

# STOP! TURN THE CAR AROUND RIGHT NOW FOR FEDERALISM'S SAKE!

*The One National Program Rule and How Courts  
Can Stop Its Impact*

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This paper was awarded third place in the California Supreme Court Historical Society's 2020 CSCHS Selma Moidel Smith Student Writing Competition in California Legal History.

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## I. INTRODUCTION

It is late July — the dead heat of summer — of 1943.<sup>1</sup> Allied forces have just bombed Rome; Benito Mussolini has been arrested; and Italy is under martial law.<sup>2</sup> Across the world, Los Angeles residents believe they are being attacked by Japanese forces.<sup>3</sup> They can see no farther than three blocks as a thick fog envelops the city, stinging their eyes and making their noses run.<sup>4</sup> They think it is chemical warfare. But the culprit is not a wartime enemy — it is the first incidence of smog in California.<sup>5</sup> A local factory is shut down as Angelenos try to discern the source, and the mayor confidently predicts “an entire elimination” of the issue within four months.<sup>6</sup> This prediction did not come to pass.<sup>7</sup>

In fact, it did not become clear until the next decade that the “hellish cloud” in the city was smog, created primarily by automobile exhaust.<sup>8</sup> In 1960, to combat the impact of the smog and some of the “worst air quality in the country,” California established a Motor Vehicle Pollution Control

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<sup>1</sup> Jess McNally, *July 26, 1943: L.A. Gets First Big Smog*, WIRED (July 26, 2018, 12:00 AM), <https://www.wired.com/2010/07/07261a-first-big-smog> (The first smog occurred on July 26).

<sup>2</sup> PBS, *Timeline of World War II*, PBS (Sept. 2007), [https://www.pbs.org/thewar/at\\_war\\_timeline\\_1943.htm](https://www.pbs.org/thewar/at_war_timeline_1943.htm).

<sup>3</sup> McNally, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Kat Eschner, *This 1943 “Hellish Cloud” was the Most Vivid Warning of LA’s Smog Problems to Come*, SMITHSONIAN.COM (July 26, 2017), <https://www.smithsonianmag.com/smart-news/1943-hellish-cloud-was-most-vivid-warning-las-smog-problems-come-180964119>. In 1948, Arie Jan Haagen-Smit, a researcher at the California Institute of Technology, discovered the source of the chemicals in the smog, which “were created when hydrocarbons produced by oil refineries and automobiles interacted with compounds in the atmosphere.” Nat’l Sci. & Tech. Medal Found., *Arie Jan Haagen-Smit*, NAT’L SCI. & TECH. MEDAL FOUND. (last accessed Dec. 10, 2019), <https://www.nationalmedals.org/laureates/arie-jan-haagen-smit>; This particular smog is called photochemical smog, though it is also known as “Los Angeles smog,” which is most common in urban areas with a large number of automobiles. The Editors of Encyc. Britannica, *Smog*, ENCYC. BRITANNICA (last updated Mar. 19, 2019), <https://www.britannica.com/science/smog>. Unlike the Angelenos’ original assumption, it “requires neither smoke nor fog.” *Id.*

Board.<sup>9</sup> In 1966, California enacted the first tailpipe emissions standards in the country.<sup>10</sup> A year later in an amended version of the Clean Air Act (CAA), the federal government preempted all states — except for California — from adopting emissions control standards.<sup>11</sup> The government has consistently reaffirmed California’s emissions control standards for over fifty years.<sup>12</sup> Until now.<sup>13</sup>

The Trump administration wants to revoke California’s ability to innovate and set its own automobile tailpipe emissions standards for greenhouse gas emissions, as well as its zero emissions vehicle regulations.<sup>14</sup> The Department of Transportation’s (DOT) National Highway Traffic Safety Administration (NHTSA) and the Environmental Protection Agency (EPA) jointly proposed the revocation of the 2013 CAA waiver as a part of the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule.<sup>15</sup> After the comment period ended and California made it clear they did not plan to comply with future Trump administration automobile emissions standards, the administration issued a final rule on the waiver and preemption

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<sup>9</sup> The Editors of Encyc. Britannica, *supra* note 8. Los Angeles smog results in many detrimental effects: “a light brownish coloration of the atmosphere, reduced visibility, plant damage, irritation of the eyes, and respiratory distress.” *Id.* Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 Nw. U. L. REV. 1097, 1109 (2009).

<sup>10</sup> Carlson, *supra* note 9, at 1109.

<sup>11</sup> *Id.*

<sup>12</sup> California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California’s Advanced Clean Car Program and a Within the Scope Confirmation for California’s Zero Emission Vehicle Amendments for 2017 and Earlier Model Years, 78 Fed. Reg. 2,112, 2,113 (Jan. 9, 2013) [hereinafter 2013 CAA Waiver].

<sup>13</sup> David Shepardson, *Trump Administration Bars California from Requiring Cleaner Cars*, REUTERS (Sept. 19, 2019, 6:10 AM), <https://www.reuters.com/article/us-autos-emissions-trump/trump-administration-bars-california-from-requiring-cleaner-cars-idUSKBN1W4157>. There was one denial, but the waiver was eventually granted. See discussion *infra* at text associated with nn. 111–13.

<sup>14</sup> The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174, 24,174 (Apr. 30, 2020) [hereinafter SAFE Vehicles Rule]. Shepardson, *supra* note 13.

<sup>15</sup> SAFE Vehicles Rule, 83 Fed. Reg. 42,986, 42,986 (proposed Aug. 24, 2018) (to be codified at 49 C.F.R. pts. 523, 531, 533, and 537 and 40 C.F.R. pts. 85 and 86) [hereinafter “Proposed SAFE Rule”].

issues, called the One National Program Rule.<sup>16</sup> One National Program withdraws California's 2013 CAA waiver and explicitly preempts the state's greenhouse gas emissions control program.<sup>17</sup> NHTSA also rolled back the Corporate Average Fuel Economy (CAFE) standards, which would put California's desired standards at odds with the new CAFE standards, the impetus for One National Program.<sup>18</sup>

The Trump administration's actions contravene the most basic principles of federalism: innovation, competition, state sovereignty, and fostering creative partnerships. Notions of federalism, the question of the proper division of authority between local and national governments, existed in the United States long before the Founding.<sup>19</sup> From the early seventeenth century and naissance of states, to a modern era of fifty states totaling 330 million people, the American tradition of federalism remains alive and well.<sup>20</sup> Spurning this long history, One National Program will impact the innovative and dynamic version of federalism that exists today — possibly impacting it indefinitely.<sup>21</sup> California's CAA waiver is an example of iterative federalism, which results in “regulations [that] are the results of repeated, sustained, and dynamic lawmaking efforts involving both levels of government.”<sup>22</sup> California's existing standards, which focus on controlling greenhouse gas emissions, are a part of one of the most significant climate-related iterative federalism schemes in existence.<sup>23</sup>

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<sup>16</sup> The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310, 51,311 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533) [hereinafter One National Program].

<sup>17</sup> *Id.*

<sup>18</sup> SAFE Vehicles Rule, 85 Fed. Reg. at 24,174. See generally One National Program, 84 Fed. Reg. at 51,310. U.S. Env'tl. Prot. Agency, *Trump Administration Announces One National Program Rule on Federal Preemption of State Fuel Economy Standards*, U.S. ENVTL. PROT. AGENCY (Sept. 19, 2019), <https://www.epa.gov/newsreleases/trump-administration-announces-one-national-program-rule-federal-preemption-state-fuel>.

<sup>19</sup> James E. Hickey, Jr., *Localism, History, and the Articles of Confederation: Some Observations About the Beginning of U.S. Federalism*, 9 IUS GENTIUM 5, 6, 8 (2003).

<sup>20</sup> *Id.* U.S. Census Bureau, *U.S. and World Population Clock*, U.S. CENSUS BUREAU (last accessed May 11, 2020), <https://www.census.gov/popclock>.

<sup>21</sup> SAFE Vehicles Rule, 85 Fed. Reg. at 24,174.

<sup>22</sup> Carlson, *supra* note 9, at 1099–1100.

<sup>23</sup> *Id.*

This paper is a comment on the negative impacts the One National Program Rule and the SAFE Vehicles Rule will have on federalism. Part II examines the deeply embedded aspects of federalism in the origin of California's CAA waiver scheme. Part III discusses how the rules will harm federalism, with a focus on the new wave of liberal federalism. Part IV discusses the reasoning behind the rules. Part V proposes a framework that emphasizes the central role federalism should play in the analysis of an eventual court's decision on the rules. It concludes that the continued existence of California's waiver scheme is essential to the vitality of modern-day federalism.

## II. THE ORIGIN OF CALIFORNIA'S WAIVER SCHEME & WHY IT IS ESSENTIAL TO FEDERALISM

Federalism is embedded in California's environmental protection scheme. California is the leader in air quality and emissions standards because of the troubles major urban areas like Los Angeles faced in the 1940s.<sup>24</sup> In 1947, California created the Los Angeles County Air Pollution Control District, the first in the nation.<sup>25</sup> But counties could not combat the problem of motor vehicle pollution at large, so in 1959, California created a Motor Vehicle Pollution Control Board to test vehicle emissions and certify any emission control devices.<sup>26</sup> California's approach prompted the adoption of the CAA of 1963, and the Motor Vehicle Air Pollution Control Act

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<sup>24</sup> S. Coast Air Quality Mgmt. Dist., *The Southland's War on Smog: Fifty Years of Progress Toward Clean Air (Through May 1997)*, S. COAST AIR QUALITY MGMT. DIST. (last accessed Dec. 10, 2019), <https://www.aqmd.gov/home/research/publications/50-years-of-progress>.

<sup>25</sup> *Id.* The bill had fierce opposition from business interests, like oil companies and the chamber of commerce, which "opposed the repeal of a state law giving manufacturers the right to 'necessary' discharge of smoke and fumes, and the creation of an air pollution permit system." *Id.* However, after the creation of the first district, districts spread all over the state. *Id.*

<sup>26</sup> *Id.* Automobile makers at the time had to agree to make separate additions to car models made for California, like smog control systems (which are an emissions control device). *Smog-Control Unit Set for California in '66-Model Cars*, N.Y. TIMES (Aug. 13, 1964), <https://www.nytimes.com/1964/08/13/archives/smogcontrol-unit-set-for-california-in66model-cars.html>.

of 1965.<sup>27</sup> The federal Health, Education and Welfare Agency even issued emissions standards identical to California's standards for model year 1968 passenger cars.<sup>28</sup>

The CAA of 1967 included California's first waiver.<sup>29</sup> The act states: "No state or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this title," but also adds that "[t]he Secretary shall, after notice and opportunity for public hearing, waive application of this section to any state which has adopted standards . . . prior to March, 30, 1966."<sup>30</sup> The waiver exclusively impacted California, because of the state's pioneering emissions regulations.<sup>31</sup> The 1977 amendments to the CAA authorized other states to follow either the federal standard or their own standards if and only if they were identical to California's.<sup>32</sup> Congress granted this option with the "hope and expectation that California would pioneer air pollution control standards and technologies that could serve as models for the United States as a whole."<sup>33</sup> This is a classic example of incentivizing a state to serve as a laboratory of democracy, one of the main objectives of federalism.<sup>34</sup> Since 1967, under Democratic and Republican administrations, the EPA has almost summarily approved California's waiver requests.<sup>35</sup> These waivers enable

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<sup>27</sup> Carlson, *supra* note 9, at 1110.

<sup>28</sup> *Id.*

<sup>29</sup> 2013 CAA Waiver, 78 Fed. Reg. 2,112, 2,113 (Jan. 9, 2013).

<sup>30</sup> Clean Air Act of 1967, Pub. L. No. 90-148, § 208, 81 Stat. 501, 501 (1967). This waiver does not apply if the state does not require higher standards than federal ones "to meet compelling and extraordinary conditions," or if the state's standards and enforcement of those standards are not consistent with Section 202(a) of the CAA. *Id.*

<sup>31</sup> Cal. Air Res. Bd., *History*, CAL. ENVTL. PROT. AGENCY (last accessed Dec. 10, 2019), <https://ww2.arb.ca.gov/about/history>.

<sup>32</sup> 2013 CAA Waiver, 78 Fed. Reg. at 2,113.

<sup>33</sup> Richard M. Frank, The Federal Clean Air Act: California's Waivers — A Half-Century of Cooperative Federalism in Air Quality Management, *Hearing Before the Calif. S. Comm. on Environmental Quality* 4 (Feb. 22, 2017).

<sup>34</sup> See generally *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See *infra* text associated with note 60.

<sup>35</sup> Frank, *supra* note 33, at 6 (Over 100 separate waiver determinations from the United States Environmental Protection Agency have been granted since 1967).

California's innovations in emissions control regulation.<sup>36</sup> Currently, the California Air Resources Board is responsible for the state's emissions regulation and innovation.<sup>37</sup>

This long and comprehensive history of emissions control and air quality regulation reveals the vitality and importance of this federalism model — in fact, the federal government continues to model many of its own emissions standards on California's.<sup>38</sup> A 1971 report on environmental quality recognized the importance of state and local governments, which are on the front lines of “essential planning, management, and enforcement.”<sup>39</sup> It noted California as a harbinger for federal emissions laws, a laboratory for solutions, and a catalyst for federal action.<sup>40</sup>

As a part of one of the “most significant climate change initiatives to come from the state,” California's iterative scheme has been the source of one of the “most innovative state responses to climate change.”<sup>41</sup> Ann E. Carlson, the originator of the term “iterative federalism,” posits that this innovation stems from the “repeated, sustained, and dynamic lawmaking

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<sup>36</sup> *Id.* These innovations include: a “[f]irst in the nation tailpipe emission standard for hydrocarbons, carbon monoxide, oxides of nitrogen and [] particulate matter emissions from diesel-fueled vehicles,” catalytic converters, “check engine” light systems, the “nation's first greenhouse gas emission standards for passenger vehicles,” and requiring manufacturers “to consider the combined effects of engines, transmissions, tire resistance, etc., on both conventional (‘criteria’) and greenhouse gas pollutant emissions.” *Id.* at 6–7.

<sup>37</sup> Cal. Air Res. Bd., *supra* note 31. The California Air Resources Board consists of sixteen members, twelve of whom are appointed by the governor and confirmed by the State Senate. Cal. Air Res. Bd., *About*, CAL. AIR RES. BD. (last accessed Feb. 8, 2020), <https://ww2.arb.ca.gov/about>. The remaining four slots consist of two members who represent environmental justice communities, and two nonvoting members who conduct legislative oversight — these four are also selected by the California Senate and Assembly (two by each). *Id.* Altogether, the California Air Resources Board includes experts in the air quality field, leaders in local air districts, and concerned members of the public. *Id.* The staff of the California Air Resources Board includes a “professional staff of scientists, engineers, economists, lawyers and policy makers.” *Id.*

<sup>38</sup> Frank, *supra* note 33, at 7.

<sup>39</sup> Council on Env'tl. Quality, *Environmental Quality, the Second Annual Report of the Council on Environmental Quality 37* (Aug. 1971), <https://files.eric.ed.gov/fulltext/ED055922.pdf>.

<sup>40</sup> *Id.* at 37–38.

<sup>41</sup> Carlson, *supra* note 9, at 1099–1100.



efforts involving both levels of government.”<sup>42</sup> The CAA waiver enables California to act more freely to limit greenhouse gas emissions.<sup>43</sup> The ability of the states and the federal government to push back and forth over different iterations of automobile emission standards has strengthened laws and the lawmaking process in ways that the federal government alone could not achieve.<sup>44</sup>

Critics of this form of federalism, which uses iterations to strengthen environmental law, suggest that limiting California’s waiver is not a federalism issue at all. Instead, they suggest that the waiver process is a coercive power grab by California.<sup>45</sup> This argument ignores the obvious. California is not the only state that follows its standards. The 1977 amendments to the CAA allow any state to adopt vehicle emissions standards that are identical to California’s, as long as a waiver has been granted for the model year, and the standards are adopted two years ahead of time.<sup>46</sup> States *have* chosen to take this option, forgoing the federal standard in favor of California’s. Almost 120 million people reside in states that follow California’s vehicle emissions standards.<sup>47</sup> The combined population of all other states

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<sup>42</sup> *Id.* at 1099. Carlson describes this dynamic as one in which the federal government has “quasi-deputized” California to act, while also continuing to promulgate federal regulations. *Id.* at 1100. Then the back and forth begins, in which “one level of government — either the singled-out state actor or the national government — moves to regulate a particular environmental policy area. The initial policymaking then triggers a series of iterations adopted in turn by the higher or lower level of government. The process then extends back to the policy originator, and so forth.” *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Carlson, *supra* note 9, at 1108–9 (Even California, the leader in these vehicle emissions regulations, has dragged its feet at times — and the federal law was what pushed the state to do more).

<sup>45</sup> Kenny Stein, *Limiting California’s Waiver Authority is Not a Federalism Issue*, INST. FOR ENERGY RESEARCH (Mar. 27, 2018), <https://www.instituteforenergyresearch.org/regulation/limiting-californias-waiver-authority-not-federalism-issue>.

<sup>46</sup> Clean Air Act of 1977, Pub. L. No. 95-95, § 177, 91 Stat. 750, 750 (1977). “Waivers do not expire; they are sometimes superseded by a new waiver approving more stringent standard.” Stanley Young, *California & the Waiver: The Facts*, CALIF. AIR RESOURCES BD. (Sept. 17, 2019), <https://ww2.arb.ca.gov/resources/fact-sheets/california-waiver-facts>.

<sup>47</sup> U.S. Census Bureau, *State Population Totals and Components of Change: 2010–2019*, U.S. CENSUS BUREAU (last updated Dec. 30, 2019), <https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html>. Maryland Dep’t of the Env’t, *States Adopting California’s Clean Cars Standards*, MD. DEP’T OF THE ENV’T (Last visited May 11, 2020), <https://mde.maryland.gov/programs/air/mobilesources/pages/states.aspx> (The

is around 209 million.<sup>48</sup> Therefore, the population of the states following California's standards is over one-third of the United States population. Moreover, California still impacts states beyond those following its standards. Any car dealerships in states bordering those following California's standards can sell cars compliant with the adopted standards.<sup>49</sup>

These states are the subject of "spillovers," which some scholars take issue with, because it means citizens of one state are living under another state's laws.<sup>50</sup> But, spillovers are where federalism blossoms — spillovers "give [people] the chance to see how other people live, to live under someone else's law, [and] try someone else's policy on for size."<sup>51</sup> Spillovers push issues into the national sphere, forcing governments to act.<sup>52</sup> This is exactly what California's emissions regulations do. Because states adopt California's regulations, and car dealers within these states sell cars compliant with California's regulations to noncompliant states, the framework goes far beyond just California.<sup>53</sup>

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entire group of jurisdictions following California's standards is as follows: California, Colorado, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia).

<sup>48</sup> U.S. Census Bureau, *supra* note 47.

<sup>49</sup> Robinson Meyer, *The Coming Clean-Air War Between Trump and California*, THE ATLANTIC (Mar. 6, 2017), <https://www.theatlantic.com/science/archive/2017/03/trump-california-clean-air-act-waiver-climate-change/518649/> (They *can* do so, but it is not a must — it is an optional economic choice for the businesses to make). Currently 12 states border the states following California's standards, bringing the total number of states (and D.C.) that may be affected by California's emissions regulations to 27. Maryland Dep't of the Env't, *supra* note 47.

<sup>50</sup> Heather K. Gerken & James T. Dawson, *Living Under Someone Else's Law*, 36 DEMOCRACY, A J. OF IDEAS (2015), <https://democracyjournal.org/magazine/36/living-under-someone-elses-law>.

<sup>51</sup> *Id.* Gerken and Dawson state that "[a] well-functioning democracy doesn't require rigid uniformity; it requires us to deliberate about which departures from national policy are consistent with our norms and which are outside the bounds." *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Meyer, *supra* note 49. Because CAFE standards regulate new cars and trucks, car dealers are only affected if they are required to follow California's rules as per their state's adoption of them, and if they sell new cars. Benjamin Leard, *The Effect of Fuel Economy Standards on New Vehicle Sales*, RESOURCES MAG. (Feb. 11, 2019), <https://www.resourcesmag.org/common-resources/effect-fuel-economy-standards-new-vehicle-sales>. The concerns about the negative economic impact of more expensive fuel/emission efficient

California's scheme is essential to federalism. It is vital that states have control over how they choose to implement federal standards as well as the ability to exceed those standards should they choose to, especially in the environmental sphere. For example, the Obama administration gave states a great deal of leeway in their Clean Power Plan to determine climate policies.<sup>54</sup> This kind of allocation of authority is essential, because “[c]limate change is an area where a deep state of gridlock has settled in at the national level, and new ideas for political coalitions and alignments are desperately needed.”<sup>55</sup> With this marketplace of ideas stripped away, innovations through iterative federalism's push and pull will be lost, and a productive area of federalism will be walled off forever by the federal government. Losing California's CAA waiver scheme doesn't just affect California — it has created an iterative scheme that flows through the federal government, and the governments of other states.

### III. HOW THESE RULES WILL HARM FEDERALISM

Federalism is older than the Founding.<sup>56</sup> It stems from long-held preferences for local authority and a strong distrust of concentrated federal power.<sup>57</sup> This division of power between the federal government and state governments is most noticeable in the Tenth Amendment to the Constitution, which gives the states any powers not expressly delegated to the government.<sup>58</sup> Because any power not reserved by the federal government

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cars on spillovers states, as well as the states that have adopted California's standards, does not come to bear. *Id.* A study of new vehicle buyers found that 92 percent of those buyers would opt for a different new vehicle, if their first choice was unobtainable (perhaps due to price concerns). *Id.* So higher CAFE standards would only have a “modest effect” on the sale of new vehicles. *Id.*

<sup>54</sup> Denise A. Grab & Michael A. Livermore, *Environmental Federalism in a Dark Time*, 79 OHIO ST. L.J. 667, 672 (2018).

<sup>55</sup> *Id.*

<sup>56</sup> Hickey, *supra* note 19, at 8.

<sup>57</sup> *Id.* at 8–9 (citation omitted). The distance between England and the colonies made it necessary for people in colonial America to make their own decisions and laws, establishing a pattern of local rule in town and county governments. *Id.* at 9.

<sup>58</sup> *Id.* at 16.

goes to the state, states have a lot of power to regulate different areas of the lives of their people.<sup>59</sup>

One of the longest lasting statements on federalism comes from a 1932 Supreme Court case in which Justice Brandeis wrote, “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>60</sup> California and its CAA waiver experiment is a laboratory of democracy, as the continued existence of the waiver is vital to the health of federalism in the twenty-first century. Federalism has gone through many iterations. This note will now examine the intersection between new blue federalism and iterative federalism, as well as the path forward from imagining states as the laboratories to a new era of modern federalism.<sup>61</sup> Analysis will demonstrate the importance of California’s continued ability to have a waiver, and how this ability is a federalism issue through and through.

#### A. NEW BLUE FEDERALISM

Federal and state governments have clashed since the founding.<sup>62</sup> In *McCulloch v. Maryland*, Justice John Marshall wrote, “[T]he question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist.”<sup>63</sup> Federalism has not always been tied to liberal ideas like the expansion of environmental protections led by state governments rather than the federal

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<sup>59</sup> U.S. CONST. amend. X. See also *id.* at amend. XI.

<sup>60</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932). However, some scholars criticize the laboratory view of federalism as a relic of the last century, specifically the pre–New Deal conceptualization of it, saying that it is a threat to federalism itself. See Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1696–97 (2017), and Robert A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 HARV. L. & POL’Y REV. 33, 35–36 (2009). Federalism must be “reconceptualized” to “maintain its progressive potential. Schapiro, *supra* note 60, at 35. “Society and social ills have become more complex. Further, the civil rights era demonstrated the dangerous potential of unchecked local power, and this threat must not be ignored.” *Id.*

<sup>61</sup> Schapiro, *supra* note 60, at 34–35. (“Blue state” federalism is federalism that pushes for distinctly liberal policies, including in the areas of student loans, climate change, and same-sex marriage).

<sup>62</sup> Hickey Jr., *supra* note 19, at 6–7.

<sup>63</sup> *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819).

government.<sup>64</sup> Now, in a time when the federal government is “unable or unwilling” to take on climate change, liberal or “blue” states have stepped in to fill the gaps.<sup>65</sup>

This brand of federalism is often called “blue state” or “new” federalism.<sup>66</sup> In fact, federalism comes in many forms, and it’s used to meet many different ends.<sup>67</sup> The concept of new blue federalism echoes Progressive Era reforms, before federalism became synonymous with conservative “states’ rights” goals.<sup>68</sup> One scholar argues that in this new progressive era of federalism, the idea itself must be reconceptualized, keeping in mind past abuses carried out under the banner of federalism.<sup>69</sup> As a solution to the threat of unchecked local power, he argues for a creative partnership between states and the federal government.<sup>70</sup> While states can press forward with issues the federal government is not yet acting on, the federal government’s help is still important to combating the challenges the nation faces.<sup>71</sup> This ensures that states are still able to problem-solve, without sealing themselves off completely from the federal government.<sup>72</sup>

## B. NEW BLUE FEDERALISM AND ITERATIVE FEDERALISM INTERTWINED

The way new blue federalism and iterative federalism intertwine shows how different conceptualizations of federalism build off one another. The

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<sup>64</sup> Schapiro, *supra* note 60, at 33. The “states’ rights” movements of the last century are often tied to opposition to civil rights, a point of view that progressives are unlikely to want associate with their own principles. *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 34. Gerken, *supra* note 60, at 1696.

<sup>67</sup> Gerken, *supra* note 60, at 1696. Paul D. Moreno, “So Long as Our System Shall Exist”: *Myth, History, and the New Federalism*, 14 WM. & MARY BILL RTS. J. 711, 715 (2005). California’s fight with the Trump administration is only the most recent battle for a liberal end, and it shows why the need for support behind new blue federalism is more pronounced than ever. See Schapiro, *supra* note 60, at 34–35 (discussing other liberal-leaning federalism battles).

<sup>68</sup> Schapiro, *supra* note 60, at 34.

<sup>69</sup> *Id.* at 35. (“The civil rights era demonstrated the dangerous potential of unchecked local power, and this threat must not be ignored.”)

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

mix of new blue federalism and iterative federalism is especially prevalent in the environmental realm. The federal government under the Trump administration has rolled back many Obama-era policies related to combating climate change.<sup>73</sup> While this is the complete opposite of the inaction that once spurred states onward to fill the climate change policy void, the existence and idea of iterative federalism's helpful push and pull still stands. It ties into the idea of new blue federalism in the way that new blue federalism pushes the federal government further.<sup>74</sup> Critics of new blue federalism and its iterations say limiting California's waiver is not a federalism issue.<sup>75</sup> One critic stated, "The California legislature and its Air Resources Board set these national standards without the opportunity for the governments and populations of other states to weigh in."<sup>76</sup> He believes Congress and the Trump administration should be the ones deciding national issues to create a coherency among the states.<sup>77</sup> The blame is aimed at the Obama administration's past decisions to increase the federal standards, and California is accused of engaging in coercive, rather than cooperative, federalism.<sup>78</sup>

Federalism is not always cooperative.<sup>79</sup> Taking power from the federal government to regulate differently than it does is an inherently

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<sup>73</sup> See Cinnamon P. Carlarne, *Climate Change Law: A Decade of Flux and an Uncertain Future*, 69 AM. U. L. REV. 387 (2019) for a discussion of the state of climate change law in the Trump era. Michael Greshko, Laura Parker, Brian Clark Howard, Daniel Stone, Alejandra Borunda, & Sarah Gibbens, *A Running List of How President Trump is Changing Environmental Policy*, NAT'L GEOGRAPHIC (May 3, 2019), <https://news.nationalgeographic.com/2017/03/how-trump-is-changing-science-environment>.

<sup>74</sup> Carlson, *supra* note 9, at 1097–99.

<sup>75</sup> Stein, *supra* note 45. The Obama administration matched California's standards, and then went further to raise CAFE standards, which this critic says hurt the automotive industry. *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* But see Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework is Useful for Addressing Global Warming*, 50 ARIZ. L. REV. 799, 817 (2008) (discussing how the CAA was also the first modern environmental statute that used a "cooperative federalism framework" (referring to the waiver scheme and emissions control standards)).

<sup>79</sup> See Ilya Somin, *No More Fair-Weather Federalism*, NAT'L REV. (Aug. 18, 2017, 8:00 AM), <https://www.nationalreview.com/2017/08/limit-federal-power-left-right-can-agree/> (discussing federalism that takes more power away from the national government).

coercive act, as it pushes the federal government to concede the power or follow along. In iterative federalism, that push and pull forces a dialogue between states and the federal government and makes federalism stronger — not weaker. California has this power because it acted first in the 1940s, and, when the federal government acted, they limited their own power to recognize California's already-existing state powers<sup>80</sup> — a delegation of power given willingly and expanded to allow other states to follow.<sup>81</sup> Federalism does not cease to exist because the Trump administration does not agree with the direction it is going, and what happens to California may reshape federalism's direction entirely.<sup>82</sup> The intertwining of iterative federalism and new blue federalism has only made the country stronger.

### C. FEDERALISM IN THE MODERN AGE, AND CALIFORNIA'S ROLE IN IT

One reconceptualization of federalism is what Heather Gerken calls “Federalism 3.0.”<sup>83</sup> Gerken's reconceptualization is based on the idea that the legacies of two different federalism debates frame federalism in an outdated way.<sup>84</sup> In one camp are what she calls the “nationalists,” who pride themselves on “solicitude for . . . dissenters,” and put the most emphasis on the power the states have as agents of the government.<sup>85</sup> The other camp is full of federalism “stalwarts,” who believe strongly that states matter the most,

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<sup>80</sup> 2013 CAA Waiver, 78 Fed. Reg. 2,112, 2,113 (Jan. 9, 2013).

<sup>81</sup> *Id.*

<sup>82</sup> This point of view might also stem from the fact that, to an extent, modern federalism has also moved into what scholars call “executive federalism,” away from cooperative federalism, because of polarization and the rise of the executive branch and the administrative state. Michael S. Greve, *Bloc Party Federalism*, 42 HARV. J.L. & PUB. POL'Y 279, 280 (2019).

<sup>83</sup> Gerken, *supra* note 60, at 1718.

<sup>84</sup> *Id.* at 1696, 1718 (The two frames come from “the mistaken assumptions of the New Deal (that state and national power should be conceived of in sovereignty-like terms) and the civil rights movement (that decentralization is properly cast in opposition to the interests of dissenters and racial minorities).”)

<sup>85</sup> *Id.* at 1696–97. Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J., 1889, 1893 (2014). Solicitude for minorities and dissenters has echoes of new blue federalism contained within.

but rely on what Gerken calls an “archaic conception of state power.”<sup>86</sup> Gerken moves beyond those characterizations. In this era of Federalism 3.0, there are no longer laboratories of democracy, but a system of iterative federalism, with “helpful redundancy” and “healthy competition,” coming from states and the federal government working together.<sup>87</sup> By encouraging the devolution of power to the states, which are already embedded in the federal regime, the federal government benefits.<sup>88</sup>

In Federalism 3.0, the government still has plenty of power to tame the states, but states can push back and shape federal law — both cooperatively and uncooperatively.<sup>89</sup> The decades of iterative federalism in California fit right in line with Gerken’s view of the future of federalism. This federalism is not the idealized laboratory, completely cut off from the federal government, but the sometimes-cooperative and sometimes-uncooperative partner of a federal government strengthened by its partnership with the states. California’s CAA waiver scheme is a prime example of a blue state scheme that has grown and been strengthened by the integration of federal and state goals, culminating in the allowance given to other states to follow its plan.<sup>90</sup> To say California is practicing a harmful version of federalism is to misunderstand the workings of modern federalism itself<sup>91</sup> — a modern federalism that continues to build on different versions of the concept, continuing the ever-lasting and ever-changing ideal of federalism this country was founded on.

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<sup>86</sup> Gerken, *supra* note 60, at 1697. New blue federalism can also lie within this concept.

<sup>87</sup> *Id.* at 1720.

<sup>88</sup> *Id.* at 1720–21. A devolution promoted by both liberals and conservatives. See generally Somin, *supra* note 79.

<sup>89</sup> *Id.* at 1721.

<sup>90</sup> *Id.* at 1720.

<sup>91</sup> See Stein, *supra* note 45. And the principles of federalism themselves weigh against what the Trump administration is trying to do to California. Denise A. Grab, Jayni Hein, Jack Lienke, & Richard L. Revesz, *No Turning Back: An Analysis of EPA’s Authority to Withdraw California’s Preemption Waiver Under Section 209 of the Clean Air Act*, N.Y.U. INST. FOR POL’Y INTEGRITY 11–12 (Oct. 2018), [https://policyintegrity.org/files/publications/No\\_Turning\\_Back.pdf](https://policyintegrity.org/files/publications/No_Turning_Back.pdf) (discussing the finding of revocation authority related to the waiver).



#### IV. A CLOSER LOOK AT THE ONE NATIONAL PROGRAM RULE & THE *SAFE* VEHICLES RULE

While federalism does require a healthy push and pull between states and the federal government, these rules are not a healthy push and pull — they are an inartful power grab by the executive branch. These rules break the mold of iterative federalism and cut off innovation completely. An examination of the One National Program Rule is necessary to determine why the Trump administration decided to release this rule before completing the rest of *SAFE*. And understanding why the administration revoked the CAA waiver helps us understand the administration's federalism motivations.

##### A. ONE NATIONAL PROGRAM

The One National Program Rule was issued in September of 2019, as a step toward finalizing the *SAFE* Vehicles Rule.<sup>92</sup> One National Program “enabl[es] the federal government to provide nationwide uniform fuel economy and greenhouse gas emission standards for automobiles and light duty trucks.”<sup>93</sup> In a press release, the EPA called on California to continue to enforce its programs but stated that the enforcement must be in line with the new federal mandate, due to the revocation of the 2013 CAA emissions waiver.<sup>94</sup>

When the *SAFE* Vehicles Rule was first proposed, having one national standard for fuel economy and tailpipe CO<sub>2</sub> emission created an efficient regulatory framework for the entire nation.<sup>95</sup> One National

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<sup>92</sup> U.S. Envtl. Prot. Agency, *supra* note 18.

<sup>93</sup> *Id.* The EPA called One National Program (and the *SAFE* Vehicles Rule as a whole) one of President Trump's top priorities. *Id.*

<sup>94</sup> *Id.* Secretary of Transportation Elaine L. Chao echoed critics of California's waiver program, stating that One National Program will ensure “that no State has the authority to opt out of the Nation's rules, and no State has the right to impose its policies on the rest of the country.” *Id.*

<sup>95</sup> Proposed *SAFE* Rule, 83 Fed. Reg. 42,986, 42,999 (proposed Aug. 24, 2018) (to be codified at 49 C.F.R. pts. 523, 531, 533, and 537 and 40 C.F.R. pts. 85 and 86). Of course, fuel economy standards were within an efficient regulatory framework before, when the Obama administration harmonized its standards with California's and decided to push further. *See infra* note 102. The Trump administration just believes those targets are too high. *See generally* Proposed *SAFE* Rule, 83 Fed. Reg. at 42,986. Fuel economy is defined

Program was released before the rest of the rule, in part, because of actions California took after the publication of the SAFE Vehicles Rule.<sup>96</sup> The EPA and NHTSA took issue with two specific actions in the rule.<sup>97</sup> First, California amended its compliance provision for manufacturers, stating that their greenhouse gas standards would only be satisfied by complying with Obama administration–era EPA standards.<sup>98</sup> Second, California announced a “voluntary framework” with four automakers “to allow those automakers to meet reduced standards on a national basis if they promised not to challenge California’s authority to establish greenhouse gas standards or the zero emissions vehicle mandate.”<sup>99</sup>

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as “use of less fuel.” Merriam-Webster, *Fuel Economy*, MERRIAM-WEBSTER (last accessed Dec. 11, 2019), <https://www.merriam-webster.com/dictionary/fuel%20economy>. The most useful fuel economy metric, the Combined Miles Per Gallon (MPG) value is the “weighted average of City and Highway MPG values that [are] calculated by weighting the City value by 55% and the Highway value by 45%.” U.S. Dep’t of Energy & Env’tl. Prot. Agency, *Gasoline Vehicles: Learn More About the Label*, U.S. DEP’T OF ENERGY & ENVTL. PROT. AGENCY (last accessed Dec. 11, 2019), <https://www.fueleconomy.gov/feg/label/learn-more-gasoline-label.shtml>. Non-gasoline vehicles are weighted slightly differently, but the fuel economy factor is a measure used on all vehicles. *Id.* Tailpipe emissions come from “fuel combustion in a vehicle’s engine.” U.S. Dep’t of Energy, *Ethanol Vehicle Emissions*, U.S. DEP’T OF ENERGY (last accessed Dec. 11, 2019), [https://afdc.energy.gov/vehicles/flexible\\_fuel\\_emissions.html](https://afdc.energy.gov/vehicles/flexible_fuel_emissions.html). CO<sub>2</sub> is the most prevalent greenhouse gas in tailpipe emissions, constituting 99 percent of the tailpipe emission. Env’tl. Prot. Agency, *Greenhouse Gas Rating*, ENVTL. PROT. AGENCY (last updated Apr. 1, 2019), <https://www.epa.gov/greenvehicles/greenhouse-gas-rating>.

<sup>96</sup> One National Program, 84 Fed. Reg. 51,310, 51,311 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* The Obama administration’s fuel standards were projected to cut greenhouse gas emissions in half by 2025. Press Release, White House, Obama Administration Finalizes Historic 54.5 MPG Fuel Efficiency Standards, (Aug. 28, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/08/28/obama-administration-finalizes-historic-545-mpg-fuel-efficiency-standard>. These standards raised fuel economy to 54.5 MPG for cars and light-duty trucks. *Id.* The last fuel economy increase prior to the 2012 increase was to 35 MPG in 2007, which was the first increase since the origin of these standards in the 1970s. Union of Concerned Scientists, *A Brief History of US Fuel Efficiency Standards*, UNION OF CONCERNED SCIENTISTS (last updated Dec. 6, 2017), <https://www.ucsusa.org/resources/brief-history-us-fuel-efficiency>.

<sup>99</sup> *Id.* Four big automakers, Ford, Honda, Volkswagen, and BMW of North America struck a deal with The California Air Resources Board after secret negotiations in which they agreed to produce a more fuel-efficient fleet to obtain regulatory

Widespread deregulation is another big goal of the administration, so the One National Program Rule fits right in.<sup>100</sup>

The impetus for One National Program, in part, comes from the belief that the Energy Policy and Conservation Act (EPCA) preempts California's greenhouse gas emissions regulations.<sup>101</sup> The EPCA "broadly preempts"

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certainty. Juliet Eilperin & Brady Dennis, *Major Automakers Strike Climate Deal with California, Rebuffing Trump on Proposed Mileage Freeze*, WASH. POST (July 25, 2019), [https://www.washingtonpost.com/climate-environment/2019/07/25/major-automakers-strike-climate-deal-with-california-rebuffing-trump-proposed-mileage-freeze/?utm\\_term=.6694edcc0b4d](https://www.washingtonpost.com/climate-environment/2019/07/25/major-automakers-strike-climate-deal-with-california-rebuffing-trump-proposed-mileage-freeze/?utm_term=.6694edcc0b4d). The California Air Resources Board hoped that it would bring the Trump administration back to the table, but the administration quickly rejected the deal as a "PR stunt." *Id.* They said at the time that they would settle for nothing less than a single national standard. *Id.* This eventually comes to light through One National Program. See One National Program, 84 Fed. Reg. at 51,310. The Department of Justice (DOJ) launched an antitrust probe into the deal California made with automakers, which some called an abuse of departmental power. Michael Wayland, *DOJ Launches Antitrust Probe over California Emissions Deal with Automakers*, CNBC (last updated Sept. 6, 2019, 4:26 PM), <https://www.cnbc.com/2019/09/06/doj-launches-antitrust-probe-over-auto-emissions-deal-with-california-wsj-reports.html>, and Mark A. Lemley & David McGowan, *Trump's Justice Department's Antitrust 'Investigation' of California Deal with Car Makers is an Abuse of Power*, STANFORD L. SCH. BLOGS (Oct. 21, 2019), <https://law.stanford.edu/2019/10/21/trumps-justice-departments-antitrust-investigation-of-californias-deal-with-car-makers-is-an-abuse-of-power>. Again, deals like this are not new, and can be considered part of the innovative process. See N.Y. Times, *supra* note 26 (describing the deal automakers made with the state on installing smog control devices). DOJ eventually chose to drop the probe. Jessie Byrnes, *DOJ Dropping Antitrust Probe of Four Major Automakers*, THE HILL (Feb. 7, 2020, 7:21 PM), <https://thehill.com/homenews/administration/482114-doj-dropping-antitrust-probe-of-four-major-automakers>.

<sup>100</sup> See generally OFFICE OF MGMT. & BUDGET, THE 2018 REGULATORY REFORM REPORT: CUTTING THE RED TAPE, UNLEASHING ECONOMIC FREEDOM (2018), <https://www.whitehouse.gov/wp-content/uploads/2018/10/2018-Unified-Agenda-Cutting-the-Red-Tape.pdf>. Nicole Goodkind, *New EPA Director is Working with Trump to End Auto Fuel Economy Standards*, NEWSWEEK (Aug. 2, 2018, 4:36 PM), <https://www.newsweek.com/epa-wheeler-emissions-deregulation-cars-trump-elaine-chao-1055135>.

<sup>101</sup> See One National Program, 84 Fed. Reg. at 51,312. The rule points to specific language from the EPCA: "Furthermore, EPCA states: 'When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.' 49 U.S.C. 32919(a). As a limited exception, a State or local government 'may prescribe requirements for fuel economy for automobiles obtained for its own use.' 49 U.S.C. 32919(c)." *Id.*

any state or local laws “‘related to’ fuel economy standards or average fuel economy standards” — which both agencies say contain emissions regulation standards.<sup>102</sup> NHTSA and the EPA have also determined that the CAA waiver would not waive EPCA preemption anyway.<sup>103</sup> They state that “avoiding preemption under one federal law has no necessary bearing on another federal law’s preemptive effect.”<sup>104</sup> According to the Trump administration, this rule, and having a nationwide standard, achieves the goal of providing regulatory certainty.<sup>105</sup>

The rule also withdraws California’s 2013 CAA waiver preempting federal standards for California’s Advanced Clean Car Program.<sup>106</sup> There are several reasons why the waiver was withdrawn — first, the aforementioned EPCA preemption rendered the 2013 waiver “invalid, null, and void.”<sup>107</sup> Second, the EPA reconsidered the grant of the waiver and withdrew it because California no longer needs the standards “to meet compelling and extraordinary conditions,” one of the three scenarios in Section 209(b) where the waiver must not be granted.<sup>108</sup> The EPA states that it has the authority to withdraw the waiver in circumstances like this because

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<sup>102</sup> *Id.* at 51, 312–313. The phrase “related to” is essential to the administration’s argument. In a fact sheet on EPCA preemption, NHTSA and the EPA state: “The tailpipe carbon dioxide (CO<sub>2</sub>) limits and zero emission vehicle (ZEV) mandate imposed by California and other States “relate to” fuel economy standards because CO<sub>2</sub> is the primary byproduct of gasoline fuel combustion and compliance with the California rules and the Federal CAFE standards is assessed on the same basis: by measuring carbon emissions.” U.S. Dep’t of Transp. & U.S. Env’tl. Prot. Agency, *Fact Sheet: EPCA Preemption*, U.S. DEP’T OF TRANSP. & U.S. ENVTL. PROT. AGENCY (Aug. 2, 2018), [https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/fact\\_sheet\\_-\\_epca\\_preemption\\_final\\_clean\\_080218\\_v1-tag.pdf](https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/fact_sheet_-_epca_preemption_final_clean_080218_v1-tag.pdf).

<sup>103</sup> See One National Program, 84 Fed. Reg. at 51,314.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 51,317.

<sup>106</sup> *Id.* at 51,328.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* According to the EPA, the concentrations of greenhouse gases over California and the rest of the United States is similar to the global average, and California’s vehicle fleet size is not significant, so the fleet does not bear any greater weight on the amount of greenhouse gases over California than any other source of greenhouse gases. One National Program, 84 Fed. Reg. 51,310, 51,328 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533).

agencies generally have the inherent authority to reconsider their actions.<sup>109</sup> Because the waiver is not unlimited, and Congress has not expressly carved out a preemption for California that does not rely on an EPA affirmation, withdrawal of the waiver is within the EPA's rights.<sup>110</sup>

Important to the administration's argument is the fact that the greenhouse gas waiver was denied once.<sup>111</sup> In 2008, the EPA determined that Section 209(b) "was not appropriate for [greenhouse gas] standards," because the standards are not designed to address conditions specific to California — they were intended for global pollution problems.<sup>112</sup> The denial was reversed in 2009, and then the newest waiver was granted in 2013.<sup>113</sup> One National Program, therefore, is only the second time in history a waiver has been denied and the first time a granted waiver has been reversed, and serves to forever alter the statutory waiver scheme.

## B. THE SAFE VEHICLES RULE

The SAFE Vehicles Rule was only recently finalized, after over half a year of delay.<sup>114</sup> The main feature of the SAFE Vehicles Rule are amended CAFE standards for passenger cars and light duty vehicles from model year 2021 to 2026.<sup>115</sup> In the rule, NHTSA and the EPA rolled back the previous CAFE

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<sup>109</sup> *Id.* at 51,331. They also say that there is "no cognizable reliance interest" to stop them from revoking the waiver. *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 51,330.

<sup>112</sup> *Id.*

<sup>113</sup> One National Program, 84 Fed. Reg. 51,310, 51,330 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533). See 2013 CAA Waiver, 78 Fed. Reg. 2,112, 2,112 (Jan. 9, 2013).

<sup>114</sup> The rule was supposed to be revised and finalized by the end of 2019, but the agencies were contemplating a new emissions reduction figure and had some issues with data analysis not backing up their claimed benefits. Samantha Oller, *Trump Administration Rethinks Emissions Freeze*, CSP MAGAZINE (Nov. 1, 2019), <https://www.cspdailynews.com/fuels/trump-administration-rethinks-emissions-freeze>.

<sup>115</sup> SAFE Vehicles Rule, 85 Fed. Reg. 24,174, 24,174 (Apr. 30, 2020). See One National Program, 84 Fed. Reg. at 51,310. The model year of a vehicle is defined as "the manufacturer's annual production period . . . which includes January 1 of such calendar year, provided, that if the manufacturer has no annual production period, the term 'model year' shall mean the calendar year." 40 C.F.R. § 85.2302.

standards.<sup>116</sup> Meanwhile, California raised its fuel economy standards, leaving automakers at a compliance impasse.<sup>117</sup>

Therefore, CAFE standards intertwine with the CAA waiver California receives. The only way the country can have uniform CAFE standards is through One National Program's revocation of the 2013 grant of the waiver.<sup>118</sup> Over the years, the CAFE standards have been increased gradually, with the previous administration setting the standards to 54.5 MPG for cars and light duty trucks by model year 2025.<sup>119</sup> This increase was the largest for fuel economy regulations in the last thirty years, and they are the standards California wants to continue to follow.<sup>120</sup> The Trump administration decided to roll back the CAFE standards because "they are no longer maximum feasible standards," and because NHTSA's 2012 standards could not be final as NHTSA is prohibited from finalizing CAFE standards beyond five model years in one rulemaking.<sup>121</sup> The EPA & NHTSA state

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<sup>116</sup> SAFE Vehicles Rule, 85 Fed. Reg. at 24,175. The CAFE and CO<sub>2</sub> standards will now increase in stringency "at 1.5 percent per year," which is significantly lower than the 5 percent per year set forth by the Obama administration. *Id.* See also Dan Goldbeck & Dan Bosch, *EPA, DOT Finalize SAFE Vehicles Rule*, AM. ACTION F. (Apr. 1, 2020), <https://www.americanactionforum.org/insight/epa-dot-finalize-safe-vehicles-rule>.

<sup>117</sup> Megan Geuss, *17 Automakers Tell Trump That Fuel Economy Rollback Needs to Include California*, ARS TECHNICA (June 7, 2019, 4:08 PM), <https://arstechnica.com/cars/2019/06/17-automakers-ask-trump-to-hold-off-on-fuel-economy-rollback>.

<sup>118</sup> Green Car Congress, *US EPA and DOT Propose Freezing Light-Duty Fuel Economy GHG Standards at 2020 Level for MY 2021–2026 Vehicles; 43.7 MPG for Cars; 50-State Solution*, GREEN CAR CONGRESS (Aug. 2, 2018), <https://www.greencarcongress.com/2018/08/20180802-epadot.html>. The CAFE standards originated in the 1970s, when oil shortages created an energy crisis in America. PEW Trusts, *Driving to 54.5 MPG: The History of Fuel Economy*, PEW (Apr. 20, 2011), <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2011/04/20/driving-to-545-mpg-the-history-of-fuel-economy>. Brian C. Black, *How an Energy Crisis Pushed the Government into Creating National Fuel Efficiency Standards*, PAC. STANDARD (Aug. 10, 2018), <https://psmag.com/environment/the-origin-of-fuel-efficiency-standards>.

<sup>119</sup> Press Release, *supra* note 98.

<sup>120</sup> Umair Irfan, *Trump's EPA is fighting California over a Fuel Economy Rule the Auto Industry Doesn't Even Want*, VOX (Apr. 6, 2019, 8:30 AM), <https://www.vox.com/2019/4/6/18295544/epa-california-fuel-economy-mpg>. Geuss, *supra* note 117.

<sup>121</sup> Proposed SAFE Rule, 83 Fed. Reg. 42,986, 42,986–988 (proposed Aug. 24, 2018) (to be codified at 49 C.F.R. pts. 523, 531, 533, and 537 and 40 C.F.R. pts. 85 and 86. The standards stretched all the way to 2025, though standards for model years 2012–2016 were already in place. Press Release, *supra* note 98.

that the SAFE Vehicles Rule, which went into effect on June 29, 2020, strikes a “reasonable balance” between market impacts and climate change.<sup>122</sup>

## V. ADHERING TO PRECEDENT & DEFERENCE ARE KEY TO THE FUTURE OF FEDERALISM

One National Program is now embroiled in litigation that could take years to come to a conclusion.<sup>123</sup> All the while, California continues to make its own decisions related to how they want to conduct their own business, despite the EPA and NHTSA prohibiting these actions in One National Program.<sup>124</sup> This section will propose a framework for a future decision in this case — one founded on a bedrock of precedent and deference, focused on honoring the vital relationship between states and the federal government that forms the heart of modern federalism.

### A. THE CURRENT STATUS OF THE LITIGATION

One National Program was immediately challenged in court by the attorney general of California, and the attorneys general of twenty-three other states, as well as the cities of Los Angeles and New York.<sup>125</sup> California

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<sup>122</sup> SAFE Vehicles Rule, 85 Fed. Reg. 24,174, 24,174–76 (Apr. 30, 2020).

<sup>123</sup> Matthew DeBord & Reuters, *California and 22 Other States are Suing the Trump Administration over Auto-Emissions Rules*, BUS. INSIDER (Sept. 20, 2019, 1:06 PM), <https://www.businessinsider.com/california-other-states-sue-trump-administration-over-auto-emissions-rules-2019-9>. SAFE is most likely next, with states and environmental groups stating they are planning on filing suit. Jennifer Hijazi, *Several States, Environmental Groups Vow to Sue Over Car Pollution Rollback*, SCI. AM. (Apr. 1, 2020), <https://www.scientificamerican.com/article/several-states-environmental-groups-vow-to-sue-over-car-pollution-rollback>.

<sup>124</sup> One National Program, 84 Fed. Reg. 51,310, 51,311 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533). Chris Isidore & Peter Valdes-Dapena, *California Won't Buy Cars from GM, Chrysler or Toyota Because They Sided with Trump Over Emissions*, CNN BUS. (last updated Nov. 19, 2019, 2:32 PM), <https://www.cnn.com/2019/11/19/business/california-limits-purchase-automakers-emissions-rules/index.html>. (California has declared it will only buy vehicles from automakers who recognize the California Air Resources Board's tougher greenhouse gas emissions standards, as well as pledged to only work with automakers who are “committed to stringent emissions reduction goals.”)

<sup>125</sup> Press Release, Office of the Attorney General, Attorney General Becerra Files Lawsuit Challenging Trump Administration's Attempt to Trample California's Authority to Maintain Longstanding Clean Car Standards, (Sept. 20, 2019). The group includes

argues preemption must be declared unlawful for several reasons: “it exceeds NHTSA’s authority, contravenes Congressional intent, it is arbitrary and capricious, and NHTSA failed to conduct the analysis required under the National Environmental Policy Act (“NEPA”).”<sup>126</sup> Their arguments rest heavily on the fact that Congress has frequently amended the law (like adding new EPCA and CAFÉ standards), leaving California’s waiver untouched each time.<sup>127</sup> California’s complaint includes a plea for the court to respect the vital role its innovation has played in our federalist system.<sup>128</sup> It states that NHTSA did not consult with the plaintiffs on One National Program, violating Executive Order 13132, “which imposes requirements on agencies that promulgate regulations with federalism implications.”<sup>129</sup> This executive order requires agencies to consult with states “early in the process” of developing proposed preemption regulations.<sup>130</sup> NHTSA did

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“Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, Wisconsin, and the District of Columbia.” *Id.* See generally Complaint for Declaratory and Injunctive Relief, *California v. Chao*, 1:19-cv-02826 (D.D.C. Sept. 20, 2019). This case is currently stayed, pending resolution of related litigation in the D.C. Circuit. Minute Order, *California v. Chao*, 1:19-cv-02826 (D.D.C. Feb. 11, 2020).

<sup>126</sup> Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 4.

<sup>127</sup> *Id.* at 17–25. Except for, of course, the denial in 2008, which was reversed after reconsideration in 2009. *Id.* at 25–26. The complaint also emphasizes the importance of California’s greenhouse gas and zero emissions vehicles standards, which they claim are fundamental to protect the public health and welfare. *Id.* at 29. See generally EELP Staff, *CAFE Standards and the California Preemption Plan*, HARV. L. SCH. ENVTL. & ENERGY L. PROGRAM (Aug. 24, 2018), <https://eelp.law.harvard.edu/2018/08/cale-standards-and-the-california-preemption-plan/> (discussing the relationship between the EPCA and CAFE standards).

<sup>128</sup> Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 32.

<sup>129</sup> *Id.* In Executive Order 13132, agencies are required to follow certain “fundamental federalism principles.” Exec. Order No. 13132, 64 Fed. Reg. 43,255, 43,255 (Aug. 10, 1999). These principles acknowledge that issues that are not national in their scope/significance are best left to the government “closest to the people,” reiterates the promise of the Tenth Amendment’s reserved powers to the states, recognizes states as laboratories of democracy, states that the national government should defer to the states when it comes to actions that “affect[] the policymaking discretion of the States,” and directs the government to act with “the greatest caution” in areas where there is uncertainty related to the authority of the national government. *Id.* at 43,255–56.

<sup>130</sup> Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 32



not do so, claiming that notice-and-comment was enough to satisfy this requirement.<sup>131</sup> California believes it does not.<sup>132</sup>

The claim California makes under the National Environmental Policy Act is that NHTSA was required to undergo an environmental assessment or prepare an environmental impact statement before undertaking this action — NHTSA did not.<sup>133</sup> The purpose of the act is to make sure that the environmental impacts of an undertaking are known to the public before the action takes place, as well as during the action, so the utmost care is taken in regard to the environment.<sup>134</sup> Because NHTSA evaded the requirement to prepare an environmental impact statement for any rule-making and regulatory action that is “likely to be controversial on environmental grounds” and for “proposed action[s] which ha[ve] unclear but potentially significant environmental consequences,” they acted improperly.<sup>135</sup> Overall, California asks the reviewing court for a litany of relief based on these facts, and asks that One National Program be held unlawful and set aside, or that the court grant a permanent injunction so the rule cannot be implemented or relied upon.<sup>136</sup>

As the case has been stayed, the administration has not yet filed their response.<sup>137</sup> It is almost certain that their reasoning will be grounded in the language of the One National Program Rule. In One National Program, the EPA states that they have the authority to withdraw a waiver

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<sup>131</sup> *Id.* at 32–33. NHTSA did not consult with California officials, or any other state that follows California’s standards. *Id.* at 33.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 35–36. There would have been several avenues that would have forced NHTSA to conduct a National Environmental Policy Act analysis: first, finding that this was a major federal action that impacted the environment, and second, finding that this action is “likely to be controversial on environmental grounds,” or “has unclear but potentially significant environmental consequences.” *Id.* At the least, there needed to be an environmental assessment considering the problem and making no finding of significant impact, or that the impact would be at a minimum if the project were undertaken. Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 36.

<sup>134</sup> *Id.* at 35 (internal citation omitted).

<sup>135</sup> *Id.* at 36 (internal citation omitted).

<sup>136</sup> *Id.* at 44.

<sup>137</sup> See Minute Order, *supra* note 125.

like the one given to California, under “appropriate circumstances.”<sup>138</sup> The EPA points to legislative history to support the claim that the waiver is revocable.<sup>139</sup> A 1967 Senate report states, “Implicit in this provision in the right of the [Administrator] to withdraw the waiver at any time [if] after notice and an opportunity for public hearing he finds that the State of California no longer complies with the conditions of the waiver.”<sup>140</sup> The EPA also makes several alternative arguments as to why the waiver cannot be given: because under Section 209(b)(1)(B) California no longer has compelling and extraordinary circumstances, and because the EPCA preempts California’s fuel emissions regulations.<sup>141</sup>

Several arguments are made beyond the legal sphere to explain why the rule is so important: the administration wants to “give consumers greater access to safer, more affordable vehicles, while continuing to protect the environment.”<sup>142</sup> NHTSA and the EPA claim the rollback will reduce technology costs by \$86 to \$126 billion dollars, and consumer costs will be around \$977 to \$1,083 less per vehicle.<sup>143</sup> In the proposed rulemaking, they highlighted the fact that consumers are less likely to purchase cars based on fuel economy standards, and are more enticed by safety technology, infotainment systems, or a better powertrain.<sup>144</sup> NHTSA used a safety analy-

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<sup>138</sup> See One National Program, 84 Fed. Reg. 51,310, 51,311 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533).

<sup>139</sup> *Id.* at 51,328.

<sup>140</sup> *Id.* at 51,312, 51,328.

<sup>141</sup> *Id.* at 51,312.

<sup>142</sup> Elaine L. Chao & Andrew Wheeler, *Make Cars Great Again*, WALL STREET J. (Aug 1, 2018, 8:40 PM), <https://www.wsj.com/articles/make-cars-great-again-1533170415>.

<sup>143</sup> SAFE Vehicles Rule, 85 Fed. Reg. 24,174, 24,176 (Apr. 30, 2020).

<sup>144</sup> Thus, the lower price of the vehicle caused by less extensive fuel economy related technology would entice more consumers to buy cars. Proposed SAFE Rule, 83 Fed. Reg. 42,986, 42,993 (proposed Aug. 24, 2018) (to be codified at 49 C.F.R. pts. 523, 531, 533, and 537 and 40 C.F.R. pts. 85 and 86). See generally Consumer Reports, *Cars with Advanced Safety Systems*, CONSUMER REPORTS (Feb. 22, 2019), <https://www.consumerreports.org/car-safety/cars-with-advanced-safety-systems/> (Forward-collision warning, automatic emergency braking, pedestrian detection, etc.). See generally, Keith Barry, *Choose an Infotainment System You’ll Love*, CONSUMER REPORTS (May 1, 2019), <https://www.consumerreports.org/automotive-technology/choose-an-infotainment-system-you-will-love/> (Infotainment is a bundle of features containing audio, navigation telephone, and texting, usually contained on a dashboard screen). See generally, Autobyte, *What is a Powertrain Warranty?*, AUTOBYTEL (last accessed Dec. 15, 2019), <https://www.autobyte.com>.

sis to show the danger of older cars on the road and determined that, if cars cost less because of a reduced focus on costly fuel economy standards, people would be able to buy new cars more frequently and take older, more dangerous vehicles off the road.<sup>145</sup>

Some stakeholders of the automotive industry back the administration on these claims and support what the EPA and NHTSA are attempting to do with One National Program and SAFE. In a suit against NHTSA by the Environmental Defense Fund, a group called the Coalition for Sustainable Automotive Regulation and the Association of Global Automakers, Inc. joined as an intervenor on behalf of the Trump administration.<sup>146</sup> They state that the One National Program framework will reduce the industry's compliance burden due to "overlapping and inconsistent regulations," and will ensure consumers have "a wide selection of vehicles" to choose from.<sup>147</sup>

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com/car-buying-tips/warranty-information/what-is-a-powertrain-warranty-100466/ (Powertrain consists of "the components that get the engine's power to the wheels and down to the ground," the engine, transmission, and drivetrain).

<sup>145</sup> Proposed SAFE Rule, 83 Fed. Reg. at 42,995 (Which lead to a 12,400 lives saved figure that the EPA and NHTSA claimed the SAFE Vehicles Rule would bring). They stand by their claim of reduced fatalities in the final rule, though they do not put a number to it. SAFE Vehicles Rule, 85 Fed. Reg. 24,174, 24,216 n. 80 (Apr. 30, 2020).

<sup>146</sup> Environmental Defense Fund v. National Highway Traffic Safety Administration, No. 19-1200 (D.C. Cir. 2019). This is the case for which *California v. Chao* is stayed. See Minute Order, *supra* note 125. The Automakers within the Coalition for Sustainable Automotive Regulation and the Association of Global Automakers, Inc include: General Motors Company, Toyota Motor Corporation, Fiat Chrysler Automobiles N.V., Hyundai Motor Corporation, Mazda, Nissan Motor Corporation, and the Kia Motor Corporation. David Shepardson, *Several Automakers Back Trump in Two Other California Vehicle Emissions Suits*, REUTERS (Oct. 31, 2019, 11:15 PM), <https://www.reuters.com/article/us-autos-emissions-california/several-automakers-back-trump-in-two-other-california-vehicle-emissions-suits-idUSKBN1XB33K>. However, not all automakers have joined — Ford Motor Company, Honda Motor Company, BMW AG, and Volkswagen AG are not a part of the suit, because they made a deal with California in July of 2019. *Id.* Honda is the only member of the Association of Global Automakers that has not intervened on behalf of the administration, and Ford and VW are a part of the Alliance of Automobile Manufacturers that will not intervene. *Id.* This split occurs as the trade associations "have been in merger talks for months." *Id.*

<sup>147</sup> Motion for Leave to Intervene by the Coalition for Sustainable Automotive Regulation and the Association of Global Automakers, Inc., Environmental Defense Fund v. National Highway Traffic Safety Administration, No. 19-1200 i, 1 (D.C. Cir. 2019). Global Automakers' membership accounted for "40 percent of all U.S. production

Another supporter of the administration’s SAFE Vehicles Rule states that critics must “move past their distrust of the Trump administration and automobile manufacturers” because sometimes a push for stricter standards will harm both consumers and the environment.<sup>148</sup> The balance between safety and affordability is a top priority for proponents of the rules, whether they be in the automotive community, part of the administration, or members of the public.<sup>149</sup>

The court should rule in California’s favor for three reasons. *First*, the precedent for granting waivers favors California strongly. *Second*, ruling against the plaintiffs in this case would contravene deference based on federalism concerns and put almost any state regulatory scheme at risk of

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and 45 percent of all U.S. sales of passenger vehicles and light trucks,” and states that this issue is of “central importance” to the intervenors. *Id.* at 3–4.

<sup>148</sup> Jason Hayes, *Unreasonable Demands Stifle Real Environmental Progress*, MACKINAC CTR. FOR PUB. POLICY (Sept. 25, 2018), <https://www.mackinac.org/unreasonable-demands-stifle-real-environmental-progress>.

<sup>149</sup> *Id.* This focus on safety (personal and environmental) as well as affordability does not play out. Within the EPA, an internal email from the director of assessments and standards division stated that the proposed CAFE standards “are detrimental to safety, rather than beneficial,” and would likely increase the number of highway deaths by seventeen annually. Ellen Knickmeyer, *EPA Challenged Safety of Administration Mileage Freeze*, ASSOCIATED PRESS (Aug. 14, 2018), <https://apnews.com/1a7551fca3294ec49029b93e994cd7f9>. The SAFE Vehicles Rule will also substantially increase vehicle greenhouse gas emissions — which can pose a substantial threat to public health. Romany Webb, *Five Important Points About the EPA’s “SAFE Vehicle Rule*, COLUMBIA UNIV. EARTH INST. (Aug. 7, 2018), <https://blogs.ei.columbia.edu/2018/08/07/five-points-epa-safe-vehicle-rule>. The rule, as it currently stands, would increase carbon dioxide emissions by 713 million metric tons, which is equivalent to nearly 40 percent of 2016 carbon dioxide emissions from the entire U.S. *Id.* High levels of greenhouse gases lead to planetary temperature increases, which contribute to “rising sea levels, population displacement, disruption to the food supply, flooding, and an increase in infectious diseases. Karen Feldscher, *Greenhouse Gases Pose Threat to Public Health*, HARVARD T.H. CHAN SCH. OF PUB. HEALTH (Nov. 1, 2011), <https://www.hsph.harvard.edu/news/features/bernstein-greenhouse-gases-health-threat>. The EPA and NHTSA have determined that there would be a \$2,340 reduction in overall average ownership costs for new vehicles. U.S. Dep’t of Transp. & U.S. Env’tl. Prot. Agency, *MY’s 2021-2026 CAFE Proposal – By the Numbers*, U.S. DEP’T OF TRANSP. & U.S. ENVTL. PROT. AGENCY (Aug. 2, 2018), <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100V26H.pdf>; Jessica McDonald, *Trump’s False Auto Industry Tweets*, FACTCHECK.ORG (Aug. 27, 2019), <https://www.factcheck.org/2019/08/trumps-false-auto-industry-tweets>. The cost savings would only end up being around \$390, a far cry from the supposed \$2,340 reduction. *Id.*

being overtaken by the federal government. *Finally*, a ruling for the Trump administration would violate the principles of federalism that have been so vital to this nation, forever impacting the way federalism works. In order to protect the innovations brought on by federalism, a court should strongly consider this framework of factors in its final decision.

## B. THE FRAMEWORK

### 1. *The Amount of Precedent Is Overwhelming*

Ruling against the Trump administration is the correct course of action for any court confronted by the issue.<sup>150</sup> The waiver has been in place for over half a century.<sup>151</sup> There is existing precedent for the continued grant of the waiver.<sup>152</sup> Agencies must “provide ‘good reasons’ for departing from prior policies and precedents that have ‘engendered serious reliance interests that must be taken into account.’”<sup>153</sup> Reliance interests exist because the waiver has *never* been revoked — it is unlikely that anyone who looked at the midterm review of the standards had an understanding that review equals revocation.<sup>154</sup> The reliance interest does not only encompass the waiver for model year 2021–2025 greenhouse gas and zero emissions vehicle standards.<sup>155</sup> Serious federal reliance interests are also in existence here — “for the last decade, the federal government has harmonized its own greenhouse

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<sup>150</sup> “No waiver has ever been revoked and the one previous denial was quickly reversed.” Young, *supra* note 46 (emphasis added).

<sup>151</sup> Carlson, *supra* note 9, at 1109 (As of 2020, it has been in place for 53 years).

<sup>152</sup> Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 34. Not only is “further justification demanded,” but “a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by prior policy.” Encino Motorcars, LLC v. Navarro, 136 S.Ct. 2117, 2126 (2017).

<sup>153</sup> Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 34.

<sup>154</sup> Young, *supra* note 46. For the government’s argument against reliance, see One National Program, 84 Fed. Reg. 51,310, 51,334 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533).

<sup>155</sup> One National Program, 84 Fed. Reg. at 51,334. The EPA and NHTSA unfairly limit the reliance interest in this way. *Id.* The reliance interest does not just attach to one waiver, even though the revocation is attached to one waiver — because the One National Program Rule pushes the waiver permanently out of existence. If a court buys into the arguments that the EPA and NHTSA make in the rule, then the CAA waiver will no longer be allowed to exist, because the argument that the EPA and NHTSA make is that the CAA waiver should not exist because of the EPCA and lack of compelling

gas emissions standards and its fuel economy standards with the California standards.”<sup>156</sup> Precedent *can* be overturned, but the EPA and NHTSA would need to make a stronger showing to prove One National Program is more beneficial than the current scheme.<sup>157</sup> They do not.

Their concern over automakers’ being placed in an “untenable situation of having to expend resources to comply not only with Federal standards, but also meet separate State requirements,” is also weak, when precedent is considered.<sup>158</sup> In 1966, a year before the CAA waiver was set in place, California’s Motor Vehicle Pollution Control Board approved smog-control devices.<sup>159</sup> Did the federal government stop this action on behalf of the automakers? No. Did the federal government try to control the market and the industry? No. Like California and automakers of the modern era, several manufacturers agreed to put the smog-control systems on their cars made to be sold within California.<sup>160</sup> California’s cooperation with automakers is nothing new and is certainly not novel enough to be the target of a politically motivated investigation by the Department of Justice.<sup>161</sup> Just like there is precedent for the continued grant of the waiver, there is precedent for cooperation between California and automakers.<sup>162</sup>

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circumstances. *See generally id.* It would be impossible, or nearly impossible, to obtain a waiver ever again.

<sup>156</sup> Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 6. And the federal government has chosen time after time to use California’s emissions standards to model their own. *The Federal Clean Air Act: California’s Waivers — A Half-Century of Cooperative Federalism in Air Quality Management: Hearing Before the Calif. S. Comm. on Environmental Quality*, *supra* note 33, at 7.

<sup>157</sup> For a discussion of the principles of *stare decisis*, see *Gamble v. U.S.*, 139 S.Ct. 1960, 1969 (2019).

<sup>158</sup> The EPA and NHTSA are concerned that requiring automakers to develop and implement technologies to follow these standards is imbalanced. One National Program, 84 Fed. Reg. at 51,312.

<sup>159</sup> N.Y. Times, *supra* note 26. This triggered a 1959 law, requiring installation of smog-control devices on 1966 car models bound for the state. *Id.* *See generally* Eilperin & Dennis, *supra* note 99.

<sup>160</sup> *Id.*

<sup>161</sup> Lemley & McGowan, *supra* note 99.

<sup>162</sup> The automakers intervening on behalf of the administration support the One National Program Rule because they believe they will suffer a concrete injury if California continues to be allowed to have their own fuel economy standards — there would be no “regulatory simplicity and certainty.” Motion for Leave to Intervene by the Coalition

## 2. *Deference is Crucial in This Case*

Precedent is not the only factor at play here. The concept of federal deference to state agency interpretations in cooperative federalism schemes is “unresolved,” but one scholar proposed a framework to deal with questions of when a court should defer to the state, or to the federal government.<sup>163</sup> His solution is that courts should consider whether Congress, when passing the scheme in question, delegates authority to a state agency for “federalism” or “decentralization” purposes.<sup>164</sup> The level of deference due to that state agency’s interpretation then varies depending on Congress’ choice.<sup>165</sup> Federalism is for when Congress specifically wanted an actual cooperative federalism scheme.<sup>166</sup> Decentralization (also called managerial decentralization) encompasses the benefits that Congress receives from the delegation of administration to state and local entities.<sup>167</sup> Deference goes to Congress if the choice was related

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for Sustainable Automotive Regulation and the Association of Global Automakers, Inc., *Envtl. Defense Fund v. Nat’l Highway Traffic Safety Admin.*, No. 19-1200, 1, 17 (D.C. Cir. Sept. 28, 2019).

<sup>163</sup> It tends to be unresolved because most of the action is occurring in lower courts, and the Supreme Court has not yet weighed in. See Ben Raker, *Decentralization and Deference: How Different Conceptions of Federalism Matter for Deference and Why that Matters for Renewable Energy*, 47 ENVTL. L. REP. NEWS & ANALYSIS 10963, 10963 (2017). *Id.* (citing *Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 391, 394 (5th Cir. 2014), where, “[i]n response to a challenge by a wind power developer, the court granted deference to a Texas state agency’s interpretation of a federal regulation, even though the federal agency tasked with implementing the act, the Federal Energy Regulatory Commission (FERC), disagreed with that interpretation.”; citing *Idaho Power Co. v. Idaho Pub. Utils. Comm’n*, 316 P.3d 1278 (Idaho 2013) “[A]n Idaho state agency had correctly ruled on a matter involving a different wind power developer. The majority opinion failed to mention a decision by FERC that had held to the contrary.”; citing *Grouse Creek Wind Park*, 142 FERC ¶ 61187 (Mar. 15, 2013) “[S]olar energy developers in Montana found themselves on the losing end of a decision by a Montana state agency. FERC later held that decision to be improper under federal law, but the state agency has not changed course.” See also Emily Stabile, *Federal Deference to State Agency Implementation of Federal Law*, 103 KY. L.J. 237 (2015).

<sup>164</sup> Raker, *supra* note 163, at 10963.

<sup>165</sup> *Id.* Reliance on congressional intent, according to Raker, puts the deference decision back in “its proper place” – which is in Congress. *Id.* at 10975.

<sup>166</sup> Raker, *supra* note 163, at 10975–76.

<sup>167</sup> *Id.* at 10974. Raker states that the usual suspects to justify federalism are competition, experimentation, political participation, and separation of powers, and that

to managerial decentralization, and deference goes to the state agency when Congress was looking to experiment with a cooperative federalism scheme.<sup>168</sup>

Considering California's waiver scheme in this framework shows that Congress intended to create a cooperative relationship to govern these emissions standards, acting according to principles of federalism. Because of this, California's agency interpretation should receive deference. The federal government's hope for the cooperative federalism scheme was that California would become a leader.<sup>169</sup> They were not given the ability to waive out of federal standards for a managerial decentralization role — it was, and has been the fundamental purpose of the CAA that California have a waiver ability, and that that waiver ability cover any state that wishes to follow it.<sup>170</sup> Any court looking at this issue should take into account this decentralization/federalism framework and determine that California's interpretations, made by the California Air Resources Board and its other related agencies, should prevail over the federal government's One National Program Rule and the SAFE Vehicles Rule.<sup>171</sup>

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these justifications are benefits of decentralization, rather than any federalism specific benefit. *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *The Federal Clean Air Act: California's Waivers — A Half-Century of Cooperative Federalism in Air Quality Management: Hearing Before the Calif. S. Comm. on Environmental Quality, supra* note 33, at 4.

<sup>170</sup> See generally 2013 CAA Waiver, 78 Fed. Reg. 2,112, 2,113 (Jan. 9, 2013). This is unlike the statute Raker discusses in his article, the Public Utility Regulatory Act (PURPA) of 1978, because “the enacting Congress simply chose to delegate administrative tasks to local organizations, not allow those organizations to alter the fundamental purpose of the statute.” Raker, *supra* note 163, at 10963, 10979. The fundamental purpose of the CAA waiver in 1967 (and from that point onward) was to allow California to experiment and do their own work within the framework provided by the CAA — not to help Congress out administratively, but innovatively.

<sup>171</sup> Currently, there is no agreed-upon deference standard in cooperative federalism schemes — some states and their courts do it differently than other states and their courts, leaving a patchwork of confusion. See generally Josh Bendor & Miles Farmer, *Curing the Blind Spot in Administrative Law: A Federal Common Law Framework for State Agencies Implementing Cooperative Federalism Statutes*, 122 YALE L.J. 1280 (2013). Adopting a test that makes Congress's decision central to the court's decision would ensure that they are following the original legislative intent.



### 3. Principles of Federalism

The importance of federalism is clear from the statutory scheme — it is interwoven through the scheme's history and the concepts of precedent and deference. And the singular innovative principle of federalism itself is important beyond those reasons. Federalism is widely debated but is continually reaffirmed as an important principle by our courts of law.<sup>172</sup> These rules would take away state power in favor of a national rule, defaulting to the new executive conception of federalism, becoming more common due to the expansive reach of the executive branch and the administrative state.<sup>173</sup> California's standards incorporate more than just California — over one-third of the United States population is covered by California's fuel emissions standards.<sup>174</sup> Federalism is not just an ephemeral idea that agencies should *try* to follow. Executive Order 13132 dispels any notion that agencies are not constrained by federalism concerns in these kinds of preemption actions.<sup>175</sup> Federalism is and should be a concern of any agency taking part in regulatory change that involves federalism implications.

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<sup>172</sup> Hickey, *supra* note 19 at 7–8. Hickey quotes Justice O'Connor, who stated, "The constitutional question (in this case) is as old as the Constitution: It consists of discerning the proper division of authority between the Federal Government and the States." *Id.* at 7.

<sup>173</sup> See generally Greve, *supra* note 82.

<sup>174</sup> See *supra*, p. 10–11. And when one looks at the number of states that joined onto the multistate lawsuit led by California, the number of people who now have a vested interest in states' retaining their power is over 179 million, which shows that the federalism concern touches almost half of the states in the union, and well over half of its population. See *supra*, p. 10–11. This is not a battle between so-called "liberal" states like California and their so-called "conservative" counterparts; it is a movement for a better environment and standard of living that is brought on by clean air through California's waiver scheme and cooperative federalism.

<sup>175</sup> See generally Exec. Order No. 13132, 64 Fed. Reg. 43,255, 43,255 (Aug. 10, 1999). The Executive Order does not create an enforceable right or benefit, but it *does* require agencies to meet certain conditions before the promulgation of rules with "federalism implications." See One National Program, 84 Fed. Reg. 51,310, 51,327 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533); ENVTL. PROT. AGENCY, *Summary of Executive Order 13132 – Federalism*, ENVTL. PROT. AGENCY (last updated Oct. 17, 2016), [https://www.epa.gov/laws-regulations/summary-executive-order-13132-federalism#:~:text=Executive%20Order%20\(E.O.\),issued%20by%20President%20William%20J.&text=The%20E.O.'s%20objective%20is,the%20Unfunded%20Mandates%20Reform%20Act](https://www.epa.gov/laws-regulations/summary-executive-order-13132-federalism#:~:text=Executive%20Order%20(E.O.),issued%20by%20President%20William%20J.&text=The%20E.O.'s%20objective%20is,the%20Unfunded%20Mandates%20Reform%20Act). In One National Program, the agencies try to say that they comply with the Executive Order's mandates when it comes to preemption (in Section 4 of the Order), just because they satisfied notice requirements in relation to the

Accepting these rules sets an untenable precedent, essentially eradicating cooperative federalism schemes.<sup>176</sup> If the executive branch can reclaim power Congress has given away, why would the executive continue to allow states to do what it is now enabled to do?<sup>177</sup> If a court decides that Congress wanted to let the executive branch and its agencies step all over the cooperative federalism scheme it has set up, as the Trump administration would like it to do, that court further contributes to the imbalance of power between the two branches.<sup>178</sup> The benefits of the state's retaining its ability to set emissions standards through the waiver framework disappear, as does the choice Congress made to step aside and let the states continue to push and pull it with iterations that spur innovations.<sup>179</sup>

If a future court rules in favor of the administration, it will stem the exciting flow toward Gerken's modern federalism, Federalism 3.0.<sup>180</sup> The iterative federalism of Federalism 3.0, with its helpful redundancies and healthy competition will be gone, perhaps first in the waiver scheme, but perhaps disappearing from other places as well as time passes.<sup>181</sup> California will no longer be there to push the federal government to go further in its own fuel emissions standards and fuel economy regulation. In turn, California will no longer have the federal government pushing it back, either to think bolder, or to scale back a certain regulation. There will not even be a hint of Justice Brandeis's laboratories, so derided as outmoded

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possibility of a conflict. One National Program, 84 Fed. Reg. at 51,327. But that does not invalidate the mandate of Sec. 4(a), which requires "clear evidence Congress intended preemption of State law." Exec. Order No. 13132, 64 Fed. Reg. at 43,257.

<sup>176</sup> For discussions of cooperative federalism see generally Doremus & Hanemann, *supra* note 78. See also Frank, *supra* note 38.

<sup>177</sup> See Benjamin Ginsberg, *The Growth of Presidential Power*, YALE UNIV. PRESS BLOG (May 17, 2016), <http://blog.yalebooks.com/2016/05/17/growth-presidential-power/> (discussing the expanding presidential power, usually at the expense of Congress and its own power structures).

<sup>178</sup> *Id.*

<sup>179</sup> See generally Carlson, *supra* note 9 (discussing iterative federalism).

<sup>180</sup> See Gerken, *supra* note 60, at 1718.

<sup>181</sup> *Id.* at 1720. There are other cooperative federalism schemes in the environmental sphere that could next face the litigative gauntlet if a court decides cooperative federalism in one area is no longer valid. See Carlson, *supra* note 9, at 1100 (discussing another example of iterative/cooperative federalism, the Ozone Transport Commission).

by current scholarship.<sup>182</sup> This will not only hurt California. It will not just hurt the states that follow California's standards, or the ones defending them. It will hurt the federal government itself. And the push for one national standard by the Trump administration for regulatory ease and for the automotive industry will end up hurting the federal system in the long run.<sup>183</sup> The court that rules on this case cannot just look at the arguments presented and rule on those at face value — they must look at the long-lasting implications of a ruling against a scheme like this. Otherwise, the healthy growth and change of federalism may, at best, be set back and, at worst, closed off forever.

## VI. CONCLUSION

The waiver that California receives through the CAA is essential to the continued existence of iterative and cooperative federalism schemes in the United States. The entire impetus of the waiver was to acknowledge how exceptional California was at recognizing, diagnosing, and addressing the problems that the early stages of climate change caused in the state. California has been able to drive the automotive emissions conversation for over half a century now, pushing the federal government to go further with its own regulations. And the federal government has been able to push back in its own ways — but never to the extent of demolishing the waiver for good — instead, pushing back in iterations to strengthen the bond between the state and federal government. Ripping away that ability will forever shape federalism and cooperative federalism in the environmental sphere as the concentration of power in the federal government and the executive branch grows. State power will shrink. The desire to innovate will also shrink, and the drive of states to go further and do more will dissipate.

The Trump administration has buckled to pressure from the automotive industry to make changes that are in the interest of industry rather than in the interest of the people of this country. The administration will irreparably damage a pillar of federalism if they succeed, and states and

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<sup>182</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932). For criticism see Gerken, *supra* note 60, at 1696–97, and Schapiro, *supra* note 60, at 35–36.

<sup>183</sup> See generally *One National Program*, 84 Fed. Reg. 51,310, 51,310 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533)

their people will not be able to innovate to make life and the environment better in their communities. Emissions standards have far-reaching impacts. It is now up to the judicial branch to protect federalism and the people of the United States, as the federal government will not take care to do so. The fate of federalism is in the hands of the courts — whether one ascribes to the laboratory conception, or Federalism 3.0 — and America's roots will be put to the test. For the sake of the United States, a return to federalism's roots and an adherence to its ideas is the best chance for federalism's survival.

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