standards.

Regardless of whether EPA accepts that responsibility, however, it should grant the waiver in order to allow California, New York and other States to continue their leadership in the reduction of motor vehicle pollutants including greenhouse gases.

While New York and many other States will continue to take strong actions to reduce these emissions, leadership from Congress is needed to fully address this issue. In that regard, I want to thank the committee for its strong interest in legislation to encourage public sector and private sector actions to reduce greenhouse gases nationwide. I also applaud Senators Sanders, Boxer and Clinton for introducing S. 309, the Global Warming Pollution Reduction Act. This comprehensive legislation addresses, on a national basis, the issues which many States have already begun to implement, as well as pursuing measures that are beyond the purview of the States—such as setting a Federal research agenda on climate change, and implementing new Federal fleet economy standards.

The importance of the matter before us cannot be overstated. Global climate change is real and we must address it now. New York strongly urges that EPA promptly grant California's waiver request and enable California, New York and other States to act as soon as possible to make headway on this critical issue.

Thank you for giving me the opportunity to testify before you today.

Senator BOXER. Thank you very much, Commissioner.

Senator Inhofe has told me that he needs to go to the Armed Service Committee. So he has asked to make a plea to his colleagues who are not here yet.

Senator INHOFE. Yes, I don't have to right away, Madam Chairman, but we are making up the Defense Authorization bill right now. I am required to be there. So I would like to ask staff to notify

any of the Republican members, because we need to have them come to this very significant hearing at this time.

Senator BOXER. Thank you.

Please, let's continue with Mr. Adler. We welcome you, Professor Adler.

**STATEMENT OF JONATHAN H. ADLER, PROFESSOR OF LAW,
DIRECTOR, CENTER FOR BUSINESS LAW AND REGULATION,
CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW**

Mr. ADLER. Thank you, Madam Chairman, and members of this committee, for the invitation to testify today about 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 for new motor vehicles.

Let me say at the outset that my interest here today is in many respects an academic one. These are issues that I study and analyze. I have no economic or political interest in the outcome of this issue or related issues.

To summarize basically my points today, while as we have already discussed, the Clean Air Act generally precludes States from developing their own emissions controls, there is a provision in the Act, section 209(b), which allows California, if it meets certain conditions, to obtain a waiver from the EPA for vehicle emission standards of its own. But the existence of this provision does not mean that the EPA should or is even permitted to grant the specific waiver that California requests now.

Regulatory controls on vehicular emissions of greenhouse gases present different issues than have been considered in all of the prior waiver requests that have been granted to California. It is not clear to me that this request meets the statutory requirements of the Clean Air Act. So I want to briefly address the statutory requirements of the Act and then say a couple of quick points about the broader policy issues and the timing of EPA action.

First, as I mentioned, it is unclear whether or not this waiver request satisfies the requirements of the Clean Air Act. There are three requirements that the Act imposes on a waiver request. The one that I think is most important for our discussion is the fact that EPA is not allowed to grant a waiver unless the granting of a waiver is necessary for California to be able to meet compelling or extraordinary conditions. In the context of urban air pollution, the sorts of air pollution and environmental concerns that were at issue when this provision was drafted and when Federal vehicle emission standards were first adopted, this was a relatively easy standard to meet. As we all know, California had particularly severe air pollution problems. California was also the first State to adopt vehicle emission standards, and Congress decided in a compromise both to recognize California's position as the first mover but also to recognize that there may be measures that are worth adopting in California that would not be worth adopting in other parts of the country. That is how we got section 209(b).

So in the past, California, for example, could argue that more stringent controls on vehicular emissions were required to enable metropolitan areas to meet the National Ambient Air Quality Standards and to reduce the comparatively large contribution that

cars and trucks made to California's unique and particularly severe air pollution problems. But these arguments aren't applicable in the context of global climate change. Global climate change is by definition global. California's problem is not any different than Montana's, than Oklahoma's, than New York's, than Canada's, than Israel's, France's or any place else. California is but one contributor of greenhouse gas emissions to the global climate commons, and the degree of warming experienced by California is a consequence of global concentrations, not any particular unique or distinct situation in California proper.

So in the context, again, of particulate matter ozone pollution, California could say they needed more stringent emission controls to help California protect California's environment and to meet the requirements of Federal law. Again, that is something that California cannot claim today, and that makes the greenhouse gas controls different than those that have been granted waivers in the past.

I also think that California has a difficulty claiming that these controls will do much of anything for California, because these controls, even if adopted by 11 other States, will not have a meaningful effect on future projections of climate change. Moreover, I should also point out that even if EPA does grant this waiver, that does not end the legal discussion, because the National Highway Transportation Safety Administration maintains that these regulations are preempted by the Energy Policy and Conservation Act, in particular the Federal fuel economy standards.

The Supreme Court's decision in *Massachusetts v. EPA* does not overturn that finding. There is an argument, certainly a serious legal argument, that California's greenhouse gas emissions standards are tantamount to the adoption of State energy efficiency standards for automobiles. I would note that Attorney General Brown himself today described the regulations at issue as encouraging energy efficient vehicles. That would strengthen the argument of NHTSA and others that these rules would be preempted even if EPA grants a waiver, because a waiver only covers, only grants a waiver of preemption from the Clean Air Act, not from other Federal laws.

In terms of the policy questions, I am certainly a strong advocate of greater decentralization in environmental law. I certainly think States should be granted greater flexibility. But when one looks at the sorts of areas where we need greater flexibility one doesn't normally start with the regulation of products bought and sold in national markets in order to address a problem of global dimensions. The academic literature is fairly unanimous on the point that the strongest arguments for flexibility occur in those areas where both the problem and the solution are relatively localized; issues like local land use, issues like drinking water, and even of the design of many air pollution control strategies, where the effects and costs are borne locally.

But in this context, we don't have either of these criteria. We have products, automobiles, that are bought and sold in national markets, that are produced for national markets, and we also have a global commons in the global atmosphere. Reducing greenhouse gases in the atmosphere to address global climate change requires

a coordinated national response, not piecemeal State responses. While I certainly think that some of the economic arguments against allowing State flexibility may have been overstated, that was not the view that Congress took when it adopted section 209, that is not the view that Congress took when it outlined the criteria for granting California a waiver, and if there was a problem with the balance that was struck in the Clean Air Act in creating a presumption of preemption, that is something that Congress can fix.

I should note, though, that even if Congress does not fix this problem and EPA does not grant the waiver, it is not as if California, New York or any other State is devoid of other opportunities in their ability to reduce greenhouse gas emissions. There are many policies that can be adopted to reduce greenhouse gas emissions that do not implicate section 209(b) and preemption.

Since I know I am running short on time, let me just make one quick point, on timing. The administrative process is slow. The *Massachusetts v. EPA* decision was only 2 months ago. The idea that a Federal Agency would go through an administrative proceeding of this type in less than 2 months would certainly be astounding. We don't see Federal agencies act that quickly in other contexts. We shouldn't be surprised they are acting slowly here.

Thank you.

[The prepared statement of Mr. Adler follows:]

STATEMENT OF JONATHAN H. ADLER, PROFESSOR OF LAW, DIRECTOR, CENTER FOR BUSINESS LAW AND REGULATION, CASE WESTERN RESERVE UNIVERSITY, SCHOOL OF LAW

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 15 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

“(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 0.15 °C 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 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 particu-

¹ T.M.L. Wigley, *The Kyoto Protocol: CO₂, CH₄ and Climate Implications*, 25 *Geophysical Research Letters* 2285 (1998).

² See, for example, Jonathan H. Adler, *Letting Fifty Flowers Bloom: Using Federalism to Spur Environmental Innovation*, in *The Jurisprudence of Environmental Protection: Change and the Pragmatic Voice in Environmental Law* (Jim Chen, ed., Environmental Law Institute, 2004).

larly 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 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 policies 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.

³ See, for example, Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 *NYU Environmental Law Journal* 130 (2005).

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 2 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).

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.

Senator BOXER. Thank you.

I understand Senator Whitehouse has asked if he can submit his opening statement, which is great.

[The prepared statement of Senator Whitehouse follows:]

⁴In 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.

STATEMENT OF HON. SHELDON WHITEHOUSE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Madam Chairman, thank you for holding this important hearing, and for your commitment to addressing the growing threat of climate change to our Nation and our world. Your leadership and tenacity are inspiring.

I also share your concerns regarding the Environmental Protection Agency's (EPA) failure to act expeditiously to approve the Clean Cars Program in California and 11 other States, including my State of Rhode Island.

As my colleagues know, over 18 months ago California submitted a request for a waiver under the Clean Air Act to enact a stricter standard to regulate vehicle carbon dioxide emissions than is currently required under Federal law. Since that time, while the dangers of global warming mounted, the EPA has sat on its hands, doing little more than to issue a litany of excuses for its failure to respond to California's request.

Meanwhile, the more than 100 million people of these 12 States, representing $\frac{1}{3}$ of our Nation's population, have been prevented from taking critically needed action to reduce their contributions to global warming, save money at the gas pump, and breathe cleaner air.

Fortunately, last month, the Supreme Court stepped in. In its landmark decision in *Massachusetts v. EPA*, the Court made it clear that the Agency has the authority to regulate vehicle CO₂ emissions. This effectively clears the way for the Agency to grant California's—and the other participating States'—waiver requests.

It is very frustrating, Madam Chairman, to be confronted with an EPA that must be taken to court and compelled to do its job. The time for delay has ended. The EPA must move forward and allow my State, and your State, and these other States, to take the urgent action we need to protect our environment and our communities' health.

The benefits of the Clean Cars Program are without question. If the program were to take effect today, the 12 participating States would collectively reduce vehicle emissions by 392 million tons by 2020—a reduction level equivalent to taking 74 million cars off the road for an entire year. Or to put it another way, these savings are equivalent to the current global warming emissions of entire countries such as Ireland, Sweden, and Israel.

A report released just yesterday by Environment Rhode Island compared the projected reductions in global warming pollution by each State participating in the Clean Cars Program. It found that by 2020 each State will have cut its emissions by an average of 17 percent, equaling a combined total of 74 millions fewer tons of carbon dioxide being released into our environment.

Furthermore, improved vehicle efficiency will save consumers money at the gas pump and reduce our dependence on foreign oil—bringing us one step closer to achieving true energy independence in the United States. The report by Environment Rhode Island estimates that the Clean Cars Program could reduce gasoline consumption by as much as 8.3 billion gallons per year and save consumers up to \$25.8 billion annually in fuel costs. With gas prices up an average of \$1.02 since January, Madam Chairman, this is a no-brainer.

But the more the EPA hems and haws, the longer Americans must wait. We can't afford that any longer.

Before Californians, Rhode Islanders, and millions of other Americans can begin to experience the benefits of cleaner air and increased savings at the pump, the EPA must approve a waiver for the State of California. And 18 months is long enough. I look forward to hearing the testimony today from our panel and learning more about the ways in which the Clean Cars Program can begin to address the looming threat of global warming across this country.

Senator BOXER. Each of us is going to have a round of 7 minutes. I just want to say, Mr. Adler, your argument is so weak. Because you are basically saying that you can't see any compelling interest why California should receive this waiver. Now, do you know that California is a coastal State?

Mr. ADLER. Yes.

Senator BOXER. OK. You understand that. You know that we are particularly vulnerable in our bay delta to saltwater intrusion from sea level, you understand that?

Mr. ADLER. Yes.

Senator BOXER. We are vulnerable to levee collapse and flooding, you understand that?

Mr. ADLER. Yes. These provisions will not do anything measurably to reduce those risks.

Senator BOXER. Whoa, whoa, whoa, wait, wait, wait. I am asking you if you understand these things about my State.

Mr. ADLER. Yes.

Senator BOXER. You are here saying we have no compelling interest. I am telling you, read the brief. Because in it, it is very clear. The predicted decrease in winter snow pack would exacerbate all of these impacts by reducing spring and summer snow melt runoff critical for our State, for fish, for wildlife, for drinking water, our high ozone level, something that was responded to by our Attorney General.

I guess at this point I would like to ask our Attorney General, I think you have been handed kind of a softball here. The lawyer is arguing here that we don't have a compelling case. Why don't you make that case?

Mr. BROWN. Well, let me just, I do believe he misstates the law. The National Highway Safety Administration did put in a brief that was preempting California's greenhouse gases. They acknowledged in the Ninth Circuit, last week, I was there, that they had no authority to do that. Because we moved to strike it. They withdrew it voluntarily.

So NHTSA has no authority over the Clean Air Act. That is No. 1, as recognized by a three-judge panel in San Francisco in oral argument. No. 2, in *Massachusetts v. EPA*, the Supreme Court explicitly held that the Clean Air Act and the Energy Conservation Act are parallel statutes that run separately, they are not in conflict. They both have to be given their full effect. So each can regulate and each can utilize its Congressional power. That means we can't get a waiver under NHTSA, that we are preempted from CAFE standards, but when it comes to the Clean Air Act, we can regulate emissions.

Now, within the merchants and manufacturers, Automobile Manufacturers case back in, I think 1979, the court expressly held that California has been a pioneer and innovator, and that is what the law envisions. When we look at compelling and extraordinary, part of the compelling and extraordinary condition is that California has led the way, on catalytic converters, on diesel, on zero emission vehicles, on low emission vehicles. We have always been out in front of the Federal Government.

Now, when it comes to, and by the way, specifically, the compelling and extraordinary doesn't apply to every waiver that we ask for. It is, the general condition in California is compelling and extraordinary. That is why we get to have our own standards, unless they conflict with or they are not as protective as the Federal Government. So you don't, as has already been ruled in a court case, it isn't a specific measure. But even if you do, global greenhouse gases contribute to warming and they exacerbate soot, ozone, carbon monoxide, nitrous oxide and all the rest of them. So even if you try to apply it to each standard, this definitely applies.

There is another ruling that says that even if the EPA isn't regulating a substance, California has the right to do that and a waiver should be granted for that.

One other thing, I do think this point about California puts a few million cars under its regime, it is not going to stop global warming. Well, if the oil companies 20 years ago in 1985 had started not building such bigger cars, had made fuel efficient cars, we would have less global warming. So when you look at California, look at California, look at the other 11 States, look at the Federal Government that is likely to follow, look at other countries that will follow either our good example or our bad example.

When you take that train of consequences, then I think you make a very compelling argument that California will reduce global warming by these standards as they are embodied in other authorities around the country and around the world. We either push reduction or we push the opposite. There is no neutral here. You are either trying to reduce global greenhouse gases or you are trying to increase them. That is why I think the case today was overwhelming and compelling.

Again, the fact you have CAFE standards and the fact that you regulate emissions under the Clean Air Act and you get more efficiency, those are not incompatible. The Supreme Court in *Massachusetts v. EPA* said exactly that. So on very strong ground, I think the EPA Director, unless ordered by Bush or Rove or somebody, will grant us the thing, and if he doesn't, we are going to sue. I will state for the record, we will win that lawsuit. Unfortunately, it will be 2 years from now, and we will be that much more in the hole. It is going to cost us that much more money and we will have that much more environmental pollutants in California, all as a result of the auto companies want to make more profit with their gas-guzzling cars and they invoke consumer choice and safety, both of which are bogus in this case. Because the national interest requires the kind of pathway that California under both parties is now pursuing.

Senator BOXER. I want to thank you for that. I think we needed to hear that. It is interesting, it is kind of like a lawyerly debate.

I would ask unanimous consent to place in the record an op-ed piece written by Arnold Schwarzenegger that just ran Monday. I am just going to read a little bit of it. "It is bad enough that the Federal Government has yet to take the threat of global warming seriously, but it borders on malfeasance for it to block the efforts of States such as California, Connecticut and others that are trying to protect the public health and welfare." I think the point he makes here is, for 16 months the EPA has refused to give us, California, permission to move forward. Even after the Supreme Court ruled in our favor last month, he writes, "the Federal Government continues to stand in our way."

Now, Mr. Adler says, oh, it would be terrible for them to act so quickly. Quickly? They got that waiver in 2005. We have gotten 40 waivers over the past years without delay. So I want to go on record, along with my Attorney General, our top lawyer in our great State, that anything I can do, to do an amicus or anything else, I will be right there with you. But it is my hope that at least

some of us on this committee are going to keep the pressure on Mr. Johnson to grant this waiver.

Senator Inhofe, you have 7 minutes.

Senator INHOFE. Thank you, Madam Chairman.

Mr. Adler, General Brown said you are misstating the law. Let me just ask you a couple of questions here. The EPA has granted dozens of waivers to California in the past. How is this waiver different from some of those in the past?

Mr. ADLER. The waivers in the past dealt with urban air pollution problems, dealt with the sorts of problems where California could argue that its concern, its interest, was fundamentally different. California could argue that, for example, the Los Angeles Basin had particularly severe ozone levels, and therefore more stringent controls on vehicles were necessary than were necessary in other parts of the country that didn't have the same high levels of air pollution.

Because climate change is a global phenomenon, that is not, that doesn't present the same sort of question as a legal matter. It is not a question of whether or not global warming poses risks and threats. It does. The question is not whether or not California is at risk from climate change. The question is whether or not California has a distinct need to adopt these standards to address extraordinary and compelling and compelling conditions that California faces. That is where this waiver is different.

As I say in my testimony, I don't think it is an open and shut case. But I think there would clearly be grounds for EPA to deny the waiver if it chose to, and if EPA were to grant the waiver, I don't think it is altogether clear that that would stand up in court. The language of the prior, cases involving waiver litigation in the D.C. Circuit do not establish that EPA has the sort of discretion that Governor Brown suggested, or that CARB has that sort of discretion. They dealt with a fundamentally different context, the sort of context that this provision was designed to address. Climate change presents a different question.

Senator INHOFE. So you would say, well, California contended that the Supreme Court decision in *Massachusetts v. EPA* supports their waiver request, then would you disagree with this?

Mr. ADLER. I would disagree with that. It establishes two things that are relevant. No. 1, it establishes that if California is going to regulate greenhouse gas emissions, a waiver is required, because it established that the Clean Air Act does apply to greenhouse gases. Whereas before that, California could at least plausibly have argued that they didn't even need a waiver.

No. 2, is that it establishes that two Federal agencies can administer their own regulatory programs in consort with one another and without contradicting each other, even though they overlap. That is a fairly traditional way of interpreting Federal statutes, that if there are two Federal statutes administered by two Federal agencies, Federal courts assume that Congress didn't mean to create a problem, but that they should work together.

But when we're looking about preemption of State law, that is not the traditional way we look at things. The language in the Supreme Court opinion, and I have the page right here, it is page 29 of the slip opinion, pointed out that the statutory obligations were

different, but also noted that these overt obligations may “overlap.” In the preemption context, if a Federal standard overlaps with a State standard, that is grounds for what the Supreme Court refers to as conflict preemption and would be grounds for finding preemption. Whether or not it was right for NHTSA to try and submit a brief in a case or not is irrelevant to the question of Federal law.

The question of Federal law about whether or not California’s standards relate to fuel efficiency is an open question. *Massachusetts v. EPA* does not resolve it one way or the other.

Senator INHOFE. All right. General Brown, in your statement, you talked about the sea level could rise by, I think you used 10 feet, Al Gore used, 2 months ago, 20 feet. It is interesting that we talk about the IPCC, and I have always contended that IPCC is very political. They have the summary for policymakers that they come out with first, that is what everyone who wants to believe that this is a policy that is consistent with theirs, that the scientists back this up.

On the other hand, just last February, the IPCC came out downgrading the estimates of sea level rise to as low as 7 inches by 2100. Even at its worse case scenario, they have actually cut this in half. You ask a very good, and before leaving the IPCC, at the same month that they are downgrading the sea level rise, they are also downgrading the amount of contribution of anthropogenic gases from human activity, saying that that from livestock exceeds the entire transportation segment. This is something fairly recent that they came out with.

But you ask a legitimate question. I think you are wrong, but assume you are right, why would we not go ahead and take whatever steps that we are talking about anyway. I would have to respond to that, because I think it is a legitimate question. Unless we are certain that it is right, I don’t want to pass what would be, would equate to a very large tax increase. If you want to use the Wharton econometric survey, they said each family of four, it would be \$2,700. That would be 10 times greater than the tax increase of 1993. Then MIT came out just recently and talked about the Sanders-Boxer bill, that this wouldn’t be \$2,700, it would be \$4,500 it would cost each family of four. Even the more modest McCain-Lieberman approach would be \$3,500.

So I am saying that it is, there is a huge cost to these things. That is one of the reasons that I keep approaching this.

Getting back to you, Mr. Adler, in your testimony you focus on the second criterion of the 209(b). Does this mean the EPA could not reject the waiver request on any other grounds?

Mr. ADLER. There are two other requirements in section 209. One, the EPA has to determine that California’s conclusion that the standards are sufficiently protective or equally protective is not arbitrary and capricious. That would be a very fact-based inquiry.

What EPA would have to show is that for example, the California Air Resources Board maybe ignored the effects of fleet turnover or the slowdown in fleet turnover that would result from higher automobile prices. To know whether or not the waiver request satisfies that requirement would require looking through the various technical information that CARB looked at. That is a very def-

erential review. The EPA has a high burden to reject a waiver on those grounds.

The third one, which is more interesting, given the timing of this, is that the California standards must be consistent with EPA's regulations of emissions. Since EPA is only now in the process of adopting Federal standards for greenhouse gases, there is this question of how can you ensure that State standards are consistent with Federal standards that have not been written yet.

Again, since California has done this a lot of times, has done this 40 some times before, I assume that the California Air Resources Board made sure its enforcement and testing protocols would comply. But if not, that would be another ground to reject the waiver.

Senator INHOFE. Thank you.

Senator BOXER. Thank you very much.

Senator Lautenberg.

Senator LAUTENBERG. Thank you, Madam Chair.

Attorney General Brown, it is nice to see you, Jerry. It has been a long time. I am glad to see you in the service of government. Your continuing encourages me as well.

The auto industry sued to block implementation of the EPCA standards, claiming that the emissions reductions are not technologically feasible. Now, I just want to show you one chart there that shows the sheer neglect, didn't pay any attention to CAFE standards. The measurement got to where it was in 1994, 1984, I am sorry, and it continues on a straight line without any improvement at all.

Now, if we look at the other chart, given higher CAFE standards around the world, as displayed here, how can the auto industry argue that fuel economy improvements and the emissions reductions that accompany them are not possible? This is the United States. Here are the other countries, I don't know whether it is visible from a distance, but Canada, Australia, China, Japan and the European Union. Here we are, looking out to 2010, and it is going to look like, well, let's look at 2007 right here, where we are.

Other countries have found it quite feasible, quite simple, apparently, because they have done it. In one case, they have taken the lead in car sales away from the practical inventors of the industry. So how can they argue that these improvements in the emissions reduction of the company are not possible? Is there any logical explanation?

Mr. BROWN. Well, there is some logical explanation. In some of these other countries, there are higher fuel taxes. So therefore, smaller cars are more attractive in the marketplace. So adapting to our particular situation, the car companies have found their biggest profit is in the heaviest, least efficient, most harmful from a CO₂ point of view vehicle. Since 1985, as you showed, the line is flat.

They build cars that are now up to 500 horsepower. It is incredible the amount of innovation in terms of power and size. Had that all gone to reducing fuel expenditure and greenhouse gases, we would be in a much better place today.

So yes, they can do it. By the way, this business about pricing. Pricing is kept very confidential. They try to hide it, they try to keep it private in the Vermont case where they are suing to invali-

date the California regulations. Some of it did come out. The studies that the CARB has done is that the costs have turned out to be much less than the industry projected, and the pricing responds to many other factors, other than the introduction of fuel economy standards.

So they can do it. They don't want to do it, because there is a financial burden because of the decisions they have made. They are part and parcel of the regime that we operate under that works for big gas-guzzling cars, and they went from 9 percent to 50 percent. When America was at 9 percent minivans, people were just as happy as they are today. Now the sacred mantra is consumer choice. Well, by and large, that is true. But there are a lot of things we don't let consumers buy because of the harmful effect.

Senator LAUTENBERG. Permit me to rescue some of my time here.

Mr. BROWN. Go ahead, I am sorry. I am not used to this role here.

Senator LAUTENBERG. The enthusiasm that we share is pervasive. I have a limited amount of time to pervade.

When we see what has been done and we look at an industry that was a premier industry in the field for years and years and years, and how we let it escape from us and have Toyota taking over the sale of more cars in the United States than does our biggest manufacturer, it is pitiful.

Mr. Grannis, the EPA now must make an endangerment finding to determine if the public at large has been endangered by EPA's failure to regulate vehicle emissions. We go from California to New York. Is there any doubt in your mind that your States have been endangered by global warming? What evidence can either you provide to demonstrate this harm?

Mr. GRANNIS. Senator, I am glad you asked me the question, because this is obviously an issue that far exceeds just California. This is an issue that at least for the 12 States, 11 other States that want to follow in California's footsteps, we have all looked at the same information that has been put out there about the impact of global warming on our States, agricultural seasons changing, flooding, soil erosion and shore erosion, rising waters, changing temperatures, shorter ski season, a whole host of issues that other States have identified.

But we are in this together. Eleven States in addition to California—

Senator LAUTENBERG. Including mine, of course.

Mr. GRANNIS [continuing].—are following this model. I don't think we are arbitrary, I don't think we are capricious, we are not nuts. We are not irresponsible. We believe that this is an issue that affects far more than just California. We are obviously getting the benefit of piggybacking on the great work that California Department of Air Resources has done and their environmental board and their Governor and Senators have done in pushing this issue.

But clearly this is an issue that is of national importance. It affects at the very least 11 other States besides the State that is looking for this waiver.

Senator LAUTENBERG. We see it in marine ecology, we see it in the loss of coral, we see it in the reduction of species, we see it in so many ways. Do you know that there was a male fish, female fish

taken out of the Potomac that had—the reverse, I am sorry. No, it was a male fish that had female eggs in its body when it was taken out of the Potomac River.

Mr. GRANNIS. Even the spawning season for striped bass, in our great fisheries in the Hudson River are changing. The charter boat captains are reporting changing fishing conditions and things that they have experienced in the past. It all adds up. I don't think any one single element makes the case. But collectively, across the country, there are issues that have arisen that are very similar.

Senator LAUTENBERG. So Mr. Attorney General, how dare you say that there is a compelling reason to change these things?

[Laughter.]

Mr. BROWN. I will tell you something. I want to hear his response to this. California doesn't have to say that the compelling reasons are unique to California. You might take that at the first reading of the statute, but court interpretation has said that it is compelling. There is no doubt it is compelling, no doubt it is extraordinary. The fact that it is true all over the world, everywhere else, that doesn't negate the compelling quality in California. That is No. 1. No. 2, as climate goes up, the criteria pollutants get worse, like ozone and carbon monoxide and the rest of it.

So we are on very solid ground. Just one final point here, and I will make it very quickly. In the *Massachusetts* case, the minority said that, oh, the damage to Massachusetts was so trivial that Massachusetts had no standing to sue. The majority said, well, it is a small little impact there relative to everyone else, but that is enough for standing. So that small impact in California will be judged by the majority in accordance with the same rule. It is enough for the waiver, just like Massachusetts had enough impact for a smaller State in order to bring a suit under the standing rules in the U.S. Supreme Court.

So I heard him say this is not crystal clear. You are right. Depending on who is on the Supreme Court. But it looks to me like a five to four majority would go this way. Now, if Scalia and Thomas and the rest of them, very clearly, they spoke what they think. But that is probably why the next Presidential election is so important.

[Laughter.]

Senator BOXER. Let's not get off on that one. We have already gotten ourselves into far too much trouble today with our hearing.

But thank you, Senator, for eliciting such a good response from our witnesses.

Senator Whitehouse, please go forward with your questions.

Senator WHITEHOUSE. Thank you, Madam Chair.

I just wanted to show the flag here on behalf of Rhode Island. We were one of the original 13 States and now we are one of the EPA 12 that are logjammed in behind the EPA's slow process. General Brown, I particularly want to welcome you. I was Attorney General of Rhode Island and I am very glad to have you in our Attorney General corps. My Attorney General, my successor, Patrick Lynch, is down here today, over at the Environmental Protection Agency, arguing for the waiver. I salute him and encourage him in that battle.

The point that I would like to make is the one about the delay. I know Mr. Adler said that 2 months is expecting an awful lot to get a Federal Agency to move in. But if you look back at the history of this thing, EPA had sat on its hands and given us a litany of excuses about this for years. Over and over again, the courts have had to compel EPA to do its job. While EPA hems and haws, the rest of us have to wait and the situation worsens.

When you have an issue that is as serious as this one, and I really commend our Chairman for bringing this forward and keeping the pressure on. Because the backside of Mr. Adler's argument is that this isn't just a California problem. This is a global problem. This is a problem for our species. When the top environmental agency of the U.S. Government doesn't take it seriously, it is very frustrating. They are giving every signal now that they really don't take it seriously. To Mr. Adler's point, the arguments that were made in our favor in *Massachusetts v. EPA* were not frivolous arguments. They were not nonsensical arguments. Indeed, they prevailed. They were successful arguments in the U.S. Supreme Court.

So the idea that the Environmental Protection Agency has to start from a cold standing start now on an issue of this magnitude, setting aside that they are on the wrong side of the issue to begin with and they took the wrong side, the fact that they didn't even prepare in advance for the eventuality they might win so they could move out rapidly I hold against them. I am not willing to give this Environmental Protection Agency a pass on however long it takes them to go through their administrative procedures. They could have run on parallel tracks for an issue of this magnitude. There is no reason for them to be hiding behind the skirts of bureaucratic delay. It is their delay, they caused it.

It is just, I can't tell you how frustrating it is to have our top environmental agency engage in all these things. I really regret that the position you have taken, Mr. Adler, is to sort of vouchsafe the slow walking administrative delay aspect on a serious problem as if they were incapable of doing it any other way. Because I don't think they are incapable of doing it any other way. I have been an administrator. You can be creative. You can two-track things. There are all sorts of things you can do if you want to. If you want to.

Mr. ADLER. That has never been EPA's practice. That has never been EPA's habit. In the past, when Congress has felt the Agency is moving too slow on these sorts of issues, Congress has forced action.

In fact, that is the history of the vehicle emissions standards in the first place, when Congress first authorized the adoption of vehicle emissions standards, it delegated that authority to the EPA's precursor, in part because the auto industry thought that they would lead to a slower process. Congress then realized that the administrative process is really slow, because you have to go through a rulemaking. You have to prepare yourself for litigation. You have to make sure everything is in the record. Because if it is not in the record, it doesn't matter how good an argument it is; when you get sued you are going to get thrown out of court.

Congress came back in and then adopted vehicle emissions standards directly into the Clean Air Act. At the end of the day,

if urgent action is needed, Congress is capable of acting much more quickly and setting much firmer deadlines than agencies that are bound by the Administrative Procedures Act and all sorts of court judgments about how they have to devote their resources.

I am not going to defend that system. But as someone who teaches administrative law, I can tell you that is the norm, that is what has been set up. I can give you examples of instances where EPA lost cases years ago and has still yet to respond with a proposed rulemaking or a notice of proposed rulemaking or anything of that sort. That is not unusual.

Senator WHITEHOUSE. I am not comforted by the argument that they could be slower.

[Laughter.]

Senator WHITEHOUSE. Thank you, Madam Chair.

Senator BOXER. Picking up on that point, it is another ridiculous—excuse me for being so blunt, but that is the way I am—it is a ridiculous point, sir. If you are a student of government and those of us who have served in legislatures or who have been governors and served in any legislature, that is a slow process. How a bill becomes a law takes a long time.

An administrator of an Agency, this is why I share the frustration with Senator Whitehouse on this point, merely needs to, with a stroke of a pen, get things done. You can shake your head all you want.

Mr. ADLER. Under the Act, that is not possible.

Senator BOXER. Excuse me. If the Environmental Protection Agency was true to its mission, rather than being the EPA, the Environmental Pollution Agency, which I call it, under this Administration, they could do this. Forty times they did it in the past, we never had to pass legislation, those 40 waivers.

Mr. ADLER. But they are often very slow. In some cases, California was enforcing the standards before EPA had granted the waiver.

Senator BOXER. But sir, your initial point, which I take issue with, Congress has to act and pass legislation, and you cited a couple of cases. Look. The fact is, if an agency is dedicated to its mission, it is a beautiful day every morning when you wake up and say, how can I make this country environmentally sound, how can I protect the health and safety of the people.

This is what it used to be like under Republican and Democratic administrations. I always go through when the Clean Air Act was passed, when the Safe Drinking Water, the Clean Water Act, the Endangered Species Act, the Superfund, the Brownfields, was under Republican and Democratic administrations until we got here. So little has been achieved here.

So it is really a question of will. I also agree with Senator Whitehouse, you can't sit here and tell Senators that it is easier for us to get legislation through and signed into law. Because we live this every day.

Now, I am going to close this and just make a few points, which some of you will be happy with and some of you will not be happy with. One, global warming is real. There is 100 percent agreement that it is real by the world's leading scientists, clearly. Those same

leading scientists tell us that they are 90 percent certain, 90 percent certain, that human activities are the cause.

Now, if a doctor, and I want you to think about this, if a doctor came and told you that your child, that there was a 90 percent chance that your child had cancer, and that an operation would cure him, you would act very fast. All of us would. I believe we really would. If we went to all of the leading doctors, they all agreed, we would act.

Now, California is acting on an issue and 11 other States are coming with us. There will be more States. They have that right under the Clean Air Act. They won at the Supreme Court, much to the chagrin of people who don't want a change in the status quo. The waiver was filed in 2005, correct me if I am wrong, isn't it May 2007? This isn't a rush job we are asking for, we are asking for it to do this. They hid behind this phony argument that the Clean Air Act couldn't in fact regulate greenhouse gas emissions.

I am not a lawyer. I am married to one and I have a son who is one, so I am surrounded by lawyers. I read that Supreme Court decision. It is plain English. It is pretty clear. They chastise this Administration.

So this committee, the majority side, is going to keep the pressure on. We have set the hearing for the EPA to come before us and answer our questions. We hope that it won't be a confrontation, but an opportunity for them to use this platform and I will send a signal now to Mr. Johnson, if any of his people are here, I hope you are here taking copious notes, that if Mr. Johnson uses that as a platform to say today, I am announcing we are granting the waiver, that I personally will leave this podium and give him a hug.

[Laughter.]

Senator BOXER. This may or may not matter to Mr. Johnson, but it would be very different than most of our confrontations.

So this issue isn't going away. I want to make the final point. This is a bipartisan issue. Only here it is not. Out there in the world, and Jerry Brown can tell you the amazing support for his position, for the Governor's position across the breadth of the political spectrum in my State. Everyone has said, this is a challenge, we are not afraid of it, we approach it with hope, not fear. We are going to act and we are going to stand up to the special interests and make our world a better place and we are going to start here in a neighborhood we call California.

For this Administration to stand in the way of California and these other States, when they always say they are for States' rights, is hypocritical, to put it very mildly. I will save my stronger language for another day, but I hope that we won't have to have any more confrontations.

I just want to thank this panel. Mr. Adler, two against one, you held your own, even though you were wrong.

[Laughter.]

Senator BOXER. I seriously appreciate your coming here, because I know it is, it is a hot issue, global warming issue. That is a little bit of a joke, too.

Then to the other two witnesses, to Jerry Brown and Pete Grannis, who are on really, you are at ground zero in this fight,

you are at ground zero. I am so proud of both of you. I particularly want to say of my Attorney General, because he speaks with knowledge, information, experience. So many years ago when I was in local government and Jerry Brown was Governor, he started a very interesting organization called Solar Cal Council. Now, you immediately show your age when you remember that. But the fact is, all those years ago, and we are talking the 1970s, it was Jerry Brown who said, you know, we have to do more to become energy independent. In those many years ago, he got me interested in it. Here I sit. It is interesting, as the Chair of this committee, and there he sits now, at a pivotal moment when we are going to fight and win this battle. If we don't win it today, we will win it tomorrow.

So I want to just thank you for your eloquence. The committee stands adjourned.

[Whereupon, at 3:54 p.m., the committee was adjourned.]

