CALIFORNIA'S AUTONOMY UNDER THE CLEAN AIR ACT: DOES EPA HAVE THE AUTHORITY TO WITHDRAW AN EMISSIONS STANDARDS WAIVER?

Ethan Siegel[†]

TABLE OF CONTENTS

I. INTRODUCTION

As issues of global warming and air pollution remain at the forefront of modern interest, regulation of pollution will continue to be a contentious topic for lawmakers, advocates, and industry players worldwide. In the United States, the Clean Air Act (CAA) provides an intricate and dynamic scheme of cooperative federalism in the name of protecting the nation's air quality.[1] Within this scheme, regulation of emissions from automobiles, is almost entirely a federal prerogative. Aside from California, no other state is given an opportunity to regulate automobile emissions. In 2013, the Obama administration's Environmental Protection Agency (EPA) granted California a waiver allowing it to regulate motor vehicle emissions until 2025.[2] However, in 2019, the Trump administration's EPA published a final rule to withdraw that waiver, denying California, as well as the states adopting those emission standards, the right to enforce them.[3]

The Safer Affordable Fuel-Efficient Vehicles Rule (SAFE) is joint rulemaking promulgated by the National Highway Traffic Safety Administration (NHTSA) and EPA, focusing on two things: (1) amending greenhouse gas and Corporate Average Fuel Economy standards; and (2) withdrawing a 2013 waiver granted to California under the Clean Air Act, allowing the state to set its own emission standards.[4] NHTSA focuses on the first issue, proposing in SAFE that state programs regulating greenhouse gas emissions are preempted by the Energy Policy and Conservation Act (EPCA).[5] This issue is at the

---

† Notes Editor of the Cardozo International and Comparative Law Review; J.D. Candidate, Benjamin N. Cardozo School of Law, 2021. I'd like to thank Professor Herz for helping me better understand my voice as a writer and a student. A special thank you to Pam, Danny, and Jessica Siegel, as well as Chloe Craig, for hearing me discuss this Note for 18 months, and supporting me through the entire process. My appreciation for your love and support grows greater with time.

1 *See* Clean Air Act, 42 U.S.C.A. § 7401 (1955).

2 California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption, 78 Fed. Reg. 2112, 2145 (Jan. 9, 2013) [hereinafter *2013 Waiver Grant*).

3 The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51310, 51310 (Sept. 27, 2019) [hereinafter *SAFE*].

4 *Id.*

5 *See* Energy Policy and Conservation Act, 42 U.S.C.A. § 6201 (1975).

center of ongoing litigation, brought forward by environmental advocacy groups, as well as multiple sovereign entities who are seeking to set aside SAFE.[6] In fact, EPA cites EPCA preemption as sufficient authority to revoke the 2013 waiver.[7] However, because it is not entirely clear that a final answer in NHTSA's favor on the EPCA issue will decide the waiver issue, EPA wrote separately in defense of its authority to revoke the 2013 waiver.

This paper will not deal with EPCA preemption, focusing only the second portion of SAF—EPA's authority for the revocation of the 2013 waiver. EPA puts forward reasons other than EPCA preemption as valid reasons for revoking the 2013 waiver: inherent agency power, textual support for revocation, and precedential authority.[8] This paper will flesh out and attempt to resolve one question: does EPA retain the authority to withdraw the previously granted 2013 waiver under § 209 of the Clean Air Act?

To answer this question, I will begin by examining the history of the Clean Air Act, focusing on the historical implications of § 209. Next, I will turn to the language of the statute, focusing on a 2008 waiver denial, its subsequent reversal in 2009, and the 2013 waiver grant. The 2013 waiver grant is related to the 2008 and 2009 waiver decisions. Next, I will analyze three arguments in favor of EPA authority to revoke the 2013 waiver. First, whether EPA (and federal agencies more generally) has the inherent authority to review and revoke its prior decisions—essentially a power to change its mind. Second, whether the text or legislative history of the Clean Air Act gives the agency any power to do so. And third, whether EPA can rely on its own precedent as authority allowing it to review and revoke the 2013 waiver. I will ultimately come to the conclusion that EPA does not have the authority to withdraw the 2013 waiver on its own, and therefore must rely on EPCA preemption.

A. Contextualizing the Underlying Issue

The fight proxied through SAFE and its pursuant litigation is one that has ebbed and flowed through the executive branch through each incoming administration—regulating greenhouse gases (GHGs). During the Bush administration little was done to reduce GHGs, while the

6 *See* Complaint for Declaratory and Injunctive Relief at 1, California v. Chao, (D.C. Cir. 2019) (No. 1:19-cv-02826).

7 *See SAFE*, 84 Fed. Reg. at 51328.

8 *See SAFE*, 84 Fed. Reg. at 51331-32.

Obama administration took great steps in decarbonizing the country.[9] In the past four years, the Trump administration has sought to reduce Obama-era greenhouse gas and environmental policies in great numbers.[10] As Cass Sunstein notes, this is a fight occurring and reoccurring in every administration change for at least the last twenty years.[11] In its role as the sole state to set emission standards, California has been the leader on this issue,[12] and a bastion of hope during the Trump administration for those who championed Obama-era regulations. In one way, SAFE can be viewed as an attack directly on climate change regulation.

B. Why EPA Must Put Forward Defenses Other Than EPCA Preemption

While, ultimately, it seems that the authority to revoke the 2013 waiver may not be found through any argument, it is worth noting quickly why EPCA preemption cannot be the sole argument that EPA rests on. Although the agencies contend that EPCA's preemptive effect renders California's greenhouse gas standards "invalid, null, and void . . . ."[13] this conclusion is at odds with the language in *Massachusetts v. EPA*.[14] In that case, the Supreme Court substantively held that greenhouse gasses are regulable under the CAA.[15] The Court also reasoned that "two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency."[16] The question that the Court was addressing speaks directly to the present issue: whether EPCA preempts EPA greenhouse gas regulation. The Court seems to have decidedly said no. So, while the agencies' arguments here are not entirely futile, given the possibility of *Massachusetts* being overruled, they certainly do not provide EPA with a strong working foundation.

---

9 Cass R. Sunstein, *Changing Climate Change, 2009-2016*, 42 HARV ENVTL. L. REV. 231, 237 (2018).

10 Cayli Baker, *The Trump Administration's Major Environmental Deregulations*, (Dec. 15, 2020), https://www.brookings.edu/blog/up-front/2020/12/15/the-trump-administrations-major-environmental-deregulations/.

11 Sunstein *supra* note 7 at 236.

12 *See* Infra II(a).

13 *See SAFE*, 84 Fed. Reg. at 51331-32.

14 Massachusetts v. EPA¸ 549 US 497 (2007).

15 *See id.* at 529.

16 *Id.* at 532.

II. WAIVERS UNDER § 209 OF THE CLEAN AIR ACT

A. History of The Clean Air Act

Cities worldwide first faced air pollution crises in the mid-20th century that threatened their health and everyday life, resulting in the demand for an enactment of pollution control legislation.[17] Up until this point in history, endeavors to control air pollution were few and far between.[18] Yet, beginning in the 1940s, U.S. cities and states began to create agencies dedicated to drafting and enforcing air pollution legislation.[19] Nevertheless, over the next fifteen years, air pollution throughout the nation fared no better. As a result, Congress passed the first national air pollution legislation—the Air Pollution Control Act of 1955.[20] While this legislation was significant in its status as a national, rather than state law, regulation of pollution continued to be primarily left to the states. While the 1955 Act importantly provided federal money to address air pollution, the money was provided to the states as assistance in their fight to combat air pollution.[21]

However, as national public awareness of air pollution, and pollution more generally increased, Congress extended air pollution control by enacting The Clean Air Act of 1963, with the purpose of "protect[ing] the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population…."[22] Even so, air pollution was primarily seen as a state function. Federal participation under this regulation was limited to "provid[ing] technical and financial assistance to State and local governments. . . ."[23]

Four years later, Congress would make a third amendment to the 1963 Act: The Air Quality Act of 1967. This amendment was the first to give preemptive power to the federal government to adopt and enforce standards relating to the control of emissions from new motor

---

17 *See* Christopher Klein, *The Great Smog of 1952*, HISTORY (Dec. 6, 2012), https://www.history.com/news/the-killer-fog-that-blanketed-london-60-years-ago; Jess Mcnally, *July 26, 1943: L.A. Gets First Big Smog*, WIRED (June 26, 2010), https://www.wired.com/2010/07/0726la-first-big-smog/.

18 *See* MARK Z. JACOBSON, ATMOSPHERIC POLLUTION: HISTORY, SCIENCE, AND REGULATION 1, 81-85 (2002).

19 *See id.* at 210.

20 *Id.* at 210.

21 *Id.* at 211.

22 Clean Air Act Amendments of 1963, Pub. L. No. 88-206, 77 Stat. 392 (1963), *reprinted in* LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1963, § 1(b)(1) (1963).

23 *Id.* § 1(b)(3).

vehicles.[24] Congress, motivated by the necessity of governing air pollution, and specifically motor vehicle emissions, opted to forego a regional approach in favor of a uniform federal policy. Under these amendments, all states were "absolutely preempted from adopting or enforcing emissions standards applicable to new motor vehicles."[25]

By 1967, California had been regulating motor vehicle emissions for at least three years.[26] In part because of these state efforts, and in addition to the unique pollution circumstances California was facing, Congress created a waiver exception in the preemptive 1967 amendments, which specifically allowed California to regulate motor vehicle emissions.[27] Since the birth of this exception, California has petitioned for at least ninety-five waivers, of which at least fifty have consisted of new or amended standards.[28] Of these, all but one have been granted in whole or in part.[29]

Three additional major CAA amendments were passed over the following twenty-three years in 1970, 1977, and 1990.[30] All were important for the overall CAA programs that we see today. In 1970, EPA was created with the purpose of enforcing federal air pollution regulations, the National Ambient Air Quality Standards were to be created for criteria pollutants, and the creation of attainment and nonattainment areas were introduced.[31] In 1977, a permitting program was created to prevent significant deterioration of air quality, as well as the introduction of the Best Available Control Technology standard.[32] The 1990 amendments changed deadlines for emission requirements, introduced the Lowest Achievable Emission Rate standard to new

---

24 Air Quality Act of 1967, 42 U.S.C.A. § 7401 (1967).

25 *See* H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 301 (1977).

26 *See* California Air Resources Board, HISTORY, https://ww2.arb.ca.gov/about/history (last visited oct. 9, 2020) (explaining that "in 1966 California established the first tailpipe emissions standards in the nation.").

27 *See* Clean Air Act, 42 U.S.C.A. § 7543 (1977).

28 JAMES E. MCCARTHY & ROBERT MELTZ, CONGRESSIONAL RESEARCH SERVICE, CALIFORNIA'S WAIVER REQUEST TO CONTROL GREENHOUSE GASES UNDER THE CLEAN AIR ACT 15 (Jan. 8, 2008).

29 *See id.*; *See also* California Air Resources Board*, California & the Waiver: The Facts* (Sept. 17, 2019), https://ww2.arb.ca.gov/resources/fact-sheets/california-waiver-facts (Only once, in 2008, has a Clean Air Act §209 waiver been denied, and EPA reversed that denial the following year).

30 Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970); Clean Air Act Amendments of 1977, Pub. L. No.95-95, 91 Stat. 685 (1977); Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990).

31 JACOBSON, *supra* note 14, at 213.

32 *Id.* at 216-17.

pollution sources, and created the nearly two-hundred item list of hazardous air pollutants.[33]

Through these amendments, however, the waiver provision given to California in § 209 remained. Even more than simply remaining untouched, the 1977 amendments strengthened and reaffirmed the autonomy given to California under the waiver provision by amending the CAA to increase the deference given to California.[34] Congress sought to "ratify and strengthen the California waiver provision . . . to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and public welfare."[35]

B. Language of The Clean Air Act § 209(b)

The waiver provision of CAA § 209 lies in subsection (b). Its relevant parts state that EPA shall waive § 209(a) for California,[36] as long as California has adopted standards for emissions that they "determine . . . will be, in the aggregate, at least as protective of public health and welfare as applicable Federal Standards."[37] Furthermore, no such waiver shall be granted if the Administrator 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 7521(a) of this title. (2) If each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for purposes of paragraph (1).[38]

EPA can only evaluate waiver requests based "solely on the criteria in section 209(b),"[39] and its review of California standards is narrow.[40] Not only is EPA limited in its review of a § 209 waiver, it must

---

33 *Id.* at 217-18.

34 Ford Motor Co. v. EPA, 606 F.2d 1293, 1294 (D.C. Cir. 1979).

35 H.R. Rep. No. 95-294, 95th Cong., 1st Sess. § 214 (1977).

36 *See* 42 U.S.C.A §7543(b) (1967) (the actual language "waive[s] application of this section to any state which has adopted standards . . . prior to March 30, 1966"—of which California was the only state to have done so).

37 *Id.* § 7543(b).

38 *Id.* § 7543.

39 *See 2013 Waiver Grant* 78 Fed. Reg. at 2145.

40 *See id.* at 2115.

also give great deference to California's factual findings.[41] EPA has "recognized that the intent of Congress in creating a limited review based on [§209] criteria was to ensure that the federal government did not second-guess state policy choices."[42] Section 209 has, historically, bestowed upon California a role in governing that has been almost entirely taken up by federal regulation. In giving California this role, Congress appears to have chosen to preserve both great discretion and broad autonomy in California's ability to regulate motor vehicle emissions.

C. The 2008 Waiver Denial, the 2009 Reversal, and the 2013 Waiver

California sought a waiver for greenhouse gas emissions in 2005.[43] Until that request, California's waivers sought to set standards for common or conventional pollutants—of which greenhouse gasses are not.[44] At the same time, however, the *Massachusetts* litigation was ongoing, raising the question of whether greenhouse gasses were subject to regulation under the CAA. Because of the relevance of the then potential decision in *Massachusetts*, EPA notified California that it would wait until a decision was reached before making a decision about this waiver.[45] Following the Court's inclusion of greenhouse gas emissions as regulable under the CAA,[46] EPA began the notice and comment period for this waiver request.[47] Eventually, however, it published its decision in 2008 and, EPA denied California's waiver request. It found, looking only at one criterion, § 209(b)(1)(B), that California did not need its own greenhouse gas standards "to meet compelling and extraordinary circumstances."[48] As will be discussed in more detail below, the 2008 denial is notable for its interpretation of § 209(b)(1)(B).

In 2009, EPA reconsidered the 2008 denial, and ultimately reversed it, granting the waiver for California's greenhouse gas emission

---

41 *See id.* at III(B) (explaining deference to California).

42 *Id.* at 2115.

43 Notice of Decision Denying a Waiver of Clean Air Act Preemption, 73 Fed. Reg. 12156, 12157 (Mar. 6, 2008) [hereinafter *2008 Waiver Denial*].

44 *See* EPA, *Criteria Air Pollutants*, https://www.epa.gov/criteria-air-pollutants (representing the six "common air pollutants.").

45 *2008 Waiver Denial,* 73 Fed. Reg. at 12157.

46 *See* Massachusetts v. EPA*,* 549 US 497 (2007).

47 *2008 Waiver Denial*, 73 Fed. Reg. at 12157.

48 *Id.* at 12168.

standards.[49] However, not only did EPA grant waivers for greenhouse gas standards, it explicitly rejected the 2008 interpretation of § 209(b)(1)(B), and reviewed California's greenhouse gas standards in alignment with what it labels the "traditional approach."[50] This approach can be seen in the 2013 waiver, as the 2013 waiver tracks the 2009 waiver in its approach to a § 209 analysis.

In 2012, California's Air Resources Board (CARB) sought a waiver for its Advanced Clean Car (ACC) regulations. These standards sought to regulate "smog and soot causing pollutants and greenhouse gas emissions" for model years (MY) 2015 through 2025.[51] By setting these standards, California was attempting to address near and long-term smog issues within California, in addition to setting a course to reach its greenhouse gas emission reduction goals.[52]

These standards sought to regulate non-greenhouse gas emissions in four different ways:[53] (1) simply reducing fleet average emission standards for some vehicle classes by MY 2025; (2) combining and simplifying previous standards to give manufacturers flexibility in complying with pollutant standards; (3) making more stringent particulate matter standards for some vehicle classes to address health issues; and (4) creating more stringent testing procedures for some vehicle classes.[54]

As for greenhouse gas emissions, CARB sought to lower these emissions to 1990 levels by 2020, with the hopes of reaching eighty percent below 1990 levels by 2050.[55] To do so, CARB proposed regulations that: (1) simply reduced CO2 emissions for some vehicle classes; (2) altered emission standards from a fleet average standard to a more dynamic "footprint" based standard, giving manufacturers more flexibility to meet these reduction goals; and (3) modified its system of credits for CO2 emissions.[56]

---

49 *See* Notice of Decision Granting a Waiver of Clean Air Act Preemption, 74 Fed. Reg. 32744 (July 8, 2009) [hereinafter *2009 Waiver Grant*].

50 *Id.* at 32745.

51 *2013 Waiver Grant,* 78 Fed. Reg. at 2112.

52 *Id.* at 2114.

53 EPA also granted California's "deemed to comply" provision for GHG, a provision that need not be discussed at this point in the note.

54 *2013 Waiver Grant*, 78 Fed. Reg.at 2114.

55 *Id.; see also* Jamesine Rogers et al., *California 1990 Greenhouse Gas Emissions Level and 2020 Emissions Limit,* CALIFORNIA ENVIRONMENT PROTECTION AGENCY, AIR RESOURCE BOARD (Nov. 16, 2007), https://ww3.arb.ca.gov/cc/inventory/pubs/reports/staff_report_1990_level.pdf (showing that estimated 1990 GHG levels in California are estimated to be 427 MMTCO2e).

56 *2013 Waiver Grant*, 78 Fed. Reg. at 2114.

Last, CARB set standards for its zero-emission vehicle (ZEV) regulations for MY 2012-2017, as well as MY 2018 and beyond.[57] The ZEV standards modified its system of credits for ZEV vehicles, in addition to increasing new sales requirements for MY 2018 and beyond.[58]

1. EPA's 2013 § 209 Analysis

a. § 209(b)(1)(A)

In *Motor and Equip. Mfrs Assoc. v. EPA* (*MEMA I*), the D.C. Circuit held that "the language of [§ 209] and its legislative history indicate that . . . California's determination that they comply with the statute, when presented to the Administrator are presumed to satisfy the waiver . . . ."[59] In accordance with this presumption, *MEMA I* further held that "the burden of proving otherwise is on whoever attacks them."[60] These presumptions are not only in alignment with the legislative history of CAA § 209, but they prescribe California great deference from EPA during its analysis of a proposed waiver.[61]

EPA begins its analysis of CARB's 2013 waiver by inquiring whether, under §§ 209(b)(1) and (b)(1)(A), California's determination that its standards are "in the aggregate, at least as protective of public health and welfare as Federal standards," and that California's findings are not arbitrary and capricious.[62] To make this decision, *MEMA I* held that the standard of proof (born by the waiver opposition), in determining whether California's protectiveness decision was arbitrary and capricious, "clear and compelling evidence."[63] In the 2013 waiver, EPA held that across the board, CARB's proposed regulations were not arbitrary and capricious, and that its standards, in the aggregate, were as protective or more protective than the federal standards.[64]

---

57 *Id.*

58 *Id.*

59 Motor & Equip. Mfrs. Assoc. v Env't. Prot. Agency, 627 F.2d 1095, 1121 (D.C. App. Ct 1979) [hereinafter *MEMA I*].

60 *Id.*

61 *See id*. at 1121 (stating that the burden of proof, as evidenced by the CAA's legislative history, lies with the party opposing the waiver).

62 42 U.S.C.A § 7543(b) (1967).

63 *MEMA I*, 627 F.2d at 1122.

64 *2013 Waiver Grant,* 78 Fed. Reg. at 2125.

Part of its analysis was based on logical reasoning. EPA compared CARB's proposed regulations to the Federal standards, but it did so within the context of the 2009 waiver grant.[65] Knowing that CARB's 2013 amendments and regulations were, by definition, stricter than the already granted 2009 waiver standards, and because (in certain relevant areas) Federal standards had not changed, CARB's newly proposed regulations could not, by definition, be *less* protective than the Federal standards.[66]

One commenter, opposing the new standards, argued that CARB's greenhouse gas emissions standard cannot be as, or more, protective than the Federal standards because greenhouse gas emissions are a global and national problem.[67] Because this problem is larger than that of a single state, one state's emission reductions will not lower total greenhouse gas emissions as much as a nationwide reduction would, even if the national *per-car* standards were more relaxed. Therefore, CARB's greenhouse gas standards are less protective than the Federal standards.[68] EPA found this argument unpersuasive.[69]

While it is true that the United States as a whole will reduce greenhouse gas emissions to a greater degree under EPA standards than will California under the CARB standards, that is not the question before EPA. The question is rather whether greenhouse gas emission standards will be reduced under the CARB standards (leading to greater protection), *in California*, as much or more than the Federal standards.[70] Finding that while Federal standards through MY 2025 at the time remained constant, under the proposed CARB standards, greenhouse gas emissions would be reduced by almost 14 million metric tons per year in addition to the reductions resulting from the federal standards.[71] EPA held that CARB's claims for protectiveness (in terms of greenhouse gas emissions) were "at least as stringent" as EPA standards.[72]

---

65 *Id.* at 2124.

66 *See id.*

67 *See id.* at 2123.

68 *Id.*

69 *See id*. (that EPA granted the 2013 waiver exemplifies its unwillingness to be persuaded by the above argument).

70 *Id.* at 2124.

71 *2013 Waiver Grant,* 78 Fed. Reg. at 2122.

72 *Id.*

b. § 209(b)(1)(B)

Next, EPA sought to determine whether California, under § 209(b)(1)(B), did not need such standards to meet "compelling and extraordinary conditions."[73] In answering this question, EPA immediately addressed the 2008 interpretation.[74] In 2008, EPA denied California the waiver for greenhouse gas emission standards on the grounds that under § 209(b)(1)(B), greenhouse gas pollution issues did not meet compelling and extraordinary circumstances because: (1) there were no greater greenhouse gas emission concentrations in California than there were in other states; and (2) there were no greater greenhouse gas effects in California than there were in other states.[75] However, as noted above, the 2009 waiver grant rejected this interpretation, readopting what EPA labeled as the "traditional approach."[76] In 2013, EPA once again rejected the 2008 interpretation in favor of the approach outlined in 2009.[77]

There are two issues raised by the competing § 209(b)(1)(B) interpretations of 2008 and 2013. The first involves interpreting the need for standards to meet the compelling and extraordinary conditions requirement of § 209(b)(1)(B). In 2008, EPA read § 209(b)(1)(B) to ask whether the greenhouse gas emission standards are necessary to meet the specific extraordinary and compelling conditions solely within California.[78] In other words, EPA asked whether the GHG specific standards could be tied to GHG related and California-unique conditions. It viewed compelling and extraordinary conditions as referring to the "factors that tend to produce higher levels of pollution . . . ."[79] Given the two reasons above (no greater emission concentrations in California; no greater emission effects in California) for EPA's denial of the 2008 GHG waiver, this interpretation seems reasonable. Both the effects and the emission concentrations of GHGs in California were arguably not more "compelling and extraordinary" than they were in other states.[80]

Yet, in 2009 and 2013, EPA read § 209(b)(1)(B) to necessitate an inquiry into "whether California needs a separate motor vehicle

---

73 42 U.S.C.A § 7543(b)(1)(B) (1967).
74 *See 2013 Waiver Grant,* 78 Fed. Reg. at 2112.
75 *Id.* at 2126.
76 *2009 Waiver Grant*, 74 Fed. Reg. at 32745.
77 *See 2013 Waiver Grant,* 78 Fed. Reg. at 2126-27.
78 *See id.* at 2125-26.
79 *Id.* at 2125.
80 *See 2008 Waiver Denial,* 73 Fed. Reg. at 12164.

program [as a whole] to meet compelling and extraordinary conditions."[81] Under this interpretation of § 209(b)(1)(B), EPA's role is not to judge whether the standards put forth by CARB are necessary to meet compelling and extraordinary GHG specific conditions, but to judge whether there *are* compelling and extraordinary conditions within the state, almost as a condition precedent to California putting forth its own standards.[82] They view extraordinary and compelling conditions as referring not to the causes of pollution, but rather to the effects."[83]

The second issue regarding § 209(b)(1)(B), though related to the first, is worth considering separately. The question lies in how the proposed standards are evaluated on an individual basis, or as a singular system of standards. In 2008, EPA stated that its § 209 analysis would not apply to greenhouse gas emission standards because § 209 refers to "certain general circumstances, *unique to California*, primarily responsible for causing its air pollution problem."[84] Rather than taking into account all of California's proposed emission standards while conducting its § 209(b)(1)(B) analysis, EPA would review California's proposed greenhouse gas emission standards "separately from the remainder of its motor vehicle emission control program for purposes of § 209(b)(1)(B)."[85] It interpreted the language of the statute to include air pollution issues unique to California, and to evaluate any proposed standards for greenhouse gas emissions in isolation of other motor vehicle standards. By doing so, EPA drastically limited the scope § 209(b)(1)(B).[86]

In 2009, EPA rejected this view, and in the 2013 waiver, the agency once again followed the reasoning outlined in 2009. In 2009, EPA found that it was best to review the emissions program "as a whole to meet compelling and extraordinary conditions."[87] Their reasoning was based on the text and legislative history of § 209(b). Congress wanted to ensure that the proposed standards were "in the aggregate, at least as protective" as the federal standards.[88] However, this does not mean that every individual standard proposed must be more stringent than its federal equivalent. Rather, EPA states that Congress

81 *2013 Waiver*, 78 Fed. Reg. at 2126.
82 *Id*.
83 *Id.* at 2130.
84 *Id.* at 2126 (emphasis added).
85 *Id.*
86 *Id*.
87 *2009 Waiver Grant,* 74 Fed. Reg. at 32761.
88 42 U.S.C.A. § 7543(b)(1) (1977).

"allow[s] California to promulgate individual standards that, in and of themselves, might not be considered needed to meet compelling and extraordinary circumstances, but are part of California's overall approach . . . ."[89] Under this interpretation, EPA can concede that greenhouse gas pollution issues may not necessarily be worse in California, such that they meet wholly unique compelling and extraordinary circumstances independently. Nevertheless, EPA can grant a greenhouse gas emission standard as part of a waiver request because, in the aggregate of all air pollution issues within the state, California's motor vehicle emission standards proposal is needed to meet "compelling and extraordinary" circumstances.[90]

In 2008, as support for the above arguments, EPA inferred from legislative history discussing factors such as California's "geographical and climatic conditions,"[91] as well as a discussion of local and regional pollution effects in California,[92] to mean § 209(b) applies *only* to local and regional pollution issues. In 2013, the agency disputed this reading of the legislative history.[93] It criticized the 2008 inference as flying in the face of congressional intent and the history of the § 209 waiver.[94] If the congressional intent was for California to have broad discretion and autonomy, acting as a pioneer and a "kind of laboratory for innovation,"[95] narrowing the scope of § 209(b)(1)(B) in this way curtails that intent.

Analyzing the proposed standards for greenhouse gases, ZEV and other particulate matter (PM) standards as a whole under § 209(b)(1)(B), the 2013 EPA Administrator Gina McCarthy found that she "could not deny the waiver."[96] She found that the commenters did not meet their burden of proof in showing that California did not meet the compelling and extraordinary conditions standard.[97] Based on an evidential record produced by CARB, showing, for example, "[r]ecord setting fires, deadly heat waves, destructive storm surges, loss of winter snowpack . . ." and "some of the worst air quality in the nation,"[98] California met the compelling and extraordinary circumstances standard. These issues, CARB demonstrated, are not

89 *2013 Waiver*, 78 Fed. Reg. at 2127.
90 42 USCA § 75403 (1967).
91 *2013 Waiver*, 78 Fed. Reg. at 2126 (quoting 2008 EPA denial).
92 *See id.* (quoting 2008 EPA denial).
93 *See id.*
94 *See id.*
95 *Id.* at 2127 (quoting *MEMA I*).
96 *Id*. at 2129.
97 *See 2013 Waiver*, 78 Fed. Reg. at 2129.
98 *Id.* at 2129-30.

necessarily the direct effects of pollution, but the effects of factors, such as geographical and climatic conditions, in combination with "large umbers and high concentrations of automobiles . . . ."[99]

c. § 209(b)(1)(C)

Lastly, EPA analyzed the proposed waiver under § 209(b)(1)(c) to ensure that the standards put forth were consistent with § 202(a) of the CAA. Under this analysis, EPA determines "whether the parties opposing, or seeking a deferral of this waiver request have met their burden to demonstrate that the CARB's ACC standards are not consistent with § 202(a)."[100] Section 202(a) imposes an obligation on the rule maker (EPA or CARB) to ensure that the proposed rule is technologically feasible.[101] If California proposes a standard that is technologically infeasible, its waiver request cannot be granted.

This analysis requires a detailed look at many factually specific questions that need not be discussed in detail here.[102] In general, these questions focus on whether manufacturers currently have the technology to meet certain standards, whether it is likely that they will have the required technology in the future, whether the cost of creating the required technology outweighs its benefits, and whether the enforcement procedures of the proposed standards are both feasible and nonconflicting with federal procedures.[103] EPA, in answering these questions, found that the opposition commenters failed to meet "the burden of producing the evidence necessary for EPA to find that California's LEV III/greenhouse gas standards and LEV emission standards" are not consistent with § 202(a).[104]

On all three elements of § 209, EPA found that "those opposing the waiver request have not met the burden of demonstrating that California's regulations do not satisfy one or more of the three statutory criteria."[105] Because of this, the waiver request was granted, and CARB's proposed standards were allowed to be implemented.

---

99 *Id.* at 2129.

100 *Id.* at 2131.

101 *See* 42 U.S.C.A § 7521(a)(3)(A)(i) (1967).

102 *See 2013 Waiver*, 78 Fed. Reg. at 2131 (EPA's detailed discussion of this criterion).

103 *See id.* at 2132.

104 *Id.* at 2144-45.

105 *Id.* at 2145.

III. INHERENCY-BASED ARGUMENTS FOR REVOCATION AUTHORITY

As noted earlier, EPA seems to rely heavily on NHTSA's EPCA action as sufficient authority to withdraw the 2013 waiver,[106] but this reliance is certainly not the only possible argument for EPA's authority to withdraw the waiver. First, EPA, as a federal agency, has the inherent authority to reconsider its prior actions. Second, EPA raises two textual arguments: "a 'clear reading' of CAA language,"[107] followed by its "snapshot in time" theory.[108] Third, that EPA has precedential authority to review and revoke a § 209 waiver.[109]

A. Inherent Agency Power Generally

The proposition that agencies harbor some inherent powers is generally an unopposed idea.[110] Additionally, the proposition that agencies harbor the inherent power to review and change prior decisions can be justified as being similar to Article III courts: the power to decide implies the power to reconsider.[111] Unlike Article III courts however, agencies can reconsider[112] prior decisions through both their adjudicatory function (adjudications) and their quasi-legislative function (rulemakings). While agency reconsideration in the adjudicatory function is not entirely pertinent here—SAFE is a rulemaking function—some of the case law and language that EPA puts forward stems from reconsideration in an adjudicatory function.[113] Because of this, I will discuss EPA's current action in both settings, by specifically examining cases that EPA draws partial authority from.

---

106 *See SAFE*, 84 Fed. Reg. at 51328.

107 *See id*. at 51331.

108 *Id.* at 51332 n. 220. (This argument is discussed almost entirely within this footnote).

109 *See id.* at 51332.

110 *See* Daniel Bress, *Administrative Reconsideration*, 91 VA. L. REV. 1737, 1742 (2005) https://yulib002.mc.yu.edu:3081/stable/3649445?seq=6#metadata_info_tab_contents.

111 *See Id.* at 1745; Albertson v. Federal Communications Com., 182 F.2d 397 (D.C. Cir. May 22, 1950).

112 Administrative Reconsideration labels what I have previously called "review and revoke" as "reconsider." In a pure adjudicative setting, 'reconsideration' is a better label than 'review and revoke', and I have chosen to adopt Bress's language in this context. Both labels ultimately mean similar things, but their connotations make more sense in their respective settings.

113 *See SAFE*, 84 Fed. Reg. at 51333 (discussing Mazaleski v. Treusdell, 562 F.2d 701 (U.S. App. D.C. 1977); *see also* Belville Mining Co. v. United States, 999 F.2d 989 (6th Cir. 1993)).

Although the Supreme Court has not issued a ruling on whether agencies have inherent powers,[114] there is arguably a common law presumption which favors inherent agency power to reconsider adjudicative decisions.[115] In contrast, however, there seem to be few restraints on an agency's inherent ability to reconsider a prior decision through rulemaking. A main reason for this is that there is little, if any, debate regarding whether an agency has inherent power to reconsider a prior decision through rulemaking, as there are external indications of its ability to do so. The Administrative Procedure Act (APA) defines rulemaking as the "agency process for formulating, amending, or repealing a rule[.]"[116] The APA has built into its definitions the implication that through its rulemaking processes an agency can reconsider, and ultimately amend or repeal, its own prior rulemaking. Moreover, courts have spoken about what procedures an agency must follow in amending or repealing a rule that they previously have issued.[117]

While this seems to give agencies broad freedom in reconsidering prior rulemakings, the APA does subject them to some limitations. Section 706 of the APA provides the scope of judicial review for courts reviewing an agency action.[118] When an agency reconsiders a prior decision through rulemaking, it can nevertheless be invalidated if the reconsideration is: (1) arbitrary and capricious; (2) contrary to constitutional rights; (3) outside the powers granted the agency in its enabling statute; or (4) promulgated with procedural errors.[119] In *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, the Court held that NHTSA's revocation of a previously promulgated motor vehicle safety standard requirement was arbitrary and capricious when the agency's rationale, supporting its revocation decision, was insufficient.[120] While the standard which courts look into an agency's reconsideration has since been greatly deemphasized,[121] the proposition still stands that an agency has the authority to reconsider and revoke a prior decision through the rulemaking process, while remaining subject to the limitations of the APA.

---

114 Daniel Bress, *supra* note 105, at 1745 (noting that only in a SCOTUS dissent has an inherent reconsideration power been mentioned).

115 *See id.*

116 Administrative Procedure Act, 5 U.S.C. § 551(5) (1966).

117 *See* Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1206 (2015).

118 5 U.S.C. § 706 (1966).

119 *Id.*

120 *See* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)

121 *See* F.C.C. v. Fox Television Stations, Inc., 556, U.S. 502, 514 (2009).

Federal courts have recognized a few specific contexts in which reconsidering a prior *adjudication* is a valid use of inherent power. Importantly, the courts have also delineated some limitations of this power. The limitations which courts have placed on an agency's power to reconsider prior a adjudication may shed light on why reconsideration through rulemaking may also be invalid.[122] Agency reconsideration of a prior adjudicative decision is generally left undisturbed when the agency's reconsideration is based on: (1) fixing a clerical error by agency or party; (2) fraud perpetuated on the agency; or (3) legal error by the agency.[123] Conversely, courts are more likely to disapprove of agency reconsideration when: (1) the agency's motive for reconsideration is to effectuate a change in policy; (2) the agency has not reconsidered accordingly in a reasonable time period; (3) there is strong reliance from parties; or (4) there is another, usually more limited, avenue for reconsideration.[124] While the situations that permit agency reconsideration are interesting, more relevant to the SAFE, are the limitations of this power, specifically the limitations addressing a reasonable time period and strong reliance from parties.

B. Reasonable Time Period as a Limitation on Agency Reconsideration

Because the issue of timeliness is judged on a reasonableness standard, it is one that "will vary with each case."[125] Within the adjudicative context, vary it has. In this setting, courts have "rejected periods of five months and nine months as unreasonable, yet have upheld three months, four months, and eight months as reasonable."[126] A time period of two years has been "held to be both reasonable and unreasonable[,]"[127] and while "eleven months, one year, sixteen months, and three years, have been held unreasonable, four and a half years has been deemed acceptable."[128] While no court has provided a hard and fast rule as to what a reasonable time frame for agency reconsideration might be, most courts have stated that it should be within a "short and

122 *See infra* III(B), (C).
123 Daniel Bress, *supra* note 105, at 1748-56.
124 *Id.* at 1748.
125 *Belville Mining Co*., 999 F.2d at 989 (6th Cir. 1993).
126 Daniel Bress, *supra* note 105,1763.
127 *Id.*
128 *Id.* at 1763-64.

reasonable time period,"[129] and some have said that this time period can be measured in "weeks, not years."[130]

There does not seem to be an indication that time, on its own, can be a sufficient bar to agency power in the rulemaking context. As stated above, the APA explicitly allows for agencies to amend and appeal rules through the rulemaking process.[131] Furthermore, the Supreme Court has held that the same APA procedures, which are followed when first promulgating the rule, also apply when the agency is engaging in a later rulemaking to repeal the first rule.[132] Therefore, as there is nothing within the APA's own rulemaking sections about rulemaking conducted in an unreasonable time, it seems safe to say that reasonable time, on its own, is not a sufficient bar to invalidating a rulemaking.[133]

In support of its inherency arguments, EPA cites to *Belville Min. Co. v. United States*, 999 F.2d (6th Cir. 1993) as an authority discussing the potential timeliness issue. In *Belville*, the 6th Circuit Court of Appeals resolved a dispute surrounding land ownership contracts between private landowners and the Secretary of Agriculture.[134] The Office of Surface Mining (OSM), an administrative body, made a decision that a group of landowners reserved for themselves rights in parcels of land that they had contractually given to the government—a decision which was later suspended by a new Director of OSM.[135] The plaintiff landowners sued, challenging the agency's authority to review and reverse its prior decision.[136]

The court ultimately held that the review, which took place eight months after the original decision, was timely for this specific action.[137] The court agreed with the general understanding that agency review of a decision is sustainable "as long as the administrative action is conducted within a short and reasonable time period,"[138] and further concluded that "absent unusual circumstances, the time period would

---

129 Cooley v. United States, 324 F.3d 1297 (Fed. Cir. 2003).

130 *Belville Mining Co*., 999 F.2d 989.

131 5 U.S.C. § 551 (1966).

132 *See Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 1199, 1206 (2015).

133 I will discuss how reasonable time is a function of reliance, and therefore very relevant to repeals and SAFE, below. *See infra* III(C).

134 *Belville Mining Co*., 999 F.2d at 991.

135 *Id.* at 992.

136 *Id.* at 991.

137 *Id.* at 1000-01.

138 *Id.* at 1000.

be measured in weeks, not years."[139] The *Belville* Court also outlined factors it considered in determining whether the review was timely, the more relevant of those factors being:[140] (1) any time limit set forth in the agency's regulations; (2) legally cognizable property interests, which had arisen from the initial decision; (3) whether the agency followed its general procedures in reviewing the initial decision; and (4) any reliance which had arisen from the initial decision.[141]

On one hand, in examining the factors outlined in *Bellville*, the first three appear to support EPA for purposes of SAFE.[142] However, guided by the general survey of the timeliness case outcomes discussed above,[143] and by the *Belville* factors specifically, if SAFE were an adjudication, its five-year gap would be presumptively unreasonable. Many of the cases holding reconsideration time periods unreasonable involved gaps of less than two or three years. Although this a rebuttable assumption, the bulk of cases with reasonable time periods were well below the five-year timeframe.

Bellville factor four—reliance based on the initial decision—brings into purview a somewhat distinct question. Although related, whether something is timely is a distinct question from whether a party relied on the initial decision. For example, let's say a federal agency makes an adjudicative judgment in favor of a corporation. The corporation makes an economically costly post-judgment business decision three days after the adjudicatory ruling. The same agency can then attempt to reconsider after only a week since the initial ruling. Caselaw suggests that one week is within a reasonable time to reconsider,[144] yet there remains a strong reliance interest on behalf of the corporation. This is why reliance is worth exploring on its own—it may shed light on what is a reasonable timeframe for reconsideration. Ultimately, however, it seems like a separate and distinct inquiry.

---

139 *Id.*

140 *See Belville Mining Co*., 999 F.2d at 1001 (absent from this list, and irrelevant for discussion here, are: (1) agency use of fraud as a pretext for reconsideration; and (2) probable impact of an erroneous agency decision absent reconsideration).

141 *Id.* at 1001.

142 There is no timeline discussed in CAA, and California did not gain a property interest to satisfy requirements (1) and (2). Moreover, there does not seem to be any relevant procedural errors found in SAFE.

143 *See infra* III(B).

144 *See infra* III(B).

C. Strong Reliance Interests as a Limitation on Agency Reconsideration

Reliance interests as an argument against inherent agency power to reconsider in the adjudicative setting have been largely unsuccessful.[145] In the adjudicative context, there has not been a single federal court ruling which has held that agency reconsideration is barred solely on the grounds of reliance.[146] Nevertheless, there have been cases in which reliance was considered a strong factor in the court's decision to invalidate the agency's adjudicative reconsideration action.[147]

The Supreme Court has delineated some guiding principles for deciding whether an agency's policy change, through rulemaking, is permissible given reliance interests. The Court did not say that agency promulgation of a new rule repealing or amending an older rule is necessarily invalid if there are strong reliance interests, but that the agency may need to provide a "more detailed justification" for its change in policy.[148] In *Encino Motorcars, LLC v. Navarro*, the Court clarified that when there is strong industry reliance on a prior policy, which outlines that an agency must present a "more reasoned explanation" for its change.[149] Specifically, the Court found that this burden could not be met when the agency provides "no reasons at all."[150]

For the purposes of SAFE, this raises two important questions: (1) did California rely on the 2013 waiver; and (2) is SAFE's reasoning sufficient to overcome that reliance interest? This is an issue raised in the notice and comment period, in addition to being discussed by EPA in its rulemaking.[151] California argues that there was strong reliance on the 2013 waiver because a plethora of state regulations and policies were enacted in the wake of the 2013 waiver, such as California's 2030 GHG reduction targets.[152] It had created substantial policy based on the 2013 waiver such that EPA should be estopped from revoking it.[153] A sovereign hoping to produce legislation aiming to lower emission standards must do so in a long-term fashion—emission

145 *See* Daniel Bress, *supra* note 105, at 1765-66.
146 *Id.*
147 *See* Prieto v. United States, 655 F. Supp. 1187, 1188 (D.D.C. 1987).
148 FCC v. Fox Television Stations, 556 U.S. 502, 515 (2009).
149 Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2120 (2016).
150 *Id.* at 2127.
151 *See SAFE*, 84 Fed. Reg. at 51334.
152 *See id*.
153 *Id.*

standards are not reduced overnight. The 2013 waiver affected emission standards up to MY 2025, a twelve-year period. It would seemingly be nearly impossible for California, or for other states adopting California's emission laws, to produce emissions legislation without relying on the standards granted in the 2013 waiver.

EPA attempted to dismiss California's reliance on the 2013 waiver, arguing that it was unjustified for the state to depend on the 2013 waiver, with a clever argument. EPA posits that due to the nature of the 2013 waiver, in relation to the EPA's GHG standards put out a year prior in 2012, that "no reliance interests accrued sufficient to foreclose EPA's authority to reconsider and withdraw the waiver."[154] In EPA's 2012 GHG standards, which also proposed standards for MY 2017-2025, EPA committed to conducting a 2018 evaluation and review (MTE) of the feasibility of the 2012 standards.[155] The MTE was a regulatory commitment by EPA to evaluate developments in manufacturing technology, fuel efficiency, fuel and car prices, and other relevant factors during the years 2016 to 2018.[156] At the end of the MTE, in 2018, EPA would make a final determination deciding whether the GHG standards set in 2012, for MY 2022-2025, are still appropriate. EPA argues that through the MTE it put all parties on notice that "EPA would be revisiting" those standards and they may be subject to change.[157]

The MTE would be inapplicable to California, and its § 209 waived standards, but for California's "deemed to comply" provision.[158] EPA argues that because California would allow compliance with its own standards up to MY 2025 through compliance with EPA standards, and that because California was on notice of the MTE, California could not have sufficiently relied on the 2013 waiver such that withdrawal is foreclosed.[159] Essentially, California knew that the MTE was happening, and it allowed compliance for its waiver with compliance under EPA standards—which included the MTE—therefore it

---

154 *Id.* at 51334-35 No. 234.

155 *Id.* at 51334.

156 Environmental Protection Agency, *Midterm Evaluation of Light-Duty Vehicle Greenhouse Gas Emissions Standards for Model Years 2022-2025*, https://www.epa.gov/regulations-emissions-vehicles-and-engines/midterm-evaluation-light-duty-vehicle-greenhouse-gas (last visited Oct. 21, 2020).

157 *SAFE*, *supra* note 3, at 51335.

158 *See 2013 Waiver*, 78 Fed. Reg. at 2112-13 (explaining that a "deemed to comply provision" "allows automobile manufacturers to demonstrate compliance with CARB's GHG standards by complying with EPA's GHG standards which were published for those MYs.").

159 *SAFE*, 84 Fed. Reg. at 51335.

cannot claim reliance on the 2013 waiver for standards up to MY 2025.[160]

The main issue with this line of reasoning is that it does not fit neatly into practice. Assuming, arguendo, that California conceded the issue of notice of the MTE, it is not entirely clear what would have changed. As noted above, regulations of emissions can only be done effectively, if at all, through long-term goal setting. If California wanted to create standards for the years beyond 2013, it was necessary for them to do so in 2013. There is an important distinction between the reliance interest California accrued compared to previous caselaw on reliance interests.

In *Encino*, the reliance interests asserted were built on past conduct: there, industry players sued claiming that the Department of Labor's new rule, interpreting a Fair Labor Standards Act overtime provision, was invalid because of decades old reliance interests.[161] The automobile dealer industry asserted that they relied on the old rule to negotiate and structure compensation plans with employees.[162] There, the rulemaking change affects mostly past decisions; the industry asserted that the new agency position would require them to make significant changes to their compensation arrangements.[163]

However, the reliance interest built by California is stronger than that; unlike *Encino*, where the new rulemaking forces change based on prior decisions, here, the new rulemaking has strong present and future implications. Individual automobile dealers—which pale in comparison to California in size, economy, and status as sovereigns—likely do not make large, national-scale policy decisions. California's reliance interests involve not only changing a compensation program, but it is also necessarily related to intricate and complex legislation and state regulation, with the goal of improving air quality. And while California could have foregone the deemed to comply provision, it seems reasonable to believe that by not including it, California would have been inviting more litigation by industry actors, who sought to set aside the standards for one reason or another, ultimately promoting less compliance with emission standards, and therefore less clean air.

For inherent agency power purposes, it seems possible that EPA harbors the general inherent ability to review and revoke a previously granted waiver through the rulemaking process. However, this ability

160 *Id.*

161 Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2120 (2016).

162 *See* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126.

163 *Id.*

is limited by obligations to follow proper procedures, to not be arbitrary and capricious, and to thoroughly explain its reasoning for reversal. For purposes of SAFE, however, there remains a strong argument that because six years had passed between the 2013 waiver and the promulgation of SAFE, too strong of a reliance interest has accrued, and that there is no way in which a reversal of the 2013 waiver is not arbitrary and capricious.

IV. TEXT-BASED ARGUMENTS FOR EPA REVOCATION AUTHORITY

If § 209 states whether EPA can revisit a waiver, then there exists a clear reading of the statute, and the other arguments discussed become less – if at all – relevant. However, looking at what § 209 states, provides no absolute answer on EPA's revocation powers. This has not stopped interested parties from providing text-based arguments. Analyzing the legitimacy of these arguments will lead to the conclusion that ultimately, EPA has no textual basis for the withdrawing the 2013 waiver. Aside from the text of § 209 itself, the legislative history behind the section, may likely provide an insight into what powers Congress intended to delegate to EPA.

A. What does § 209 Say About a Waiver?

Section 209 is silent on EPA's authority to revisit a waiver decision. Section 209(a) prohibits any state from adopting or attempting to enforce "any standard related to the control of emissions" from motor vehicle engines subject to § 209 regulation.[164] Section 209(b) grants EPA specific powers in waiving this requirement for California.[165] It allows EPA to make determinations about whether California's waiver decision is arbitrary and capricious, whether California does not need its own standards, and whether California's standards are consistent with CAA § 201.[166] The CAA does not speak on whether EPA can reconsider and withdraw a previously granted waiver. This raises a question—is the CAA's silence on EPA's ability to reconsider and withdraw a waiver meaningful?

The argument that § 209 silence grants EPA the authority to review and revoke a waiver stems from the premise that EPA, as a federal agency, has the inherent ability to revoke a previously granted

164 42 U.S.C. § 7543(a) (1967).
165 *See infra* II(a) for discussion of these powers.
166 42 U.S.C. §7521 (1967).

waiver, and nothing in § 209 indicates Congress wanted to restrict that ability.[167] Therefore, § 209's silence implies EPA retains this ability. In other words, because Congress did not tell EPA it cannot do something, EPA can do that thing. This argument assumes meaning to the silence: it allows EPA to make a decision based on a lack of text in the CAA.

Nathan Alexander Sales and Jonathan H. Adler examined cases in which an agency asserted or denied some power based on that agency's own interpretation of its enabling statutes.[168] In these cases, agencies either expanded or contracted their authority, completely disclaimed any power at all, or claimed for itself a new power, one not found within its relevant statutes.[169] EPA's argument above is what the authors have labeled the "statutory silence" subset of "jurisdiction-asserting" cases.[170] The relevant question in these situations, the authors say, is how can we know "whether Congress intended the agency to wield a particular power? Is the fact that a statute is silent on the conferral of a proposed power—i.e., the fact that the statute neither grants nor denies it—evidence that Congress anticipated that the agency would exercise that power?"[171]

The authors note that only a few courts have addressed whether statutory silence can create an agency power, but the few who have discussed it have held that Congress's failure to expressly deny a power to an agency is not an ambiguity to be interpreted by the agency.[172] In *Railway Labor Executives' Ass'n v. National Mediation Board*,[173] the National Mediation Board (NMB) argued that it had the power to initiate investigations *sua sponte* into representation disputes among railway employees under the Railway Labor Act (RLA).[174] It further claimed that because the RLA gave it the power to investigate upon request by parties, and nothing in those statutes expressly denied it the power to initiate investigations *sua sponte*, it indeed had the

---

167 *See SAFE*, 84 Fed. Reg. at 51331.

168 *See* Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L REV. 1497 (2009). The authors discuss agency power issues within a *Chevron* context, asking in what situations should deference be applied to an agency's interpretation of its own jurisdiction. While I do not discuss *Chevron*, many of the same principals apply here.

169 *Id*. at 1505.

170 *Id.*

171 *Id*.

172 *Id.* at 1518.

173 29 F.3d 655 (D.C. Cir. 1994).

174 *Id*.

power to investigate.[175] The D.C Circuit invalidated this interpretation, stating that agreeing would give the NMB the power to do whatever it wanted.[176] The court stated that on the contrary to the NMB's interpretation, the NMB has no inherent authority and could only wield the powers statutorily given to them.[177]

This is analogous to the argument that § 209's silence grants EPA the power to withdraw a previously granted waiver. As with the NMB, EPA's review of a waiver is not a completely arbitrary or a new power, so it says, but rather one that stems from its ability to grant waivers in the first place (just as the NMB's power to investigate *sua sponte* stemmed from its power to investigate upon request).[178] Just as the RLA's text did not deny the NMB the power to initiate investigations *sua sponte*, neither does the CAA deny EPA the power to review and revoke a previously granted waiver.[179]

It is likely Sales and Adler are right, and EPA does not have statutory power (founded in a *lack* of statutory language) to review and revoke a prior waiver, and therefore there is no meaning to the statutory silence. The general nature of agency power weighs too heavily against EPA ability to do this. EPA, as an administrative agency, can only be delegated the authority to take an action by explicit statutory language.[180] That there is no language in the CAA granting EPA permission to review and revoke a previously granted waiver is the end of the argument—no text, no power.[181]

B. Legislative History Regarding Clean Air Act Text

There is only a single sentence within the CAA legislative history which can be used as evidence suggesting EPA authority to revoke a previously granted waiver. A 1967 Senate Report contains a statement that "implicit in this provision is the right of the Secretary to withdraw the waiver at any time after notice and an opportunity for public

175 *Id.*
176 *Id.*
177 Nathan Alexander Sales & Jonathan H. Adler, *supra* note 10.
178 *See SAFE*, 84 Fed. Reg. at 51331.
179 *Id*.
180 *Id*. at 1534.
181 The issue can be raised of whether EPA's actions, which occurred through a rulemaking, are materially different from the NMB's, which did not. While it is different, I do not think it changes the conversation – EPA can still only promulgate rules it is given the power to do so through its enabling statutes. That § 209 does not state whether EPA can retroactively look at rules is an analogous interpretive exercise to the NMB's interpretation that the RLA allows to initiate investigations sua sponte.

hearing he finds that the State of California no longer complies with the conditions of the waiver."[182] On the surface, this is a strong indication that Congress intended EPA to have the authority to withdraw a waiver at any time. However, there are two issues with assuming this single statement confers onto EPA the authority in question: (1) it is not entirely clear that revoking a previously granted waiver is supported by the 1967 statement; and (2) this statement was made before major CAA changes—changes that have relevant significance for a waiver revocation.

C. Does the 1967 Legislative History Support Revocation Authority?

The first issue is whether the 1967 statement actually supports EPA's current position. It seems that EPA conflates the language of this legislative history with the facts at hand. EPA's reliance on this quote raises the question of whether the phrase "no longer complies,"[183] is the same as the idea as "since EPA no longer interprets the CAA the same, California 'no longer complies'"?[184]

It seems undeniable from the legislative history, text of the CAA, and prior EPA § 209 decisions, that there may come a time when California does not need its own emission standards.[185] It seems implied from the very nature of the waiver that this is a realistic possibility. For example, there may come a time when the air quality in California has improved to such a degree that having its own standards is not necessary for health and safety concerns. Or, if EPA makes federal emission standards more stringent, to the point that they exceed California's standards, California would be unable to have its own emission standards. In these situations, California would not be granted a § 209 waiver. But nothing in California's emissions or pollution problems seems to have changed such that California does not need its own emission standards.[186] In fact, EPA has sought to reduce federal emissions standards in recent years.[187]

Since none of the above two situations has occurred, it must be a change in interpretation by EPA that makes California no longer

---

182 S. Rep. No. 90-403, at 34 (1967).

183 42 U.S.C. § 7543(b) (1967).

184 The quoted material here is not a quote from any source, but rather my own phrasing of the question presented in this subsection.

185 *See generally,* 42 U.S.C. § 7543(b) (1977).

186 *See 2013 Waiver Grant,* 78 Fed. Reg. at 2129-30.

187 *See SAFE* as an example of EPA attempting to lower emissions standards.

deemed to comply. It is not EPA's general authority to make a waiver decision which deems California non-compliant. Instead, it is EPA's authority to change its mind on how to interpret § 209.[188]

The 1967 legislative history does not necessarily support EPA's claim of textual support to revoke the waiver. It is reasonable to argue that the 1967 statement supports a waiver revocation when California no longer deems to comply with the waiver provision because of external change—either pollution decreasing or EPA increasing the stringency of its standards. But it seems like a stretch to claim that the 1967 supports a waiver revocation when EPA changes its interpretation, while federal standards and California's pollution remain the same. In saying the Secretary can determine whether California "no longer complies with the conditions of the waiver,"[189] it plausibly reads as though the Secretary can, at any time, determine whether California no longer has circumstances that fit the criteria requisite for obtaining a waiver. It does not easily read, however, that the Secretary can determine whether California no longer complies with the conditions of the waiver because the requisite criteria for obtaining a waiver has now changed.

2. Agency Changing Direction of its Own Policy

EPA's decision here raises an issue slightly tangential to the actual legislative history: when can an agency change its policy direction? In general, a federal agency may not announce a position that abruptly changes direction from prior agency pronouncements without providing a reasoned explanation for that change.[190] But, under *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.,*[191] the Supreme Court held that an agency may do so only if it provides a reasoned analysis for its change of direction.[192] Specifically apt here, the Court stated that "an agency's view of what is in the public interest may change, either with or without a change in circumstances," nevertheless, "an agency changing its course must supply a reasoned analysis" for its decision to do so.[193]

---

188 *See SAFE*, 84 Fed. Reg. 188 at 51339.

189 S. Rep. No. 90-403, at 34 (1967).

190 David H. Becker, *Changing Direction in Administrative Agency Rulemaking: "Reasoned Analysis," the Roadless Rule Repeal, and the 2006 National Park Service Management Policies*, ENVIRONS: ENVTL. L. & POL'Y J. 65 (2006).

191 463 U.S. 29, 38 (1983).

192 Becker, *supra* note 190, at 75 (quoting *State Farm*).

193 *Id*.

EPA may likely argue that SAFE provides a thoroughly reasoned analysis of its decision to change its policy in interpreting § 209. However, where the policy change conflicts with prior policy positions, the agency may not be given as much deference in making its decision to change.[194] Although EPA's interpretation of § 209 in SAFE is not at odds with the 2008 waiver decision,[195] it is at odds with almost every other waiver decision and their respective § 209 interpretations.[196] In *Good Samaritan Hospital v. Shalala*,[197] the Supreme Court stated that the consistency of agency position is a factor in determining whether the new policy position change is due deference.[198] In *Shalala*, the Court upheld the agency's revised position because its new position, although contradictory to the prior one, was nonetheless plausible under the statute, and because it remained closely within "the design of the statute as a whole and . . . . its object and policy."[199]

EPA's interpretive change does not seem to play the same role as the change in *Shalala*. The entire history of CAA § 209—including all legislative history but one statement—suggests California should receive deference in its determination that it needs a waiver, and that EPA does not play a dominating role in that decision.[200] Unlike in *Shalala*, EPA's interpretive change does not fit squarely within the design of the CAA generally and § 209 specifically. Because it is a competing policy change, and it does not support the design of § 209, it may not—and should not—be given the deference an agency policy change can be entitled to.

D. Is EPA Limited to a "Snapshot in Time?"

As noted in the history section above, the 1967 statement was made before the creation of EPA and the current § 209 waiver scheme. In the 1967 Air Quality Act, the predecessor of the CAA, § 208 housed the waiver provision.[201] There, the waiver provision allowed the Secretary of Health, Education and Welfare to waive application of federal standards "unless *he* finds such State does not require standards more stringent than applicable Federal standards to meet compelling

194 *Id*. at 77.
195 The Bush waiver decision denying California a waiver.
196 *See infra* II(c) discussing the 2008, 2009, and 2013 waiver decisions and methods.
197 508 U.S. 402 (1993).
198 Becker, *supra* note 190, at 77.
199 Becker, *supra* note 190, at 77 (quoting *Shalala*).
200 *See infra* II(a) for the history of § 209 waivers.
201 *See* 42 U.S.C. § 209 (1967).

and extraordinary conditions or that such State standards and accompanying enforcement procedures are not consistent with section 202(a) of this title."[202] This is an important distinction from the CAA text today.[203]

It makes sense that the secretary could revoke a waiver in 1967—the ultimate decision of the life of a waiver rested in their hands. In the 1967 waiver scheme, they held the power of determining whether the state required more stringent standards, giving them final word and therefore, more statutory authority in deciding how a waiver should be treated.[204] This is in stark contrast to today's waiver provision, where it is California who holds that power. California itself must determine whether a waiver is needed (by determining whether the state requires more stringent standards) before EPA can decide whether to grant the waiver. This is important because it locks EPA's § 209 power into a single moment in time: "EPA Administrator's ability to evaluate whether California was entitled to a waiver to a single point in time—after California had made a protectiveness determination but before a waiver had been granted[.]"[205] Because EPA is locked into this moment, and its granted powers have changed, the 1967 legislative history has much less, if any, bearing on EPA's role in the current waiver scheme.[206]

The counter to this argument, it seems, is that EPA cannot be locked into a snapshot of time because a reading of § 209(a) indicates that EPA must always be regulating emissions beyond what is on the face of a waiver request. EPA claims that the relationship between the CAA § 209(a) and § 209(b) is "another textual indication that EPA's grant of a waiver is not limited to a snapshot in time. . . ." The argument can be broken down as such: [207]

(1) CAA § 209(b) grants the EPA the authority to waive preemption of §209(a);

(2) CAA § 209(a) forbids any state from both adopting vehicle emission standards, as well as attempting to enforce vehicle emission standards;

---

202 *Id.* (emphasis added).

203 *See* Denise A. Grab et al., *No Turning Back (NYU Institute for Policy Integrity*, INSTITUTE FOR POLICY INTEGRITY 7-8 (Oct. 2018), https://policyintegrity.org/files/publications/No_Turning_Back.pdf.

204 *See* 42 U.S.C. § 209 (1967).

205 Grab *supra* note 210, at 8.

206 *See id*.

207 *SAFE,* 84 Fed. Reg. 188 at 51332 n. 220.

(3) As statutory interpretation guides, the EPA should presume the phrase "attempt to enforce" is not surplusage and therefore has meaning;

(4) All potential meanings of the phrase "suggest some ability on EPA's part to consider actions on the state's part separate from the state's 'adoption of statutory or regulatory provisions and submission to EPA of a waiver request for those provisions."[208]

To the EPA, attempts to enforce means either attempted enforcement actions under an already waived program, or attempted enforcement actions without a validly waived emissions program–either way, "attempting to enforce" envisions state activity outside the scope of what can be determined by EPA from the face of a waiver submission;"[209]

(5) Therefore, § 209(a) prohibits activities, some of which are limited to a specific time, but also prohibits activities that may have already happened, are currently happening, or will happen in the future–unlike a simple § 209(b) waiver submission;

(6) Therefore, under § 209 as a whole, EPA is not limited at all in reconsidering its previous actions on § 209 activities "in light of activity later in time than or outside the authorized scope of a waiver once granted."[210]

The issue with this line of reasoning is the jump made from (5)-(6). EPA's interpretation of § 209(a), granting it the time-uninhibited authority to regulate attempted enforcement actions makes sense. Were they bound by time in regulating any attempted state enforcement actions, EPA would likely be unable to enforce their own authority. It would be impossible for the agency to stop a state's unauthorized emissions enforcement were it only able to do so if the state was submitting a waiver at the same time. Any state wanting to continue enforcing these technically prohibited actions would simply never submit a waiver, possibly denying EPA any chance to review the state's actions.

However, because EPA can review state attempted enforcement actions,[211] which take place outside of the scope of, or without any kinship to, a previously granted waiver, such actions do not overwhelmingly indicate the creation of a review and revocation power for already granted waivers. It seems, more reasonably, to indicate exactly

---

208 *Id.* at 51332 n. 220.

209 *Id.*

210 *Id.*

211 *See* 42 U.S.C.A. § 7542(a) (1977).

what the EPA claims for it to mean:[212] that it is not limited to a snapshot in time when an attempted state enforcement action falls outside the scope of a waiver. This is entirely different from the conclusion that EPA can revoke a previously granted waiver.

For example, assume that in 2014, a year after the 2013 waiver was granted, California began attempting to enforce a new standard, requiring automobile manufacturers to quadruple their ZEV production and sales. This is an action that is certainly outside of the scope of the 2013 waiver. As such, no one would reasonably object to EPA invoking its § 209(a) authority to extinguish California's actions. Yet, there seems to be no reason to believe that, as EPA claims,[213] the authority exemplified in the situation above would also grant EPA the ability to revoke the same 2013 waiver. It seems that when EPA sought to give meaning to the phrase "attempt to enforce," it may have read into this language an authority that does not necessarily seem to exist.

V. PRECEDENT-BASED ARUGMENTS FOR REVOCATION AUTHORITY

Last, I will discuss the notion that because EPA has reconsidered a § 209 waiver in the past, precedent suggests it can do so now. In 1982, EPA promulgated a rule reconsidering and affirming a waiver which it granted to California in 1977.[214] In 1977, EPA granted California a § 209 waiver, permitting it to enforce specific motorcycle fill-pipe and fuel tank requirements.[215] Following approval of the waiver, CARB promulgated state rules in an attempt to implement these new requirements.[216] CARB was, through these rules, attempting to set a schedule for compliance with the waived standards, and made changes to the EPA approved schedule found in the 1977 waiver submission.[217] The changes decreased the amount of time given to industry actors to comply with the new standards.[218] These changes necessarily called into question the technological feasibility of implementation.[219]

---

212 *SAFE*, 84 Fed. Reg. at 51332 n. 220.

213 *See id*.

214 California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption; Summary of Decision, 47 Fed. Reg. 7306, 7306 [hereinafter *1982 Waiver*].

215 *Id.*

216 *Id.*

217 *Id.* at 7307.

218 *See id.*

219 *1982 Waiver,* 47 Fed. Reg at 7307; *see infra* Part II(c)(ii)(C) (explaining that technological feasibility, found in CAA § 202(a), is intertwined in a § 209 waiver).

A. Reasons Behind the Rulemakings

To understand why the 1982 rulemaking is significantly different from SAFE, it is necessary to analyze the reasons behind why EPA promulgated the 1982 rule reconsidering the waiver. In 1982, the only issue that EPA was reconsidering was "whether California fill-pipe and fuel tank opening regulations are consistent with section 202(a) of the [CAA]."[220] Ultimately, for reasons not relevant to the discussion at hand, EPA found that they were consistent, and affirmed the 1977 waiver.[221] EPA took a second look at the 1977 waiver because: (1) California acted in a way that was potentially conflicting with the original waiver; and (2) these actions called into question the feasibility of implementing them.

On the other hand, SAFE is reconsidering the 2013 waiver because it no longer interprets § 209(b) to mean the same things it did in 2013. As discussed above,[222] EPA rejects the prior interpretation, instead putting forward a reading it claims is "more in accord with the text, structure, purpose, and legislative history" of § 209(b)(1)(B).[223] EPA says that because § 209(a) "expresses Congress' judgement that vehicle emission pollution problems are presumptively appropriate only for federal regulation, with one state afforded the extraordinary treatment under CAA section 209(b). . . the best, if not the only, reading of [209(b)(1)(B)] is that it requires a pollution problem at the local level,"[224] one that "corresponds in a state-specific particularized manner to the type of pollution problem that Congress required as the predicate for federal regulation."[225] Essentially, EPA is saying that because Congress sought to have a uniform national emission standard through § 209, any exception to this power given to a state (§209(b)) can only deal with issues that are state-specific.

EPA's current line of reasoning is similar to that of the 2008 waiver denial, in that it contemplates requiring state-specific effects of climate change. However, in SAFE, EPA takes it one step further. Rather than requiring only a state-specific issue, EPA focuses on the elements found in § 202(a), claiming that § 209(b)(1)(B) requires a "state-specific, particularized nexus between the elements of a pollution problem [(1) emissions of pollutants; (2) resulting air pollution;

220 *1982 Waiver*, 47 Fed. Reg. at 7307.
221 *Id.* at 7310.
222 *See infra* II(C).
223 *SAFE*, 84 Fed. Reg. at 51339.
224 *Id.* at 51340.
225 *Id.*

(3) health and welfare effects from that resulting air pollution]."[226] For reasons not necessary to discuss here, there are certainly arguments against this reading of § 209(b)(1)(B). [227] What is relevant, however, is understanding what type of change preceded the current waiver revocation—here, that type of change stems from an internal interpretation switch from EPA.

1. The Current Revocation Motivations are Significantly Different From Those of the 1982 Review

The reasoning behind the 1982 rulemaking is almost entirely fact based. In 1977, CARB put forward a plan that was ultimately approved. Subsequently, in creating the specifics for that plan, timelines changed, leading to legitimate factual questions, which asked if what CARB was now requiring of industry players was practically possible.[228] Review in this setting makes sense; if the facts underlying the waiver approval change, such that what was originally waived is no longer possible, a review of the changes are necessary to ensure ultimate compliance with and success of the regulation.

However, what sparked revocation in SAFE seems entirely different. The facts underlying California's 2013 waiver did not change. Unlike in the 1982 waiver, CARB did not suggest new timelines that called into question technological feasibility, nor did it significantly amend its objectives.[229] Meanwhile, it does not seem that the real-life effects of pollution have diminished since 2013; in 2013, California was experiencing "[r]ecord setting fires, deadly heat waves, destructive storm surges, loss of winter snowpack . . . ." and "some of the worst air quality in the nation."[230] These pollution effects found in 2013 do not seem to have substantially improved. As of 2018, the year of SAFE's proposal, California was ranked the least healthy state in terms of air pollution.[231]

---

226 *Id.* at 51340.

227 *See id.* at n. 260 (CARB arguments against why this reading is incorrectly applied to GHG emission standards).

228 *See 1982 Waiver,* 47 Fed. Reg.

229 Post-2013, the only amendment to its 2013 objectives was the deemed to comply provision which, notably, lessened, not strengthened, regulation.

230 *2013 Waiver Grant,* 78 Fed. Reg. at 2129-30.

231 America's Health Rankings United Health Foundation, *Analysis of U.S. Environmental Protection Agency; U.S. Census Bureau, Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2018,* UNITED HEALTH FOUNDATION, https://www.americashealthrankings.org/explore/annual/measure/air/state/ALL?edition-year=2018 (last visited Sept. 25, 2020).

The potential external factors that would have triggered the same type of reconsideration as the 1982 rule are wanting. In 1982, industry players petitioned to have the waiver reconsidered because there was an external,[232] factual change—the timelines for implementation were shorter. Here, while industry players would arguably want SAFE to be promulgated, they could not have claimed a difference in factual circumstances.

In fact, during EPA's 2016-2018 MTE, EPA evaluated the "CO2 standards for [MYs 2022-2025] . . . re-evaluat[ing] the CO2 standards for those model years and to undertake to develop new CO2 standards . . . if it concluded that the previously finalized standards were no longer appropriate."[233] Rather, it was more similar to the 1982 circumstances, a factual inquiry into the circumstances of emissions and emission standard implementation. EPA was to determine whether the proposed standards set for MY 2022 and beyond were still appropriate. Regardless of how EPA comes out in this determination, an inquiry opportunity like the MTE is likely more analogous to the 1982 waiver reconsideration than SAFE is. Because EPA builds its authority from an interpretive change, and not a factual change, waiver revocation precedent is not a strong authority for present day waiver revocation.

VI. CONCLUSION

The goal of this paper was to determine whether EPA has the authority to revoke a § 209 waiver, and whether the arguments the agency has made in defense of SAFE hold true. It seems that EPA may have the inherent rulemaking power to revoke a waiver generally, but that this power is strongly limited. Moreover, it seems that this inherent rulemaking is not as strong in the context of the snapshot in time argument, which argues that the language of § 209 actually places a limit on EPA's inherent rulemaking powers. It also seems unlikely that EPA can claim review and revoke power through the text of the CAA, its legislative history, or past precedent. Ultimately, it seems like the best argument in defense of EPA's authority to revoke a § 209 waiver rests in its rulemaking powers as a federal agency. In terms of SAFE specifically, I am unpersuaded that its rulemaking powers will be sufficient to support a finding of authority to revoke the 2013 waiver. California and thirteen other states have spent the last five to six years

232 *1982 Waiver,* 47 Fed. Reg.
233 *SAFE*, 84 Fed. Reg. at 42988.

organizing the future of their emissions standards, automobile economies, and public health laws, around the waiver. That type of reliance, coupled with the lack of statutory and legislative history backing, indicates that California has a strong argument in defending the 2013 waiver.