June 2003

The California Climate Law: A State's Cutting-Edge Efforts to Achieve Clean Air

Deborah Keeth

Follow this and additional works at: http://scholarship.law.berkeley.edu/elq

Recommended Citation
Available at: http://scholarship.law.berkeley.edu/elq/vol30/iss3/15

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38PZ5M

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcerl@law.berkeley.edu.
The California Climate Law: A State's Cutting-Edge Efforts to Achieve Clean Air

Deborah Keeth*

California recently enacted a Climate Law requiring automakers to reduce carbon dioxide emissions in new vehicle fleets. Utilizing a special exception in the Clean Air Act, the Climate Law has the potential to achieve improvements in air quality not only in California, but across the nation. Yet the law will likely draw a challenge from automakers claiming federal preemption under the Clean Air Act. Whether the Climate Law can withstand a preemption challenge will depend in part on the success of the strategic drafting of the law, effort's subsequent to the law's passage, and a narrow reading of whether air quality regulations focused on carbon dioxide emissions “relate to” fuel economy standards. Ultimately, the success of this far-reaching law may depend on politics.

Introduction .................................................................................................. 716
I. The California Climate Law ................................................................. 718
   A. What the Law Requires ................................................................. 718
   B. Flexibility Built Into the Law ....................................................... 720
   C. Restrictions on the California Air Resources Board ............... 721
II. Background: Laws, Regulation, And Litigation Related To
    The Climate Law .............................................................................. 722
   A. The Clean Air Act: California’s Special Exception ................... 722
   B. The Energy Policy and Conservation Act: Limitations on
      California’s Options ................................................................. 724
   C. California’s Zero Emission Vehicle Program:
      Foreshadowing Opposition ....................................................... 725

Copyright © 2003 by the Regents of the University of California
* J.D. candidate, University of California at Berkeley School of Law (Boalt Hall), 2004;
B.S., Humboldt State University, 2001. I am grateful to Jennifer Schlotterbeck and Matthew
Chapman for their assistance in preparing this piece for publication. All errors and omissions are
my own.
INTRODUCTION

California reaffirmed its leadership in pursuing environmental protection in July 2002 when Governor Davis signed new legislation requiring automakers to reduce carbon dioxide emissions in future vehicle fleets. Although the law only governs vehicles sold in California, it has national significance for several reasons. First, the legislation provides a counterbalance to the Bush administration's unwillingness to enforce or expand existing air quality laws, as well as the

1. California's Early Efforts to Regulate Vehicle Emissions.......................................................... 725
III. Potential Threats To California's Climate Law.......................................................... 728
A. The ZEV Litigation: Questioning the Scope of Federal Preemption........................................ 729
1. Central Valley Chrysler-Plymouth v. California Air Resources Board: The District Court ...... 729
2. Unsettled Issues Raised in the Litigation.......................................................... 731
   a. Issue: Preemption.......................................................... 731
      1) CARB's Argument: Why California Is Not Preempted.......................................................... 731
      2) Automakers' Argument: Why California Is Preempted.......................................................... 732
   b. Issue: Whether Alternative Methods of Compliance Are True Options................................ 733
      1) CARB's Argument: The Optional Nature Protects the ZEV Law........................................ 733
      2) Automaker's Argument: Options Cannot Save the ZEV Law............................................. 734
B. What Resolution of the Issues in the ZEV Challenge Would Mean to the California Climate Law.................. 735
IV. "Preemptive" Strikes, Post-Hoc Efforts, And Politics: Attempts To Save The Climate Law.................. 736
A. Strategic Moves?.......................................................... 736
B. Post-Hoc Efforts.......................................................... 737
C. Federalism and Environmental Law: Politics Revealed.......................................................... 738
Conclusion.................................................................................................................. 740

2. Governor Davis of California noted that his state was leading the way in emissions regulation because "Washington politicians have failed to act." Green Davis, ECONOMIST, July 27, 2002 at 45. For recent activity regarding domestic air quality, see e.g., Jeffrey Ball, California Opens New Front in Battle Over Fuel Efficiency, WALL ST. J., May 3, 2002, at A1 (noting that automakers and their advocates in Congress successfully quashed Senators John McCain (R-
administration's outright attempts to repeal critical air quality protections. Second, several key states, including New York and Massachusetts, are likely to adopt California's more stringent pollution regulations for themselves, as they have in the past. This possibility has automakers worried, as these three states make up nearly one-fifth of the American auto market. Adoption of stricter emissions standards by such a large block of states could de facto improve the national emissions standard, forcing automakers to improve the vehicles they sell across the country. Finally, even if other states do not adopt the new legislation, California, as the most populous state and boasting the largest share of the auto market in the nation, could single-handedly force automakers to improve emissions on all vehicles.

The ability of California's new law to withstand legal challenges will be critical to ensure that this important new tool can be used to improve air quality across the nation. Reluctant to accept regulations requiring them to improve vehicle emissions, automakers have balked at every new pollution requirement proposed by California: they have either passively dragged their feet complaining of technological infeasibility and a lack of

---

3. See Margaret Kriz, Change Is in the Air, NAT'L J., Dec. 7, 2002 (detailing revisions to the Clean Air Act described by the Administration as the "Clear Skies Initiative" which would delay currently scheduled emissions reductions and implement a voluntary, rather than mandatory, emissions reduction program).


6. See John H. Cushman, California Lawmakers Vote to Lower Auto Emissions, N.Y. TIMES, July 2, 2002, at A14 (describing that when other states have joined California's lead in pollution regulation, automakers have been forced to sell cars that meet the stricter standard nationwide).

7. See Ball, supra note 2 (noting the impracticality for automakers to produce two sets of vehicles – one to meet California's standards and the other for the rest of the nation).
market demand, or they have actively pursued litigation to challenge the mandates. Automakers will not likely improve vehicle emissions of their own initiative and will likely challenge any regulations forcing them to do so.

This Comment analyzes the California Climate Law’s ability to withstand potential legal challenges. Section I introduces the Climate Law. Section II describes background air quality laws and regulations that influenced California’s new legislation. Section III explains potential threats to the Climate Law posed by issues raised in recently settled automaker litigation that claimed federal preemption of California’s 2001 Zero Emission Vehicle Program. Section IV analyzes the evolution and strategic drafting of the Climate Law, efforts subsequent to the law’s passage, and the interplay between federalism and politics. The section ends by examining the potential impacts of those elements on the law’s sustainability. The Comment concludes that the California Climate Law finds itself in a tenuous position, with its fate resting on an unsettled reading of the scope of federal preemption, the success of the strategic drafting of the legislation, and, of course, politics.

I. THE CALIFORNIA CLIMATE LAW

A. What the Law Requires

In June of 2002, the California Legislature passed groundbreaking legislation regulating the automobile industry. Introduced by Assemblywoman Fran Pavley (D-Agoura Hills), Assembly Bill 1493 (Climate Law or AB 1493) garnered a diverse coalition of support from churches, the ski industry, firefighter unions, environmentalists, and the high-tech industry in Silicon Valley. The bill narrowly passed the California Assembly with the minimum requirement of forty-one votes.

---

8. For example, when new regulations were proposed in 1984 requiring a reduction in the lead content of gasoline, refining industry officials complained that the industry did not have the capacity to comply with the new rules effectively, that the rules would likely cause a decline in domestic gasoline production and an increase in gasoline prices, and that they may drive small refiners out of business. Philip Shabecoff, New Limits on Lead in Gasoline Are Planned, N.Y. TIMES, July 21, 1984, at 1. Similarly, when regulations requiring the installation of catalytic converters were proposed, the auto industry “lobbied forcefully against passage of the standards.... calling them unobtainable, disastrously expensive and environmentally unnecessary.” Michael Weisskopf, Auto-Pollution Debate Has Ring of the Past; Despite Success, Detroit Resists, WASH. POST, March 26, 1990, at A1. The Department of Justice went so far as to charge automakers in 1969 with conspiring to delay the development of antipollution devices. Id.


The bill’s near defeat was due partly to an intense media campaign orchestrated by automakers and conservative pundits.\footnote{Ann Notthoff, Address at the Boalt Hall School of Law Environmental Law Society Speaker Series (Feb. 12, 2003). Notthoff is the California Advocacy Director of the Natural Resources Defense Council, one of the primary sponsors of the California Climate Law.}

The California Climate Law is the first law of its kind in the nation requiring automakers to reduce emissions of greenhouse gases,\footnote{"Greenhouse gases" are gases in the atmosphere that absorb terrestrial radiation leaving the surface of the Earth. These gases include carbon dioxide, methane, nitrous oxide and ozone. Some of the gases, such as carbon dioxide, naturally occur in the atmosphere but have significantly increased in concentration since the Industrial Revolution. This increased concentration disrupts the natural absorption and reflection function of the atmosphere, leading to climate change. EPA, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990-2000 (April 2002), 1-2 to 1-3, available at http://yosemite.epa.gov/oar/globalwarming.nsf/content/emissions.htm (last visited Oct. 31, 2003). Some of the potential impacts of climate change on California include reductions in the state water supply, adverse human health impacts, changes in patterns of agricultural production, and increased potential for wildfires. Cal. Legis. Counsel's Dig., AB 1493 (2001-2002 Reg. Sess.), available at WL CA LEGIS 200 (2002).} specifically carbon dioxide, in new automobile fleets.\footnote{CAL. HEALTH & SAFETY CODE § 43018.5(a). Automobiles are sources of carbon dioxide emission through engine combustion, fuel evaporation, and refueling losses. EPA, Automobile Emissions: An Overview, available at http://www.epa.gov/otaq/05-autos.htm (last visited March 25, 2003). Automobiles are responsible for nearly 40 percent of greenhouse gas pollution in California. Cal. Legis. Counsel's Dig., supra note 13.} The California law requires the California Air Resources Board (CARB) to “develop and adopt regulations that achieve the maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles.”\footnote{CAL. HEALTH & SAFETY CODE § 43018.5(a).} The Climate Law does not mandate specific reduction percentages or overall reduction goals, but instead broadly sets out three criteria for the new standards. The criteria are:

1. the standards must be “capable of being successfully accomplished within the time provided... taking into account environmental, economic, social, and technological factors;”\footnote{Id. § 43018.5(i)(2)(A).} 
2. the standards must be “economical to an owner or operator of a vehicle;”\footnote{Id. § 43018.5(i)(2)(B).} and
3. the impact of the new law on the economy and jobs of the state—particularly in the automobile industry—must be considered.\footnote{Id. § 43018.5(c)(2)(A)-(F).}

Guided by these criteria, CARB must determine what constitutes the “maximum feasible and cost-effective reduction” of emissions. While the goal of the Climate Law is general, the timetables for compliance are specific. CARB must adopt regulations by January 1, 2005 for 2009 model year vehicles.\footnote{Id. § 43018.5(a)-(b)(1).} These regulations will not go into effect until January 1,
2006 however, to allow the state legislature to review CARB's regulations and enact any necessary complementary legislation.²⁰

B. Flexibility Built Into the Law

The Climate Law provides automakers with a flexible means of complying with the emissions standards. First, the Climate Law allows automakers to use their own research and development experts to determine the most effective design and manufacture approaches for their fleet.²¹ The flexible approach contrasts with technology-based approaches, commonly known as "command and control," under which the legislature and administrative agencies determine how to achieve the reductions by mandating the type of technology to be used.²² The regulated community often complains that command and control techniques are extremely inefficient, stifle innovation, lead to unnecessary litigation, and, even fail to achieve the hoped-for environmental results.²³

Second, the Climate Law allows automakers to use alternative methods of compliance to achieve their reductions—methods that do not involve vehicle fleet improvements.²⁴ For example, automakers can achieve a percentage of their emission reduction goal by decreasing the release of greenhouse gases at their facilities and other stationary sources. Automakers can also buy emissions credits from other dischargers in the state and apply the credit toward their carbon dioxide reduction goal.

Third, CARB will likely average the reductions across the automaker's entire production fleet.²⁵ Averaging a fleet's vehicle emissions means that not every vehicle model must reduce its emissions by the same amount or to the same level. Automakers may choose to achieve the reductions by focusing on the improvement of smaller, lighter models in their fleet, while preserving the power, speed, or weight of their trucks or sport utility vehicles (SUVs).²⁶

Finally, the Climate Law allows an automaker to comply before it is required by banking reduction credits with the California Climate Action

²⁰ Id. § 43018.5(b)(1).
²¹ Id. § 43018.5(c)(3).
²³ Orts, supra note 22, at 1236; Ackerman & Stewart, supra note 22, at 1334-35.
²⁴ CAL. HEALTH & SAFETY CODE § 43018.5(c)(3).
Banking credits makes achieving compliance in the 2009 model year fleets easier. The provision encourages early reductions and it benefits automakers that can rapidly respond to reduce emissions.

C. Restrictions on the California Air Resources Board

While the Climate Law leaves CARB to determine many details, the law is specific in restricting several potential areas of regulation. CARB may not:

1. impose additional fees or taxes on vehicles, fuel, or vehicle miles traveled;
2. ban the sale of a vehicle category (such as SUVs);
3. require a reduction in vehicle weight;
4. reduce speed limits; or
5. impose mandatory reductions on vehicle miles traveled.

Notably, experts frequently point to these very same prohibited categories of regulation as the most expedient and practical methods for reducing vehicle emissions. Explicitly exempting these potential sources of emissions reductions was a political maneuver to ensure the bill’s passage. Drafters added the restrictions to the bill before it passed the state senate in response to a media campaign by the opposition claiming, among other things, that the bill would enable increases in vehicle taxes and decreases in speed limits.

27. CAL. HEALTH & SAFETY CODE § 43018.5(c)(5)(A).
28. Id. § 43018.5(d)(1)-(5).
30. Green Davis, supra note 2; Notthoff, supra note 12.
31. For a description of the circuitous route the Climate Law took on its way to passage, see infra note 129. Rallying the opposition, a coalition group calling itself “We Drive” began sponsoring radio and print advertisements featuring Cal Worthington, a famous Southern California car sales representative, after AB 1058 passed the Senate in May 2002. The advertisements claimed that AB 1058 would give CARB the right to impose taxes on vehicle miles traveled; add fees of “around $3,500” to the sale of new vehicles; increase the state gasoline tax; and reduce speed limits on state highways. We Drive, AB 1058 Campaign Page, available at http://www.wedrive.org/campaign.html (last visited Aug. 5, 2003). Sponsors of the bill similarly waged an intensive public relations campaign, hiring high profile political consultants and bringing out such big-name politicians as Senators John McCain, John Kerry, and Joe Lieberman, and celebrities such as Paul Newman to support the bill. See Danny Hakim, CALIFORNIA IS MOVING TO GUIDE U.S. POLICY ON POLLUTION, N.Y. TIMES, July 3, 2002.
While the Climate Law does not specifically prohibit CARB from achieving emissions cuts by requiring an improvement in fuel efficiency, federal law precludes CARB from doing so. The federal government explicitly reserved the power to regulate fuel efficiency in the Energy Policy and Conservation Act of 1975. Any attempt by the state of California to regulate fuel efficiency is therefore preempted. In recent challenges in federal court, automakers have argued that federal law also preempts climate regulations that require an improvement in fuel efficiency in effect. This argument will likely be at the heart of any challenge to the California Climate Law.

II. BACKGROUND: LAWS, REGULATION, AND LITIGATION RELATED TO THE CLIMATE LAW

Three sources of law, regulation, and litigation influenced the drafting of the Climate Law and will be critical to successful implementation of the law. The Clean Air Act prescribes California's duty to assure air quality and its right to do so by regulating vehicle emissions. The Energy Policy and Conservation Act describes the federal government's exclusive authority to regulate fuel efficiency, a concept intimately tied to reducing carbon dioxide emissions. Finally, California's Zero Emission Vehicle Program and arguments regarding federal preemption raised in recently settled litigation foreshadow the types of challenges the Climate Law is likely to face in the future.

A. The Clean Air Act: California's Special Exception

The Clean Air Act (CAA) requires the Environmental Protection Agency (EPA) to regulate pollutants that "cause or contribute to air

33. Cent. Valley Chrysler-Plymouth v. Cal. Air Res. Bd., No. 02-5017 (E.D. Cal. June 11, 2002) (order granting plaintiff's motion for preliminary injunction and issuing preliminary injunction), sub nom. Cent. Valley Chrysler-Plymouth v. Kenny, No. 02-16395 (9th Cir. 2002). Note that Michael Kenny is named in the appeal as the Executive Officer of CARB. The litigation was settled in August 2003 prior to a decision by the Ninth Circuit.
34. Jeffrey Ball & Mitchel Benson, California Emissions Bill Sets Stage for Fight Over Car Design, WALL ST. J., July 8, 2002, at A2. The auto industry also considered trying to overturn the law by adding a referendum to California's November 2002 ballot, but the industry ultimately abandoned the idea. See Green Davis, supra note 2. Other areas of potential future litigation that are beyond the scope of this Comment include the following: (1) the claim that climate change is not a sufficiently "compelling and extraordinary condition[]" as required under 42 U.S.C. § 7543(b)(1)(B) to waive federal preemption of a state emissions regulation; (2) challenges to the specific regulations CARB will develop in order to implement the Climate Law as inadequate; and (3) the claim that the decision by EPA to either grant or deny California's request for a waiver once regulations have been adopted is illegal.
pollution which may reasonably be anticipated to endanger public health or welfare." To achieve this mandate, EPA establishes National Ambient Air Quality Standards (NAAQS). NAAQS set the maximum discharge level allowable in the ambient air for pollutants considered harmful to public health and the environment. Each state must develop and submit to EPA for approval a State Implementation Plan (SIP) describing its proposed methods for achieving the NAAQS. Importantly, Congress preempted all states except California from setting independent motor vehicle emissions standards as part of their SIP. Congress thought this exception appropriate given California’s “unique problems and pioneering efforts” at controlling air pollution from motor vehicles. To take advantage of this exemption, California must develop standards that “will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.” Before California can enforce independent regulations under the exception, EPA must grant California a waiver of federal preemption.

States generally must implement the national standards developed by EPA. The purpose is “to ensure uniformity throughout the nation” and “to avoid the undue burden on motor vehicle manufacturers which would result from different state standards.” However, a 1977 amendment to the CAA allows states to adopt California’s stricter

38. Id. § 7408(a).
39. EPA, National Ambient Air Quality Standards, available at http://www.epa.gov/airs/criteria.html (last visited March 25, 2003). The standards are meant to set the maximum level of pollutant that can be in the ambient air at any time, in any location. There are two levels of standards. Primary standards are “requisite to protect the public health.” 42 U.S.C. § 7409(b)(1). Secondary standards are “requisite to protect the public welfare.” Id. § 7409(b)(2).
40. Id. § 7410(a)(1). States are divided into air quality regions. The EPA considers any region that does not meet either the primary or secondary air quality standard for a criteria pollutant in “non-attainment.” Id. § 7407(d).
41. Id. § 7543(a) (“No State ... shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles ...”); id. § 7543(b) (The EPA Administrator shall “waive application of [the preemption provision] to any State which has adopted standards ... for the control of emissions from new motor vehicles ... prior to March 30, 1966.”). Only California meets the requirements of the waiver.
43. 42 U.S.C. § 7543(b)(1).
44. Id. The EPA’s authority to deny a waiver request by California is limited. It may only deny a waiver if it determines that: (1) California’s finding that its standards are more protective than federal standards is arbitrary or capricious, (2) California’s standards are not required to meet the state’s “compelling and extraordinary (air quality) conditions”, or (3) California’s proposed standards are inconsistent with the EPA’s authority to prescribe federal emissions standards under § 7521(a). Id. § 7543(b)(1)(A)-(C).
45. Id. § 7521(a).
46. MVMA I, supra note 42, at 1337.
emissions regulations, provided (1) the adopted regulations are identical to California's program, and (2) states adopt the standards at least two years prior to commencement of the model year being regulated. Thus, states have two choices: follow the federal standard, or opt-in to California's stricter standard. This opt-in provision is one of the main reasons why the Climate Law is nationally significant.

B. The Energy Policy and Conservation Act: Limitations on California's Options

Another important background law that will affect the fate of the California Climate Law is the Energy Policy and Conservation Act of 1975 (EPCA). Congress recognized nearly thirty years ago that prudence called for the regulation of the nation's production and consumption of fossil fuels. Thus, in the wake of the 1973-74 Arab Oil Embargo, Congress passed EPCA. The purpose of EPCA is to enhance the supply of fossil fuels in the United States through increased production and energy conservation programs. The primary method envisioned for conserving energy was the regulation of motor vehicle fuel efficiency.

In EPCA, Congress set the corporate average fuel economy (CAFE) standard, for passenger vehicles. It charged the Department of Transportation with amending the average fuel economy standards for passenger cars and lightweight trucks. The CAFE standards set a minimum performance requirement for vehicle miles traveled per gallon of fuel. The minimum standards do not apply to individual vehicle

---

47. 42 U.S.C. § 7507.
50. When EPCA was enacted, oil accounted for about 40% of all energy used in the United States. See H.R. REP. NO. 340, 94th Cong., 1st Sess. 86 (1975); S. REP. NO. 179, 94th Cong., 1st Sess. 2 (1975).
51. 49 U.S.C. § 32902(b).
52. Id. § 32902(a)-(c)(1). The Secretary of Department of Transportation delegated this function to the National Highway Traffic Safety Administration (NHTSA). 49 C.F.R. § 1.50(f) (2003).
53. The current CAFE standards are 27.5 miles per gallon (mpg) for automobiles, 49 C.F.R. § 531.5(a), and 21.0 mpg for light trucks. 49 C.F.R. § 533.5(a). The standard for automobiles has not changed since Congress established it in 1975. The standard for light trucks has varied only slightly since the 1980s due to heavy lobbying by the auto industry. See Ball, supra note 2. The NHTSA recently increased the standard for light trucks to 21.0 mpg for Model Year (MY) 2005, 21.6 mpg for MY 2006 and 22.2 mpg for MY 2007. NHTSA, Final Rule Light Truck Average Fuel Economy Standards Model Years 2005-07, 68 Fed. Reg. 16868 (April 7, 2003).
models, but instead are averaged across an automaker's fleet for any given model year. Thus, a manufacturer can produce a vehicle model that performs significantly under the CAFE standard, so long as other vehicle models in the manufacturer's fleet for that year can achieve a correspondingly higher CAFE standard. EPCA expressly preempts state attempts to regulate fuel economy, providing that a state "may not adopt or enforce a law or regulation related to fuel economy standards." There is no exception to this preemption, even for California.

C. California's Zero Emission Vehicle Program: Foreshadowing Opposition

1. California's Early Efforts to Regulate Vehicle Emissions

Four categories of vehicles will be relevant to the discussion in this section. The following chart describes them.

<table>
<thead>
<tr>
<th>Vehicle Type</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>LEV</td>
<td>Produces reduced emissions of criteria pollutants</td>
</tr>
<tr>
<td>PZEV</td>
<td>Meets certain regulatory standards qualifying them as extremely low emission vehicles</td>
</tr>
<tr>
<td>AT PZEV</td>
<td>PZEV with an additional source of emissions control, such as an advanced battery or an electric power train</td>
</tr>
<tr>
<td>ZEV</td>
<td>Produces no emissions of criteria pollutants</td>
</tr>
</tbody>
</table>

The Climate Law is not California's first attempt to regulate vehicle emissions. Prior to the Climate Law, the most significant emissions

54. 49 U.S.C. § 32904(a)(1)(B). While NHTSA sets the CAFE standard, EPA calculates each manufacturer's average fuel economy. To do so, EPA divides the total number of vehicles manufactured by a manufacturer in a model year by the sum of the fractions obtained by dividing the total number of vehicles produced for each model by the fuel economy for that model. Id. § 32904(a)(1). Thus, if a manufacturer produces only a small number of highly fuel-efficient vehicles, the gains made by that improvement will only have a small impact on reducing the manufacturer's CAFE standard.

55. Id. § 32919(a).
regulation program implemented in the United States after the air quality controls of the early 1960s was California's 1991 low emission vehicle (LEV) program. Among other things, the program required the seven largest automakers to make two percent of their 1998 auto fleets zero emission vehicles (ZEV), increasing up to ten percent in 2003. After EPA approval of California's preemption waiver request, several states announced plans to use the CAA opt-in provision to adopt California's ZEV standards for their own states.

CARB has amended the LEV program several times since its enactment in 1991. In 1995, the program was amended after a CARB-commissioned report indicated that the advanced technology required to make ZEVs a viable option would not be available until between 2000 and 2001. CARB amended the program again in 1998 to "provide additional flexibility in the ZEV program by allowing additional types of vehicles to be used to meet program requirements." The amendments created additional mechanisms, or "pathways," for automakers to receive

56. Cal. Code Regs., tit. 13, §§ 1960 et seq. CARB adopted the program in response to the 1988 California legislature's mandate that CARB "take whatever actions are necessary, cost-effective, and technologically feasible in order to achieve ... a reduction in the actual emissions of reactive organic gases" and to reduce other air pollutants. 1988 Cal. Stats. ch. 1568, § 34 (codified at Cal. Health & Safety Code § 43018(b)).


59. Id. §§ 1960 et seq.


63. The entire program's changes include: "(1) imposing passenger car exhaust emission standards on most sport utility vehicles (SUVs), pick-up trucks, and mini-vans; (2) lower exhaust emission standards for all light- and medium-duty vehicles; (3) reductions in evaporative emission standards; (4) additional mechanisms for the generation of ZEV credits; and (5) establishment of 'CAP 2000' certification requirements." EPA, California State Motor Vehicle Pollution Control Standards; Request for Waiver of Federal Preemption: Within the Scope Request; Opportunity for Public Hearing, 67 Fed. Reg. 35809 (May 21, 2002).
credit toward their ZEV requirement. The regulations allowed vehicles that were extremely clean, yet not pure ZEVs, to receive credit as Partial ZEVs (PZEV). Automakers could use earned credits from the manufacture of PZEVs to meet a portion of their ten percent ZEV requirement.

The state made a third set of changes to the ZEV program in 2001. CARB designed the changes to “maintain progress towards commercialization of ZEVs while recognizing constraints due to cost, lead-time, and technical challenges.” Among other things, the changes:

1. lower the number of ZEVs automakers need to produce in the early years;
2. gradually increase the percentage of ZEVs required from ten percent in model year 2003 to sixteen percent by model year 2018;
3. allow automakers to receive credit toward their 2003 ZEV requirement for the production of a new category of vehicle—advance technology partial zero emission vehicles (AT PZEV); and
4. add credit multipliers for very high efficiency ZEVs and AT PZEVs.

AT PZEVs are PZEVs that have an additional source of emissions control. CARB has two methods of recognizing AT PZEVs that are relevant to assessing the potential success of the Climate Law. The first allows vehicles to qualify as AT PZEVs and measures the amount of credit they earn based on their “advanced ZEV componentry” and reduction in carbon dioxide emissions. The second grants credit for the same type of advanced componentry, but calculates emissions reductions using vehicle fuel efficiency. California uses the federal fuel efficiency

64. CAL. CODE REGS, tit. 13, § 1962(c). PZEVs meet certain regulatory standards qualifying them as extremely low emission vehicles. Id. § 1962(c)(1)-(2). The most common PZEVs are electric hybrids that run on an electric motor and gas engine.
66. Id.
68. Id. § 1962(b)(1)(A).
69. See id. § 1962(b)(4). AT PZEVs may include plug-in electric hybrids, compressed natural gas vehicles, and electric vehicles with higher fuel efficiency or more power coming from their electric motor.
70. Id. § 1962(e). Large automakers may use credits from the production of PZEVs to meet 60 percent of their ZEV requirement and must use credits from the production of ZEVs to meet 20 percent of their ZEV requirement. The remaining 20 percent of the ZEV requirement can be met by producing either ZEVs or AT PZEVs. Id. § 1962(b)(2)(A)-(C). Since AT PZEVs earn automakers more “credits” than regular PZEVs, production of the advanced technology vehicles reduces the total number of vehicles automakers must produce.
71. Id. § 1962(c)(4)(B)(1).
72. Id. § 1962(c)(4)(B)(2).
test procedures to measure a vehicle’s emission performance in order to determine whether it qualifies as an AT PZEV.73

CARB originally requested a finding from EPA that the 2001 Amendment was within the scope of the waiver granted in 1993,74 but it later withdrew its request.75 Then-pending federal litigation over the 2001 Amendment influenced CARB’s decision to pull its request for approval from EPA.76 The next section discusses this litigation.

III. POTENTIAL THREATS TO CALIFORNIA’S CLIMATE LAW

Recently settled litigation over California’s ZEV program illustrates one of the biggest potential threats to the Climate Law. In early 2002, automakers filed suit against CARB in an effort to prevent implementation of the 2001 ZEV Amendment.77 While the suit challenged the portion of the ZEV program addressing AT PZEVs, and not carbon dioxide emissions per se, arguments made in that litigation prior to settlement foreshadow some of the difficulties the Climate Law will face.78

73. Id. § 1962(c)(4)(B)(1)-(2).
74. EPA, California State Motor Vehicle Pollution Control Standards; 2001 Zero-Emission Vehicle (ZEV) Amendments; Within the Scope Request; Opportunity for Public Hearing; Correction Notice, 67 Fed. Reg. 38652 (June 5, 2002).
78. See Jeffery Ball, The Economy: U.S. Joins Fight Against California Clean-Air Effort, WALL ST. J., Oct. 10, 2002, at A2. The Alliance of Automobile Manufacturers, an industry trade association whose members sell more than 90 percent of all vehicles sold in the U.S., has said it plans to sue to block the Climate Law using the same legal argument advanced in the 2001 ZEV program litigation. Id.
A. The ZEV Litigation: Questioning the Scope of Federal Preemption

1. Central Valley Chrysler-Plymouth v. California Air Resources Board: The District Court

The DaimlerChrysler and General Motors corporations, as well as several California auto dealers, sought declaratory and injunctive relief to prevent enforcement of the 2001 ZEV Amendment on the grounds that federal fuel economy laws preempted the program. Specifically, automakers argued that the portion of the newly amended program granting additional credits for the production of AT PZEVs, coupled with the methods used to identify vehicles as AT PZEVs, amounted to regulation of fuel efficiency. The district court granted automakers a preliminary injunction enjoining enforcement of the 2003 and 2004 ZEV sales requirements, pending the outcome of the litigation.

As noted above, EPCA expressly preempts state regulations "related to fuel economy standards." Relying on the Supreme Court's definition of "related to" in Morales v. Trans World Airline, automakers argued, and the district court agreed, that "related to" broadly encompasses "rules [that] have the purpose and effect of regulating the fuel economy of a portion of the new-vehicle fleet in California." The court held that the amendment "clearly has the purpose" of regulating fuel efficiency. The court provided very brief treatment of the issue, however, merely noting "the specific rules used by CARB to qualify [AT PZEVs] incorporate and apply the federal fuel economy test procedures" and that vehicles "qualify as AT PZEVs based not on their emission performance, but on their fuel consumption." Despite CARB's protestations that the intent of the program is to "push the limits of technology to reach zero-emission vehicles in order to protect the public health," the court indicated that CARB actually intended to regulate fuel efficiency, using carbon dioxide emissions as a proxy.

80. Id. at 6-7.
81. Id. at 1.
82. 49 U.S.C. § 32919(a) (emphasis added); see supra section II.B.
83. "The ordinary meaning of these words is a broad one—to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with ... and the words thus express a broad pre-emptive purpose." 504 U.S. 374, 383 (1992) (internal quotations omitted).
84. Cent. Valley Chrysler-Plymouth, slip op. at 7 (emphasis added).
85. Id. at 8.
86. Id. See also supra section II.C.1 (discussing the 2001 amendment's proposal to determine emission reduction by measuring vehicle fuel efficiency).
87. Cent. Valley Chrysler-Plymouth, slip op. at 11.
88. The court speculated that the reason there is not a severability provision in the statute is because "the achievement of ... higher fuel economy is a central purpose of the 2001 ZEV
In addition, the court found that improving fuel efficiency is the only practical way to lower carbon dioxide emissions, thus meeting the "effect" prong outlined in Morales. Automakers persuaded the court that the AT PZEV pathway was the only viable way for automakers to comply with the ZEV mandate, and that the regulations therefore had the practical effect of regulating fuel efficiency. Specifically, the court found that the cost of meeting the ZEV quota in other ways was prohibitively high, such that, "a company trying to comply with the ZEV mandate at the least possible cost will not consider relying in any significant way on any technology other than [AT PZEVs, the most fuel efficient vehicle option]." The court also held that because the fuel efficiency option was the only viable alternative in the ZEV program, the entire 2001 ZEV Program was subject to the preliminary injunction.

CARB appealed the preliminary injunction in the Ninth Circuit. The litigation settled after CARB agreed to reduce the speed with which automakers would be required to comply with the ZEV program. The issues raised by the litigation remain, however. Automakers and the current administration are likely to raise the same arguments in a amendments." Id. at 13. Including a severability provision would have defeated this supposed purpose.

89. Id. at 10. Accord Ball, supra note 2 ("the easiest way to reduce [carbon dioxide] emissions is to make cars and trucks go farther on a gallon of gas"); Hakim, supra note 31 (citing as the most obvious avenues for achieving carbon dioxide reduction the addition of "fuel-saving technologies like hybrid engines..., continuously variable transmissions or special starter-generators that shut off idling engines."). The automakers made the same argument on appeal. See Appellees' Answering Brief at 16, Cent. Valley Chrysler-Plymouth, Inc. v. Kenny, No. 02-16395 (9th Cir. 2002) (admitting that though there are theoretically other compliance methods besides improved fuel efficiency, "technical and economic draw-backs make those other types of AT PZEVs largely irrelevant to compliance with the ZEV mandate, as a practical matter"). Folding under European pressure calling for an emissions reduction similar to that required by the California Climate Law, the "Big Three" automakers have already agreed to reduce carbon dioxide emissions in the vehicles they sell in Europe. Their chosen method to achieve the reductions is to improve fuel efficiency. Ball, supra note 2. While this demonstrates that it is technically possible for auto manufacturers to achieve carbon dioxide reduction in vehicles, it strengthens the argument that fuel efficiency is the only practical way to do it.

90. Cent. Valley Chrysler-Plymouth, slip op. at 15.

91. Cent. Valley Chrysler-Plymouth, Inc. v. Kenny, No. 02-16395 (9th Cir. 2002) [hereinafter "Kenny"], appealing order in Cent. Valley Chrysler Plymouth, Inc. v. Cal. Air Res. Bd., No. 02-5017 (E.D. Cal. June 11, 2002). The Department of Justice, representing the Department of Transportation, filed an amicus brief in support of appellee automakers. See Brief for the United States as Amicus Curiae in Support of Affirmance, id. Note that in addition to the two issues outlined below, the parties also disagreed about whether the portion of the 2001 amendment related to AT PZEVs could be severed from the remainder of the program if it was found to be preempted.

challenge to the Climate Law. Thus, analyzing the positions of the parties is a useful exercise.

2. **Unsettled Issues Raised in the Litigation**

The two issues raised on appeal that are of particular importance to the Climate Law are: (1) the scope of EPCA preemption provision, and (2) the value of alternative methods of compliance within the ZEV program.

a. **Issue: Preemption**

1) **CARB's Argument: Why California Is Not Preempted**

CARB argued that the District Court erred by construing EPCA's preemption provision too broadly. CARB began its argument by noting that there is a presumption against preemption of a field traditionally regulated by the states, such as air pollution. In order to overcome the presumption, Congress' intent to regulate an area of traditional state authority must be "clear and manifest." CARB claimed that Congress' intent is anything but clear, and thus, a narrow reading of EPCA's preemption provision was more appropriate. To support its argument, CARB first pointed to a Supreme Court decision questioning the value of the Morales Court's broad reading of the phrase "related to" in the preemption provision of a different statute. The more recent Travelers opinion looked to the objectives of the federal statute, the purpose of the state law, and the effect of the state law on the federal statute, requiring an "acute interference" with Congress' purpose before finding preemption of the state law.

Second, CARB argued that the purpose and legislative history of EPCA and the CAA reflect Congress' intent to allow California to regulate emissions, despite potential impacts on fuel efficiency. In the CAA, Congress explicitly allowed California to adopt motor vehicle

---

93. See Ball & Benson, supra note 34.
94. Appellant's Opening Brief at 23, Kenny, supra note 91.
95. Id. at 24-25 (arguing that states have traditionally regulated environmental issues). See Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 446 (1960) (holding that environmental regulation is an area of traditional state authority).
97. Appellant's Opening Brief at 28-30, Kenny, supra note 91 (noting that since Morales the Supreme Court has found the phrase "related to" too ambiguous to stand alone). See N.Y. State Conference of Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995) (noting that a broad reading of the meaning of "related to" could be limitless and that prior interpretations of the phrase by the Court would not be very useful at drawing lines).
98. See Travelers, 514 U.S. at 656, 658-61.
emissions regulations more stringent than the national standard.\textsuperscript{100} Congress recognized in EPCA the potential relationship between emissions reductions and fuel efficiency.\textsuperscript{101} CARB argued that incidental effects on fuel efficiency were therefore within the contemplation of Congress, and, thus, do not indicate a "clear and manifest" intent to preempt programs like that proposed by CARB.\textsuperscript{102}

Finally, CARB pointed out that the 2001 Amendments do not interfere with Congress' purpose under EPCA of enhancing the supply of fossil fuels in the United States through increased production and energy conservation programs.\textsuperscript{103} CARB relied on the optional nature of the program and the limited nature of the AT PZEV pathway of the program\textsuperscript{104} as having only a "marginal" effect on a manufacturer's CAFE achievement.\textsuperscript{105} Drawing on Travelers, CARB claimed there is no preemption where there is only a "tenuous, remote, or peripheral connection" to the federal field.\textsuperscript{106}

2) Automakers' Argument: Why California Is Preempted

The automakers, on the other hand, presented several arguments in support of their position that federal law preempts California from even indirectly regulating vehicle fuel efficiency. Automakers framed the Climate Law not as a regulation of the environment, but as a regulation of fuel economy.\textsuperscript{107} They argued that since states have clearly not traditionally regulated fuel economy, no presumption against preemption should be granted.

Next, automakers contended that the preemption provision in EPCA expressly preempts state regulations "related to" fuel economy.\textsuperscript{108} They

\textsuperscript{100} Id. at 35-39 (citing Congress' intent as evidenced in legislative documents, see, e.g., H.R. Rep. No. 95-294, at 301-302 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1380-81, and confirmed in court cases, see, e.g., Motor & Equip. Mfrs. Ass'n v. EPA, 627 F.2d 1095 (D.C. Cir. 1979)).


\textsuperscript{102} Id. at 41.

\textsuperscript{103} Id. at 39, \textit{Kenny, supra} note 91.

\textsuperscript{104} Appellant's Opening Brief at 39, \textit{Kenny, supra} note 91.

\textsuperscript{105} Id. at 41.

\textsuperscript{106} Even if utilized to the maximum extent, the AT PZEV pathway can only account for twenty percent of a manufacturer's ZEV quota under the current regulations. CARB, Workshop to Discuss Possible Amendments to the Zero Emission Vehicle (ZEV) Program (Dec. 5-6, 2002) (on file with author).

\textsuperscript{107} Travelers, 514 U.S. at 661.

\textsuperscript{108} Appellee's Answering Brief at 24, \textit{Kenny, supra} note 91.
claimed the court must read "related to" broadly to encompass any state regulation having a "connection with" or "reference to" state law. Automakers pointed out that the 2001 Amendment expressly references fuel efficiency as a qualification for AT PZEVs and uses the federal fuel efficiency standards to test compliance. Automakers claimed the reference is sufficient to preempt the amendment.

Third, the automakers noted that the structure and legislative history of EPCA indicate that Congress knew how to grant California an exception to preemption, but it chose not to. Finally, the automakers argued that California's regulations have a substantial and direct (rather than tenuous or remote) effect on the federal law. They described the criteria and requirements Congress intended the NHTSA to follow when evaluating whether to change the national fuel efficiency standards under EPCA. The automakers noted that California's regulations do not require the same type of analysis, allowing California to unilaterally disrupt Congress' careful balance of priorities. The automakers argued that, given this evidence, the Court of Appeals should not overturn the preliminary injunction.

b. Issue: Whether Alternative Methods of Compliance Are True Options

The parties also disagreed on whether the alternative methods of compliance were true options and, if so, whether the availability of alternatives can save the Amendment from preemption.

1) CARB's Argument: The Optional Nature Protects the ZEV Law

CARB argued that the optional nature of the AT PZEV pathway for meeting the ZEV mandate protects it from preemption. Under Ray v. Atlantic Richfield Co., a state may adopt optional regulations that would
be preempted if they were mandatory.\textsuperscript{115} CARB argued that increasing fuel efficiency is only one alternative in a program that is intended to be flexible, allowing automakers to pursue a number of compliance options unrelated to fuel efficiency.\textsuperscript{116} Furthermore, CARB argued, the lower court's rejection of alternative options for compliance was too simplistic.\textsuperscript{117} CARB argued that though the alternatives may be more costly than producing AT PZEVs, they are neither unreasonably expensive nor technologically impossible.\textsuperscript{118} Therefore, even if the AT PZEV pathway would be preempted if it were mandatory, it is not preempted as a viable optional method of compliance within the broader ZEV program.

2) Automaker's Argument: Options Cannot Save the ZEV Law

The automakers argued that options to the AT PZEV pathway cannot save California's 2001 Amendment from preemption.\textsuperscript{119} They argued that whether or not options exist, EPCA expressly preempts the regulation of fuel economy,\textsuperscript{120} and the availability of options is irrelevant. Further, they distinguished \textit{Ray} by first noting that it was a case of implied preemption, as opposed to the express preemption they believe EPCA provides.\textsuperscript{121} Under express preemption, no consideration of options is required. Second, they noted that the facts of \textit{Ray} are the reverse of the present matter and lead to a different outcome.\textsuperscript{122} In \textit{Ray}, the option for compliance with a Washington state tanker law (that would have been preempted if it were mandatory) was more expensive than the non-preempted option. The automakers argued that the otherwise preempted option was allowed to stand because, in practical terms, no party would choose the more expensive option. Here, in contrast, the option for compliance that automakers argued would be preempted if it were mandatory (the AT PZEV pathway) is less expensive than the non-preempted compliance options. Because it is less expensive, all the parties will choose it—and hence, produce more fuel-efficient vehicles. Ultimately, automakers argued, and the court agreed, that when Congress' intent to preempt is clear, "preemption cannot be avoided by

\textsuperscript{115} 435 U.S. 151, 173 (1978).
\textsuperscript{116}  Appellant's Opening Brief at 43, \textit{Kenny}, \textit{supra} note 91.
\textsuperscript{117}  \textit{Id.} at 43-51.
\textsuperscript{118}  For example, CARB notes that the automakers can rely on credits they have already earned to satisfy their ZEV requirement in the short term, produce alternative vehicles such as PZEVs and buy credits from other manufacturers in the medium term, and develop fuel cell technology that will allow them to produce full-fledged ZEVs to meet their requirement in the long term. \textit{Id.} at 44-50.
\textsuperscript{119}  Appellee's Answering Brief at 43-49, \textit{Kenny}, \textit{supra} note 91.
\textsuperscript{120}  \textit{Id.} at 22.
\textsuperscript{121}  \textit{Id.} at 44.
\textsuperscript{122}  \textit{Id.} at 45.
intertwining preemted requirements with non-preempted requirements."

B. What Resolution of the Issues in the ZEV Challenge Would Mean to the California Climate Law

The challenge in Central Valley Chrysler-Plymouth focused on the AT PZEV pathway within the 2001 Amendment to California's Zero Emission Vehicle program. Nonetheless, the resolution of the issues would have a significant effect on the California Climate Law because of the intimate connection between AT PZEVs and carbon dioxide—the greenhouse gas the Climate Law seeks to control. Though the litigation settled before the Ninth Circuit could issue a decision, the same issues are likely to be raised in any challenge to the Climate Law. The Ninth Circuit could have found for the automakers, holding that the meaning of the phrase "related to" in EPCA should be broadly construed to encompass any regulation that references or has a connection to fuel efficiency. Under such a broad reading, it would be almost impossible for the California Climate Law to withstand judicial scrutiny.

Carbon dioxide emissions and fuel consumption are intertwined: the amount of emissions released is directly proportional to the amount of fuel consumed. Thus, while relatively simple improvements in technology can capture other types of pollutants before they exit a vehicle's tailpipe, improving carbon dioxide emissions will likely require more fundamental restructuring of vehicles. Under a broad preemption standard, this interrelationship will make it very difficult to distinguish attempts to reduce carbon dioxide emissions from attempts to improve fuel efficiency.

On the other hand, if the Ninth Circuit finds for CARB in the ZEV litigation by narrowly reading the scope of EPCA's preemption, then the Climate Law will be in a much stronger position. CARB would still have to demonstrate that the Climate Law does not acutely interfere with the goals and purpose of EPCA, however. Strategic maneuvering at the drafting stage may help CARB navigate this hurdle.

123. Cent. Valley Chrysler-Plymouth, slip op. at 8 (citing Napier v. Atl. Coast Line, 272 U.S. 605, 613 (1926); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001)).
124. Cent. Valley Chrysler-Plymouth, slip op. at 5-6.
125. EPA, supra note 14.
126. For example, simply installing a catalytic converter on a vehicle can significantly reduce hydrocarbon and carbon monoxide emissions. Id.
127. Ball & Benson, supra note 34.
IV. "PREEMPTIVE" STRIKES, POST-HOC EFFORTS, AND POLITICS: ATTEMPTS TO SAVE THE CLIMATE LAW

A. Strategic Moves?

In its original version, the bill that would become the Climate Law died in the state legislature's inactive file despite a rigorous debate over its merits. Representative Pavley later reincarnated it as a new bill with a new name and number, and it quickly passed in a special session of the state legislature.129 Perhaps significantly, the reinvigoration of the program as part of AB 1493 took place just over two weeks after the district court granted the preliminary injunction against enforcement of the 2003 and 2004 ZEV sales requirements.130 While the drafters of the Climate Law clearly went to great lengths to incorporate the concerns of automakers and drivers, the litigation over the 2001 Amendment to the ZEV program also likely influenced the final form of the law.131 Examining the significant changes the sponsors made to the substance of the original bill to formulate the final bill which passed as AB 1493 may shed some light on the drafters' strategy for insulating the Climate Law from anticipated challenges by automakers.

The Legislative Counsel's Digest132 explicitly notes that California intends the Climate Law to fall within the waiver provision of the Clean Air Act, not to supercede or conflict with the Act.133 This clarification of intent in the Climate Law's legislative history serves two related purposes. First, it clarifies the state's position that California's regulation

129. Assemblywoman Fran Pavley (D-Agoura Hills) first introduced the substantive portion of the Climate Law in February 2001 as AB 1058. After over a year of discussion, AB 1058 had passed the Assembly and Senate by May 2002. The bill went back to the Assembly for concurrence, but was “parked” until the necessary support to pass the Assembly was assured. Concurrent to AB 1058's introduction, Assemblyman Fred Keeley (D-Boulder Creek) introduced the original version of AB 1493. In its first incarnation, the bill dealt with amendments to the Government Code relating to state audits. After passing the Assembly and being sent to the Senate, the bill went to the Inactive file in July 2001. In June 2002, AB 1493 was reactivated during a special session of the legislature convened to deal with a state budget crisis. In less than a month the text of the original AB 1493 was gutted, a majority of the substance of AB 1058 was inserted, amendments were made, and the bill passed the Senate and Assembly. Governor Gray Davis signed the Climate Law in July 2002. AB 1493 Assembly Bill History, available at Legislative Counsel of California http://www.leginfo.ca.gov/pub/0102bills/art/asm/ab_1451-1500/ab_1493_bill_20020722_history.html (last visited June 28, 2002).

130. The District Court Order was issued June 11, 2002. Cent. Valley Chrysler-Plymouth, slip op. at 1. The Climate Law passed the state assembly and senate on July 1, 2002. AB 1493 Assembly Bill History, supra note 129.

131. The legislative history of AB 1493 indicates that assembly members opposed to the bill argued that it would be challenged as preempted by federal law, “almost certainly leading to litigation.” Senate Rules Committee, analysis of Assem. Bill No. 1493 (2001-2002 Reg. Sess.) (June 28, 2002).

132. The Legislative Counsel's Digest is a source of official California legislative history. It is included as a preamble to the legislation prior to codification.

of carbon dioxide emissions falls within its authority under the California exception to emissions regulation in the CAA. Second, it places the law within California's permitted authority to regulate carbon dioxide emissions, distinguishing it from the prohibited realm of fuel efficiency regulation. This careful attempt to clarify the state's intent may successfully protect the state if automakers challenge the Climate Law as preempted by federal law. Despite this effort at strategic drafting, the fate of the Climate Law seems uncertain given the potential impact of an unfavorable result in the pending ZEV litigation. Supporters of California's Climate Law from around the nation have recognized its tenuous position and are making moves to support the law.

B. Post-Hoc Efforts

Neither EPA nor CARB currently regulates carbon dioxide as a "criteria pollutant." Carbon dioxide disperses more evenly into the atmosphere than criteria pollutants, such as ozone and carbon monoxide, which contribute to localized smog. Though there is ample evidence that carbon dioxide poses a substantial indirect health risk to the global population, EPA has not recognized it as a sufficiently direct threat to the population of the United States to warrant regulation as a criteria pollutant under the CAA. It will be more difficult for CARB to argue that the Climate Law is an exercise of California's authority to regulate on behalf of the health and welfare of its citizens—a traditional role for states—if carbon dioxide is not a criteria pollutant. If CARB cannot argue that the Climate Law falls under its traditional health and welfare regulation, it cannot take advantage of the judicial presumption that Congress does not intend to preempt an area of traditional state authority without express evidence to the contrary—a presumption the Climate Law may desperately need.

There has been recent activity, however, to place California's efforts to control carbon dioxide squarely within the protected confines of the CAA. Supporters have filed two lawsuits against EPA since adoption of the Climate Law seeking to establish carbon dioxide as a criteria pollutant.

135. Cushman, supra note 6 (describing that AB 1493 "was carefully written to limit emissions of carbon dioxide, not fuel economy").
138. See Appellant's Opening Brief, Kenny, supra note 91 and accompanying text (discussing the presumption against preemption in areas of traditional state regulation).
pollutant. The first, filed in federal district court in Washington by the Sierra Club and others, was “intended partly to force the government to curtail auto emissions and partly to clear the way for states [particularly California] to take action on their own.” In the second, Connecticut, Maine, and Massachusetts sent an intent-to-sue letter to EPA seeking regulation of carbon dioxide as a criteria pollutant from mobile and stationary sources. Though success on this claim would bolster California’s position, the likelihood of success is unclear.

C. Federalism and Environmental Law: Politics Revealed

The success of the Climate Law ultimately turns on federalism—whether the federal government’s preemption of an area of regulation, no matter how ambiguous, can prevent states from asserting their authority, even in a tangential manner. It has been suggested that, “the actual allocation of regulatory authority between federal and state governments depends on legislative and bureaucratic politics,” with federalism contracting or expanding “in response to pragmatic concerns of political actors in legislatures and bureaucracies.”

The brief filed in support of automakers and against CARB by the Department of Transportation is a sure indication of the Bush administration’s assertion of federal authority. CARB views it as a retraction of the scope of the authority the federal government granted to the state under the CAA in 1970.

If allocation of authority is dependent on politics, it is important to consider whether the concerns of the Bush administration are different from those of the Nixon era. Some concerns seem to have remained the same over the last thirty-three years. The desire to reduce dependence on foreign oil is still as significant today as it was in 1970. Moreover, the

139. See Andrew C. Revkin, E.P.A. Is Sued Over Emissions Classification, N.Y. TIMES (Dec. 7. 2002), at A17; Jennifer Lee, Seven States Sue EPA Over Standards on Air Pollution, N.Y. TIMES, (Feb. 21, 2003), at A25.
140. Revkin, supra note 139.
141. Lee, supra note 139.
143. Brief for the United States as Amicus Curiae in Support of Affirmance, Kenny, supra note 91.
144. Appellant's Opening Brief, Kenny, supra note 91.
145. The desire to reduce dependence on foreign oil represented one important incentive leading to the passage of the EPCA. See supra notes 49 and 50 and accompanying text. The United States meets its oil needs today by importing a substantially higher percentage of foreign oil than it did during 1975, the year EPCA was passed; up from 36 percent in 1975 to 54 percent in 2002. NHTSA, supra note 49 at 5769; Kenneth Bredemeier, Will Oil be Cut Off Again? It's Less Likely Now, Many Experts Say, THE WASH. POST, May 16, 2002, at E1. Politicians frequently cite the desire to reduce dependence on foreign oil as a rationale for domestic oil exploration. See Kevin Galvin, Energy Bill Aims at Less Foreign Oil: Arctic-Refuge Drilling Proposal Angers Environmentalists, SEATTLE TIMES, Feb 27, 2001, at A8.
level of concern for the health of the auto industry appears to remain unchanged.\textsuperscript{146} Despite the similarities in concern for foreign oil independence and auto industry vibrancy, the equilibrium has shifted to a reduced acceptance of California's ability to regulate.

There are a few key differences in pragmatic concerns of the executive and legislative branches. First, the range of preferred methods for reducing dependence on foreign oil has shrunk. The Nixon administration recognized improved fuel efficiency as an important element of achieving the overall goal of decreased dependence on foreign oil. The current administration, on the other hand, has primarily focused on encouraging the exploration of new domestic sources.\textsuperscript{147}

Second, there has been a change in the federal government's concern for air quality. In 1970, the year that marks the introduction of the Clean Air Act,\textsuperscript{148} the National Environmental Policy Act\textsuperscript{149} and the first Earth Day, there was widespread support at the federal level for air quality protection. In fact, though Congress intended that states assume the primary implementation role under the CAA, it was concerned that states had not done enough to protect air quality and would even try, in an interstate "race to the bottom," to undermine federal efforts to set more stringent controls.\textsuperscript{150} While the current administration nominally supports a healthy environment, the administration's refusal to recognize and support climate protection is notorious.\textsuperscript{151} The Department of Transportation's support for the automakers in the challenge to the 2001 ZEV Amendment clearly signals "President Bush's unwillingness to

\begin{itemize}
\item \textsuperscript{146} Greg Miller, \textit{Drive to Increase SUV Gas Mileage Still an Uphill Climb}, L.A. TIMES, May 20, 2001, at A19 (describing emissions regulation proposals by both Democrats and Republicans as a "reflection of how much influence the powerful auto industry lobby has in both parties").
\item \textsuperscript{147} The Administration's attempts to open Alaska for drilling were recently accepted by the House, but rejected by the Senate. Arctic drilling continues to appear in new energy bills, primarily for symbolic purposes. Other efforts to encourage domestic production, such as tax breaks and royalty relief for oil drilling in the Gulf of Mexico have recently been proposed. Richard Simon, \textit{Energy Bill Seen as a Gusher of Industry Breaks}, L.A. TIMES, April 10, 2003, at 32.
\item \textsuperscript{148} 42 U.S.C. §§ 7401-7671q.
\item \textsuperscript{149} 43 U.S.C. §§ 4321-4370e (2003).
\item \textsuperscript{150} See Symposium, supra note 142 at 1190-94 (suggesting Congress originally intended that the federal government provide leadership on air quality through the CAA. See, e.g., "We have learned from experience with implementation of the [1967 Air Quality Act] that States and localities need greater incentives and assistance to protect the health and welfare of all people." 116 CONG. REC. 32,901, (1970) (comments of Sen. Muskie)).
\item \textsuperscript{151} See Andrew Revkin, \textit{Panel of Experts Faults Bush Plan to Study Climate}, N.Y. TIMES, Feb 26, 2003, at A1 (describing National Academy of Sciences' critique of Bush's climate plan as containing insufficient funding and requiring research into areas that have already been commonly accepted among the scientific community); Andrew Revkin, \textit{With White House Approval, E.P.A. Pollution Report Omits Global Warming Section}, N.Y. Times, Sept. 15, 2002, at 1:30 (describing EPA report on air quality as omitting a discussion of climate change for the first time in six years); President George W. Bush, supra note 2 (the President's remarks detailing his concerns with the Kyoto Protocol).
offend his political allies by pushing the industry to develop cleaner cars."

This shift illustrates that "the federal government's attitude toward state autonomy has not been constant over time; it ebbs and flows in response to administrative and political needs and goals." An outright aversion to increased environmental protections, coupled with a strong desire to protect and promote industry means that the administration's political weight in the federalism debate will likely continue to fall on the side of federal regulation (or lack thereof) of air pollution emissions.

CONCLUSION

The Climate Law's ability to deflect federal preemption challenges under EPCA depends on several not entirely certain outcomes. First, it will require judicial interpretation of EPCA's "related to" phrase narrowly to find preemption only upon direct interference with federal policies. Second, efforts to draft the Climate Law to avoid a preemption challenge must succeed. While the drafters of the Climate Law appear to have made some strategic efforts to insulate the law from a preemption challenge, other drafting devices seem to be short-term fixes to appease the bill's opposition and garner political support. While the effort may have lead to the passage of the Climate Law, it may not protect the law enough to see it through to implementation. Third, efforts of climate law advocates to require regulation of carbon dioxide as a criteria pollutant would lend critical support to California. Finally, the balance of federalism seems to depend on the political climate. Judging by the current administration's position on air quality protection and the federal government's steady support for the auto industry since the 1970s, the Climate Law faces an uphill struggle.