United States Senate

WASHINGTON, DC 20510

October 23, 2018

The Honorable Elaine Chao
Secretary
U.S. Department of Transportation
1200 New Jersey Ave SE
Washington, DC 20590

Mr. Andrew Wheeler
Acting Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, DC 20004

Dear Secretary Chao and Acting Administrator Wheeler:

We write in support of the existing coordinated national program of strong standards for fuel economy and vehicle greenhouse gas (GHG) emissions, which benefits both the automotive industry and the American public. These standards are maintained not only by the Environmental Protection Agency (EPA) and the Department of Transportation (DOT), but also by the states that we represent. The changes you have proposed to this carefully negotiated program are not supported by federal law and will only result in higher costs for the American consumer and years of litigation and investment uncertainty for the auto industry—all while endangering public health and welfare. We urge you to abandon the confrontational and counterproductive approach you have proposed, and instead work to preserve the coordinated national program by seeking consensus with the states.

Under the *Clean Air Act*, both the EPA and the state of California have authority to regulate GHG emissions from the tailpipe. Under Section 177 of this act, states can choose, as twelve have done and Colorado is in the process of finalizing, to adopt California's standards in lieu of federal requirements. Today, these standards are collectively implemented as a single national program under a 2012 agreement between DOT, EPA, and the California Air Resources Board. If the federal agencies diverge from the standards that were set together under this agreement through Model Year 2025, there will no longer be a single national program.

We believe it would be a grave error to cast aside this national consensus approach. Rather than negotiate, you have chosen to challenge the authority of our states to regulate emissions from vehicles in order to force a nationwide rollback of fuel economy and vehicle emission standards. This action would be without precedent in the fifty-five year history of the *Clean Air Act*. The legal justifications offered in the Safer Affordable Fuel-Efficient Vehicles Proposed Rule for Model Years (MY) 2021-2026, as detailed below, are plainly contradicted by the historical record of legislative intent, are not supported by statutory text, and have already been rejected by the courts.

1. Section 209 of the *Clean Air Act* recognizes that the California Air Resources Board's regulations on mobile sources predate federal standards. It mandates that the EPA Administrator shall grant a waiver from federal preemption for any new California clean air regulation that is at least as protective of public health and welfare as federal standards. The statute creates no mechanism to revoke such a waiver, and no EPA

Administrator has ever attempted to revoke any of the more than 150 waivers granted over the last five decades. Nonetheless, the Administration now proposes to revoke the waiver granted in 2013 for California's tailpipe emission standards for Model Years 2022 to 2025, which have been adopted by twelve states under Section 177 of the *Clean Air Act*. This is unprecedented and not supported by the statutory text.

2. The Administration argues that California's waiver is invalid because the state does not face "compelling and extraordinary conditions" as required by statute. This boldly ignores the historic drought that California recently experienced and the exceptionally intense wildfires now burning throughout the state – both compelling and extraordinary conditions that have been exacerbated by climate change and are only expected to grow worse. It also disregards the inescapable conclusion that California's clean air programs as a whole are necessary to address local air quality problems that put eight of its cities in the top ten cities in the nation most polluted by smog. Indeed, higher temperatures caused by greenhouse gases will exacerbate smog formation and wildfire smoke. The administration instead argues that the waiver is invalid unless California's experience of climate change and contribution to atmospheric carbon dioxide is "unique," an argument that has no basis in statute and is contrary to the analysis conducted for every other waiver previously granted. This is a particularly absurd interpretation given that Section 177 of the *Clean Air Act* allows any other state to adopt standards put forward by California in recognition of the fact that all states face similar pollution challenges.

3. The Administration further argues that California's waiver is invalid because the standards are "technologically infeasible" in spite of the fact that they are currently part of a program that was promulgated jointly with the federal agencies. The 1,200 page joint technical analysis of these standards, completed in 2016 by EPA, NHTSA, and the California Air Resources Board, found that the standards are technologically feasible and cost-effective, and that there are now more technologies available to meet the standards than originally anticipated.

4. The Administration goes on to assert that the original *Energy Policy Conservation Act* of 1975—which created the fuel economy standards and was later strengthened by the *Ten-in-Ten Fuel Economy Act,* passed as part of the *Energy Independence and Security Act of 2007*—interferes with the separate authority conferred to California and other states by the *Clean Air Act*. Two federal courts in 2007 already considered and rejected the same arguments now resuscitated in the Administration's proposal. This case law was an important factor in our enactment of the *Ten-in-Ten Fuel Economy Act*, as evidenced by statements on the floor of the House and Senate at the time of its passage. Indeed, the very first section of this bill makes clear that the fuel economy law does not interfere with the authorities conferred by the *Clean Air Act*. The argument put forward in this rule not only ignores judicial precedent, but also contravenes clear legislative intent.

5. The Administration additionally asserts that the *Energy Policy Conservation Act* preempts not only state tailpipe emissions standards for gasoline-powered vehicles,

but also a mandate for zero-emission vehicles, which has been authorized by the *Clean Air Act* waiver and adopted by nine additional states. This policy does not govern how many miles a gasoline-powered vehicle can drive per gallon of fuel; it requires manufacturers to produce some number of battery electric vehicles or hydrogen fuel cell vehicles, which do not use petroleum fuel at all. It is illogical for DOT now to argue that the zero-emission programs relate to the mileage of gasoline-powered vehicles in order to broadly claim preemption.

These claims to preemption are not faithful interpretations of statutory law. The Administration's justification knowingly disregards both legislative intent and case law. The surest way to maintain one national program is to collaborate with the states to preserve the agreement that is working right now for a coordinated program of federal and state standards. We urge you to abandon this confrontational and misguided proposal.

Sincerely,

Dianne Feinstein
United States Senator

Kamala D. Harris
United States Senator

Charles E. Schumer
United States Senator

Tom Carper
United States Senator

Edward J. Markey
United States Senator

Chris Van Hollen
United States Senator

Richard Blumenthal
United States Senator

Sheldon Whitehouse
United States Senator

Ron Wyden
United States Senator

Elizabeth Warren
United States Senator

Jeffrey A. Merkley
United States Senator

Michael F. Bennet
United States Senator

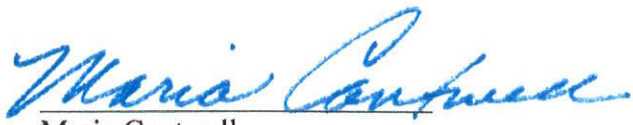
Jack Reed
United States Senator

Bernard Sanders
United States Senator

Benjamin L. Cardin
United States Senator

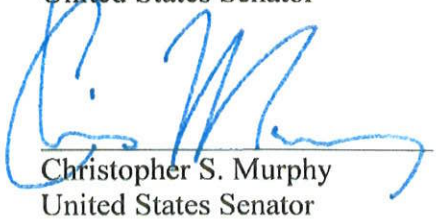
Kirsten Gillibrand
United States Senator

Patrick Leahy
United States Senator



Maria Cantwell
United States Senator

Robert P. Casey, Jr.
United States Senator



Christopher S. Murphy
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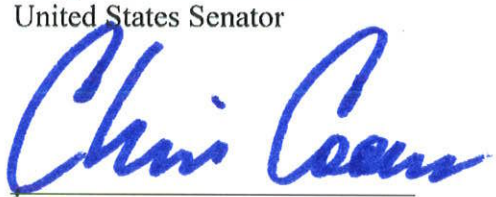

Christopher A. Coons
United States Senator