Building Certainty into the Electric Transition: Tools to Resist Ideological Instability

*Craig Holt Segall**

I. ABSTRACT: TWO PROPOSITIONS ON VEHICLE REGULATION IN UNCERTAIN TIMES

I hope to convince you of two claims in this brief essay.

DOI: https://doi.org/10.15779/Z38Z02ZB0W

* Craig Holt Segall is Senior Vice President of Evergreen Action, a national climate and environment advocacy group. He was previously Deputy Executive Officer and Assistant Chief Counsel of the California Air Resources Board where he was involved in developing the policies and agreements discussed in this article. The views expressed here are his own. This paper was originally developed for an ABA proceeding in December 2023 and has been modified and expanded with the ABA's permission. I thank the editorial staff of ELQ Currents for their help in improving this article.

First: The Republican-appointed majority of the Supreme Court's attacks on the administrative state have destabilized environmental law,[1] and this legal breakdown has happened when the vehicle sector most needs coordination and certainty during the complex transition to electric vehicles. Accordingly, the traditional pas-de-deux in the courts between industry and the regulatory agencies, in which litigation has modified or delayed but not stopped down-the-middle regulation, is no longer a reliable dance routine. Especially in view of the death of the *Chevron* deference doctrine in June 2024,[2] a lawsuit on an emissions rule may now produce a surprise opinion from one of the ideologues on the bench ruling multiple decades of clean air rules somehow unconstitutional. The lingering prospect of a second Trump administration only heightens these risks.[3] This breakdown is bad for public health and the climate, as well as, from a narrow but important business perspective, investment certainty.

Second: Lawyers in the field would serve their clients best by abandoning the usual industry reflexive litigation position, given its likelihood of causing destructive instability and instead working towards strategies, including contractual instruments, that can insulate the zero emissions transition from legal politics. With billions on the line, an entire new infrastructure to build, novel connections between the transportation and electric and building sectors, and a shifting global trade web, the *last* thing industry needs is to find out what Samuel Alito thinks James Madison might have thought about batteries. Electoral uncertainty in the 2024 general election only heightens the need for clarity of direction. We need to find ways to empower less erratic government actors and to create new mechanisms for certainty.

II. INTRODUCTION: SHARED PUBLIC AND PRIVATE INTERESTS IN DECARBONIZATION

The vehicle industry hangs between two counterposed trends. The first trend is dire: The Supreme Court's right-wing majority is dismantling environmental laws that the industry relies on for certainty. The second is positive: Zero emission vehicles (ZEVs) are more popular and economic than they have ever been, and a global transition is underway. The question I seek to address in this essay is how to ensure that transition in the United States continues sensibly, equitably, and at pace despite the ongoing legal and political uncertainty. After surveying the landscape and recent history, I propose a range of extra-regulatory measures to secure stability (as well as possible). These measures—including contractual commitments pioneered in response to Trump-era rollbacks—are urgently needed as we confront growing legal and electoral uncertainty.

---

1. *See generally* Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97 (2022).
2. *Loper Bright Enter. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024).
3. *See* Shane Goldmacher, *Trump Leads in 5 Critical States as Voters Blast Biden, Times/Siena Poll Finds*, N.Y. TIMES (Nov. 6, 2023), https://www.nytimes.com/live/2023/11/06/us/trump-biden-times-siena-poll-updates.

To underline the key negative trend: The environmental regulatory structure that is meant to drive forward cuts to vehicle pollution, and hence to manage the transition to zero emission vehicles, is under direct and increasing political and legal attack. As Donald Trump and state-level Republicans inveigh against electric vehicles, a judicial assault is ongoing. Fossil fuel companies have captured the politics of the Republican party,[4] and that capture is reflected in the votes of the Supreme Court Justices appointed by that party. The Justices constituting the core of the Court majority, appointed by Donald Trump and George W. Bush (both presidents who lost the popular vote)[5] accurately reflect the more extreme views of their party. Over the last few terms, they have offered a poorly grounded "major question" doctrine[6] that fossil fuel interests are deploying to destabilize the ambitious regulations the Clean Air Act and similar statutes in fact require.[7] The Court's baffling "clear statement" rule invalidates statutes that offer environmental protections if those statutes are not clear enough to a Republican Justice.[8]

The most recent term has substantially accelerated instability. It included the overruling of the landmark *Chevron* deference doctrine[9] and a surprise stay of a well-established EPA rulemaking.[10] As a result of the first case, right-wing appointees now have a much clearer path to question the technical and legal judgments of vehicle regulators, substituting their own judgments of what the Clean Air Act and other relevant laws require.[11] The second case further erodes a long-standing presumption against Supreme Court stays in ordinary environmental litigation—increasing the risk that judicial preferences may be substituted for expert agency analyses at early phases of vehicle rulemaking

4. Consider, for instance, the antediluvian views of the new House Speaker, which foreshadow Republican policy efforts to come. Lisa Friedman, *New House Speaker Champions Fossil Fuels and Dismisses Climate Concerns*, N.Y. TIMES (Oct. 26, 2023), https://www.nytimes.com/2023/10/26/climate/mike-johnson-climate-policies.html.

5. *See* Ron Elving, *How the Supreme Court's Conservative Majority Came to Be*, NAT'L. PUB. RADIO (July 1, 2023), https://www.npr.org/2023/07/13/1185496055/supreme-court-conservative-majority-thomas-trump-bush.

6. For a prescient early critique, *see, e.g., Major Question Objections*, 129 HARV. L. REV. 2191, 2196-203 (2016).

7. *See generally West Virginia v. EPA*, 597 U.S. 697 (2022) (invalidating EPA carbon rules for power plants and articulating a "major questions doctrine" of uncertain reach).

8. *See* Richard J. Lazarus, *Judicial Destruction of the Clean Water Act: Sackett v. EPA*, U. CHICAGO. L. REV. ONLINE (2023), https://lawreview.uchicago.edu/judicial-destruction-clean-water-act-sackett-v-epa; David Owen, *Sackett v. Environmental Protection Agency and the Rules of Statutory Misinterpretation*, 48 HARVARD ENV. L. REV. 333, 361 (2024), https://journals.law.harvard.edu/elr/wp-content/uploads/sites/79/2024/08/01_HLE_48_2_Owen.pdf.

9. *See generally Loper Bright*, 144 S. Ct. 2244 (invalidating the long-standing *Chevron* deference doctrine).

10. *See generally Ohio v. U.S. Env't Prot. Agency*, 144 S. Ct. 2040 (2024) (imposing a highly unusual stay of EPA clean air rules over the dissent of all three liberals and Justice Barrett).

11. Long-time environmental litigator Kevin Poloncarz offers a thoughtful explication of this point in an essay reposted by his firm at *How Will EPA Regulate in Loper Bright's Uncertain Wake?,* COVINGTON (April 2024), https://www.cov.com/en/news-and-insights/insights/2024/04/how-will-epa-regulate-in-loper-brights-uncertain-wake#layout=card&numberOfResults=12.

disputes. The combined effect is a high risk of judicial caprice in place of careful design.

In worse news for the vehicle sector specifically, given this unsettling legal context, cases regarding vehicle electrification and the core California federal vehicle regulatory scheme, argued this term before the D.C. Circuit, may well reach the Supreme Court next year.[12] The first of these cases to be decided at the appellate level, for instance, upheld the California waiver program but left open the possibility of cert grants on the legality of that program next term[13] to a Court that has rapidly been cutting back the reach of settled environmental law doctrines. In sum, even as auto companies strive to compete in a global transition to electric vehicles, the basic building blocks of regulatory compliance are in ever-growing doubt.

But the second global trend towards zero emission vehicles provides tools and incentives to press on. After all, we are midway into a wholesale transition away from internal combustion engines across both cars and trucks, with zero emission vehicle sales climbing dramatically year-on-year.[14] Because zero emission vehicles are a genuinely superior technology to internal combustion engines in respect to both cost and performance[15] and the only technology fully consistent with global climate goals,[16] multiple global regions are moving forward with zero emission vehicles. Retrenchment of key standards in the United States cannot reverse the transition globally.

Indeed, the bulk of global automakers and truck engine manufacturers are committed to zero emissions futures, and plummeting battery and renewable energy prices have led the head of the International Energy Agency to deem the transition inevitable.[17] Though there has never been a viable private economic interest in continuing to cook the planet, balance sheets are now bearing this

12. *See* Dan Farber, *Vehicle Regulations on Trial,* LEGAL PLANET (Sept. 13, 2023), https://legal-planet.org/2023/09/13/vehicle-regulations-on-trial/.

13. *Ohio v. U.S. Env't Prot. Agency*, 98 F.4th 288, 294 (D.C. Cir., 2024), *cert. docketed*, No. 24-13 (July 9, 2024).

14. *See* International Energy Agency, *Outlook for Electric Mobility* (April 2024), https://www.iea.org/reports/global-ev-outlook-2024/outlook-for-electric-mobility.

15. *See, e.g.*, Tom Randall, *Long-Range EVs Now Cost Less Than the Average New Car in the US*, BLOOMBERG (June 7, 2024), https://www.bloomberg.com/news/articles/2024-06-07/long-range-evs-now-cost-less-than-the-average-us-new-car (discussing for a general audience the many advantages of the technology).

16. Yes, even though they may be powered indirectly by fossil-fuel electricity for some time to come in some markets. *See* Georg Bieker, *A Global Comparison of the Life-Cycle Greenhouse Gas Emissions of Combustion Engine and Electric Passenger Cars*, THE INTERNATIONAL COUNCIL ON CLEAN TRANSPORTATION WHITE PAPERS (July 20, 2021), https://theicct.org/publication/a-global-comparison-of-the-life-cycle-greenhouse-gas-emissions-of-combustion-engine-and-electric-passenger-cars/ (providing this analysis).

17. *See, e.g.,* Maxine Joselow, *The Clean-Energy Transition is 'Unstoppable,' IEA Says*, WASH. POST (Oct. 24, 2023), https://www.washingtonpost.com/politics/2023/10/24/clean-energy-transition-is-unstoppable-iea-says/ (discussing remarks of Fatih Birol, head of the International Energy Agency on the ultimate inevitability of the transition, and the dangers of disruption along the way).

out—with the billions of the Inflation Reduction Act (IRA) pushing corporate interests to align with public ones.[18]

In light of these competing pressures and opportunities, we need not sit around and wait for the Court to do damage. It is the weakest branch of the government, and the least democratically legitimate.[19] Other actors, from the executive and Congress to state and local governments, have statutory and Constitutional duties that require supporting environmental protections and public welfare. They have tools to carry forward their own obligations despite the Court's see-sawing opinions. Indeed, state governments have previously moved the transition forward even when *both* the Court and the executive branch have been hostile,[20] and they may need to do so again. They should find support from both industry and the public in doing so, both on the merits and as a matter of normative policy.

A clear model that local and state governments can follow to protect progress in reducing greenhouse gas emissions and driving investments in zero emission vehicles (ZEVs) exists. In recent years, California and its regulatory Air Resources Board have twice concluded quasi-contractual arrangements with industry to maintain public health protections regardless of litigation outcomes—first, the "Framework Agreements on Clean Cars,"[21] and this year, the "Clean Truck Partnership."[22] These deals, important in their own right, are also models for future efforts to align the public good with rational private interests.

These contractual mechanisms are among several potential stability-promoting tools that the Supreme Court's radical rewrite of core statutory and environmental law suggest as least-regrets approaches to supplement ongoing efforts at regulatory and statutory ambition. The emergence of these tools, as a partial response to the right-wing attack on environmental law, is a striking feature of our emerging green industrial policy at this pivotal moment—both as a practical matter in the politically pivotal autumn of 2024 and as a subject of ongoing academic study.

---

18. The IRS helpfully outlines some of these funds here: *Credits for New Clean Vehicles Purchased in 2023 or After*, INTERNAL REVENUE SERVICE, https://www.irs.gov/credits-deductions/credits-for-new-clean-vehicles-purchased-in-2023-or-after (last updated Aug. 8, 2024).

19. The classic work on the limits and vulnerabilities of the Court remains the best starting point. *See generally* GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (U. Chicago Press 2008).

20. *See* Candice Norwood, *In Trump vs. California, the State Is Winning Nearly All Its Environmental Cases*, GOVERNING (May 9, 2019), https://www.governing.com/archive/tns-trump-v-california-environmental-cases.html.

21. *Framework Agreements on Clean Cars,* CAL. AIR RES. BD. (Aug. 17, 2020), https://ww2.arb.ca.gov/news/framework-agreements-clean-cars.

22. *CARB and Truck and Engine Manufacturers Announce Unprecedented Partnership to Meet Clean Air Goals*, CAL. AIR RES. BD. (July 6, 2023), https://ww2.arb.ca.gov/news/carb-and-truck-and-engine-manufacturers-announce-unprecedented-partnership-meet-clean-air.

III. LEARNING FROM INSTABILITY: FAILURES OF LITIGATION AND SUCCESSES OF COLLABORATION

This story is best told, first, historically, as the way in which these new mechanisms have emerged is instructive. It is a story about how industry and ideological right-wing pressure on a settled regulatory regime first destabilized a more typical regulatory pathway and then required creative legal efforts to reconstruct certainty.

The past several years of regulatory history show that the best approach to ideological attacks on the regulatory structure is to find ways to keep driving change forward via tools outside litigation.

A. Utilizing Multiple Regulators Provides Opportunities for Ambition.

The divided structure of vehicle regulation has historically created multiple avenues to maintain and increase ZEV momentum by deploying their combined authorities. Three separate regulators, the Environmental Protection Agency (EPA), the California Air Resources Board (CARB), and the National Highway Transportation Safety Administration (NHTSA), operate in an overlapping statutory scheme. That structure, which includes an independent and federally-protected role for California, has been particularly important during the recent Trump-era retrenchments, and can continue to secure ambition.

Under that structure, car and truck emissions are regulated under the Clean Air Act by the first two regulators, Environmental Protection Agency (EPA) and the California Air Resources Board (CARB). The joint arrangement, which Congress has repeatedly preserved, arises from California's historical role as a pre-EPA vehicle regulator as a result of serious air quality challenges.[23] The arrangement has proven fertile, with California generally regulating more ambitiously than EPA, providing a basis for later catch-up EPA standards in an "iterative federalism" arrangement.[24] Innovations, indeed, regularly spread through large networks as Congress authorized other states with air quality issues to follow California standards at their discretion and as other international jurisdictions regularly adopted California (or EPA) programs and technologies,[25] including the now-familiar catalytic converter.[26] Given these decades of success, it is unsurprising that Congress, in the IRA, reaffirmed CARB and EPA's role in regulating emissions, including for greenhouse gas emissions and to promote

23. For a comprehensive account of this history and process, *see generally* Greg Dotson, *State Authority to Regulate Mobile Source Greenhouse Gas Emissions, Part 1: History and Current Challenge*, 49 ENVTL. L. REPORTER 11037 (2019) and Greg Dotson, *State Authority to Regulate Mobile Source Greenhouse Gas Emissions, Part 2: A Legislative and Statutory History Assessment*, 32 GEO. ENVTL. L. REV. 625 (2020).

24. *See generally* Ann Carlson, *Iterative Federalism and Climate Change*, 4 UCLA J. OF SCHOLARLY PERSPECTIVES 1 (2008).

25. *See generally* Craig Holt Segall, *Networked Federalism: Subnational Governments in the Biden Era*, 48 Ecology L. Currents 1 (2021).

26. CARB discusses this history at *History*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/about/history (last visited Sept. 11, 2024).

ZEVs—while also providing funding to support broader adoption of standards by a network of interested states.[27]

The third regulator, the National Highway Transportation Safety Administration (NHTSA), sets on-road fuel economy standards (the corporate average fuel economy or "CAFE" standards for light-duty vehicles and heavy-duty pickup and van or "HDPUV" standards for certain heavier vehicles). The standards originate from the OPEC oil crisis of the 1970s. Congress's response, the Energy Policy and Conservation Act, charged NHTSA with reducing petroleum dependence via fuel economy.[28]

Notably, since CAFE standards preempt state fuel economy standards, the oil and auto industries have periodically tried to argue that *emissions* standards under the Clean Air Act programs run by EPA and CARB are preempted. Those arguments have repeatedly been rejected by the courts,[29] and the Supreme Court notably observed that the regimes were to be harmonized in its landmark *Massachusetts v. EPA* opinion in 2007 (albeit without discussion of CARB's specific role).[30]

Thus, the core legal structure affords multiple practical opportunities for the three agencies to push each other, to create coordinated approaches, and, in the event of retrenchments or legal setbacks in parts of the system, to maintain momentum elsewhere. When industry has seized these opportunities for mutual reinforcement via collaborative "deals," the system has helped promote a steady and beneficial transition to ZEVs. But industry has repeatedly had to learn that trying to break the system comes with disruptive costs.

B. Pre-History—The Obama "Auto Deal."

The first of these deals emerged from an initial round of fossil-fuel-backed industry-led disruption. In keeping with its usual lead role, California moved to regulate vehicle greenhouse gas emissions in the early 2000s[31] and joined with other states to petition EPA to do the same. This petition culminated in the Supreme Court's *Massachusetts* decision noted above when the George W. Bush administration, bowing to oil and auto industry pressure, declined to regulate or to grant California a waiver to do so itself. Alternatively, the tripartite regulatory structure functioned well as CARB's rules offered a different path and a constituency for progress despite retrenchment. The new Obama administration

27. *See* Greg Dotson & Dustin Maghamfar, *The Clean Air Act Amendments of 2022: Clean Air, Climate Change, and the Inflation Reduction Act*, 53 ENVTL. L. REPORTER 10017, 10029 (2023).

28. The Pew Trusts have a useful (if dated) history of this program. *See* THE PEW ENVIRONMENT GROUP, *History of Fuel Economy: One Decade of Innovation, Two Decades of Inaction* (2011), https://www.pewtrusts.org/-/media/assets/2011/04/history-of-fuel-economy-clean-energy-factsheet.pdf.

29. *See Green Mountain Chrysler Plymouth v. Crombie*, 508 F. Supp. 2d 295, 343-93 (D. Vt. 2007); *Central Valley Chrysler-Jeep v. Goldstene*, 529 F. Supp. 2d 1151, 1174-80 (E.D. Cal. 2008).

30. *See Massachusetts v. EPA*, 549 U.S. 497 (2007).

31. CARB provides a helpful pocket history of this effort here: *California's Greenhouse Gas Vehicle Emission Standards under Assembly Bill 1493 of 2002,* CAL. AIR RES. BD., https://ww2.arb.ca.gov/californias-greenhouse-gas-vehicle-emission-standards-under-assembly-bill-1493-2002-pavley (last visited Sept. 11, 2024).

was able to use this pressure, to force a deal that unified the practical compliance requirements for all three programs and secured industry agreement, in part by functionally tying industry acceptance of that package to the bailout funds.[32] The result was a harmonized CARB/EPA/NHTSA program that significantly cut emissions and was renewed in Obama's second term.

C. The Auto Industry Unwisely Asks Trump to Intervene—And Hates the Consequences.

Unfortunately, industry opted to disrupt the program after the Trump election, renewing the regulatory pas-de-deux without a reliable dance partner. CARB and the Obama EPA had already concluded the review without incident and determined all was well,[33] but auto industry trade groups lobbied for what they appear to have conceived as limited regulatory relief (minor adjustments to timing and stringency, essentially) and initially cheered EPA's decision to make changes after a hastily redone mid-term review.[34] Applause turned to regret as the industry discovered that the Trump Administration intended to flatline progress on both carbon pollution and fuel economy standards, breaking the national program that provided investment certainty. The industry also faced sudden real planning complexities as California took defensive measures to maintain progress by severing itself from the weakened national standards.[35]

Faced with the consequences of their actions, the automakers told the administration that the rollbacks were "untenable" and profoundly disruptive; the Trump team finalized its plans anyway, undercutting company electrification plans globally.[36] Making matters even worse, Trump then pulled the waiver for California's ongoing greenhouse gas program for light-duty vehicles years after it had been issued, destabilizing billions in investment and putting California in jeopardy of violating state and federal clean air and climate mandates.[37]

---

32. *See* Jody Freeman, *The Obama Administration's National Auto Policy: Lessons from the Car Deal*, 35 HARV. ENVTL. L. REV. 343 (2011). For a discussion of the full package deal, which was tied together politically if not legally, *see* Daniel J. Weiss & Jackie Wiedman, *5 Ways the Obama Administration Revived the Auto Industry by Reducing Oil Use*, CENTER FOR AM. PROGRESS REPORTS (Aug. 27, 2012), https://www.americanprogress.org/article/5-ways-the-obama-administration-revived-the-auto-industry-by-reducing-oil-use/.

33. The results are memorialized online at *Advanced Clean Cars Midtem Review*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/advanced-clean-cars-midterm-review (last visited Sept. 17, 2024).

34. *See* Sonari Glinton, *Trump Administration Takes Key Step to Rolling Back Auto Fuel Standards*, WGBH (Aug. 14, 2017), https://www.wgbh.org/news/2017-08-14/trump-administration-takes-key-step-to-rolling-back-auto-fuel-standards.

35. *See* Tony Barboza, *California Moves to Safeguard Vehicle Emissions Rule from Trump Rollback*, L.A. TIMES (Aug. 7, 2018), https://www.latimes.com/local/lanow/la-me-carb-trump-emissions-20180807-story.html.

36. Coral Davenport, *Automakers Tell Trump His Pollution Rules Could Mean 'Untenable' Instability and Lower Profits*, N.Y. TIMES (June 6, 2019), https://www.nytimes.com/2019/06/06/climate/trump-auto-emissions-rollback-letter.html.

37. *See* Coral Davenport, *Trump to Revoke California's Authority to Set Stricter Auto Emissions Rules*, N.Y. TIMES (Sept. 7, 2019), https://www.nytimes.com/2019/09/17/climate/trump-california-emissions-waiver.html; The Trump Administration's withdrawal documents and a related effort to

D. The Framework Agreements.

Confronting years of see-sawing litigation over the waiver recission and regulatory rollbacks as well as substantial jeopardy to long-term planning, the core of the industry changed course. Five auto companies—Ford, Honda, VW, BMW, and Volvo—opened negotiations with California and the states that follow its rules (which collectively comprise almost half of the U.S. market) to maintain greenhouse gas reductions in the face of an unstable regulatory regime.[38]

The companies and CARB developed final settlement agreement contracts, distinct for each company, under CARB's contract and enforcement settlement authority. The contracts established that those companies would maintain compliance under CARB's program by reducing greenhouse gas pollution across their entire fleets in a way broadly consistent with the disrupted national program regardless of litigation outcomes (and because these agreements were much more stringent than the finalized Trump EPA and NHTSA rules, they guaranteed national compliance as well).[39] The companies got real benefits from these deals—principally, authorization to comply on a *fleet-wide basis*, thereby enabling national-scale rather than state-by-state product planning, which they ordinarily would not have been able to do under CARB's California-specific rules (or under parallel rules in states following those standards) without state-level enforcement consequences. Thus, CARB and its supporting states traded some degree of state-by-state rigor and certainty in exchange for clear progress nationally. The companies gained regulatory relief and flexibility. In essence, the deals helped knit back together the nationally harmonized program that Trump had disrupted. The deals continued through model year 2026, thereby providing for certainty on investment and product deployment regardless of the continuing legal churn over the waiver and federal program.

Other automakers were less prescient. GM maintained support, sometimes tacit and sometimes explicit, for the Trump administration until after the 2020 election.[40] Stellantis and Toyota likewise took another year or two to recognize CARB's decades-old authority—Toyota via a letter to CARB and a change in its litigation position and Stellantis ultimately via a separate agreement.[41]

---

preempt California's standards are archived at *Final Rule: One National Program on Federal Preemption of State Fuel Economy Standards*, ENVT'L PROT. AGENCY, https://www.epa.gov/regulations-emissions-vehicles-and-engines/final-rule-one-national-program-federal-preemption-state (last visited Sept. 24, 2024).

38. Coral Davenport & Hiroko Tabuchi, *Automakers, Rejecting Trump Pollution Rules, Strike a Deal With California*, N.Y. TIMES (July 25, 2019), https://www.nytimes.com/2019/07/25/climate/automakers-rejecting-trump-pollution-rule-strike-a-deal-with-california.html.

39. *See* Joselow, *supra* note 17.

40. Rachel Becker, *GM Drops Fight Against California Car Standards*, CALMATTERS (Nov. 30, 2020), https://calmatters.org/environment/2020/11/general-motors-drops-fight-california-standards/.

41. Riley Beggin, *Stellantis, Toyota Drop Out of Trump Lawsuit Against California Emission Rules*, THE DETROIT NEWS (Feb. 2, 2021), https://www.detroitnews.com/story/business/autos/2021/02/02/stellantis-toyota-drop-out-trump-suit-against-california-emission-rules/4352557001/; David Shephardson, *Toyota Recognizes California*

Meanwhile, the companies were exposed to compliance risk, a lesson they later learned at their cost.[42] Stellantis's own Framework deal with CARB responds to the product planning challenges the company created by failing to reach a deal sooner, and secures certainty by committing to follow CARB rules through 2030 regardless of litigation outcomes.[43] Toyota and GM remain uncommitted to any formal contractual arrangements.

E. Biden's Restoration, New Rules, and New Threats.

The rest of the regulatory story is quickly told. The Biden administration eventually restored the relevant waiver[44] and imposed newly stringent federal standards for the model years leading up to the mid-2020s through both EPA and NHTSA.[45] More recently, it has proposed a new round of greenhouse standards for cars[46] and trucks[47] and a new set of fuel economy standards.[48] CARB resumed its historic role as the leading regulator. Acting more ambitiously to address the climate crisis and California's persistent air quality problems, it finalized a set of zero emission vehicle standards for new cars that will effectively end internal combustion engine vehicle sales in 2035,[49] and a parallel set of rules for trucks ends heavy-duty combustion vehicle sales in 2036.[50] These rules awaited EPA waivers at the time of writing.

Authority to Set Vehicle Emissions Standards, REUTERS (Aug. 23, 2022), https://www.reuters.com/business/sustainable-business/toyota-recognizes-california-authority-set-vehicle-emissions-standards-2022-08-23/#:~:text=WASHINGTON%2C%20Aug%2023%20(Reuters),government%20fleet%20purchases%20by%20California.

42. Stellantis, for example, apparently found itself with a compliance deficit resulting in significant national product planning challenges. *See* Steve Hanley, *Unpacking the Stellantis "No ICE For You" Story*, CLEANTECHNICA (June 20, 2023), https://cleantechnica.com/2023/06/20/unpacking-the-stellantis-no-ice-for-you-story/ (Observing, accurately, "[t]he company that later became part of Stellantis decided to back the wrong horse during the prior administration. Actions have consequences").

43. *California announces partnership with Stellantis to further emissions reductions*, CAL. AIR. RES. BD. (Mar. 19, 2024), https://ww2.arb.ca.gov/news/california-announces-partnership-stellantis-further-emissions-reductions.

44. California State Motor Vehicle Pollution Control Standards, 87 FED. REG. 14332 (Mar. 14, 2022).

45. Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards, 86 FED. REG. 74434 (Dec. 30, 2021); Corporate Average Fuel Economy Standards for Model Years 2024-2026 Passenger Cars and Light Trucks, 87 FED. REG. 25710 (May 2, 2022).

46. Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, 88 FED. REG. 29184 (May 5, 2023).

47. Greenhouse Gas Emissions Standards for Heavy-Duty Vehicles-Phase 3, 88 FED. REG. 25926 (Apr. 27, 2023).

48. Corporate Average Fuel Economy Standards for Passenger Cars and Light Trucks for Model Years 2027-2032, 88 FED. REG. 56128 (Aug. 17, 2023).

49. *See Advanced Clean Cars Program*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/about (last visited Sept. 27, 2024).

50. *See California approves groundbreaking regulation that accelerates the deployment of heavy-duty ZEVs to protect public health*, CAL. AIR RES. BD. (Apr. 28, 2023), https://ww2.arb.ca.gov/news/california-approves-groundbreaking-regulation-accelerates-deployment-heavy-duty-zevs-protect.

But the cycle threatens to begin again. Republican attorneys general and their fossil fuel allies quickly sued over the restored waiver and new federal rules, and the D.C. Circuit heard that argument in September 2023.[51] The auto companies, having learned wisdom, did not sue and generally supported the regulators. The red states instead re-raised the implausible argument that 1970s era efforts to reduce oil dependency somehow preempt CARB rules that cut combustion emissions (and so also reduce oil dependency).[52] They also have raised new challenges, asserting that EPA, for instance, violated the Republican Justices' newly created "major question doctrine" by regulating vehicles in its usual matter.[53] Ohio further posited that the standards California set for itself under the decades-old waiver provision of the Clean Air Act somehow violate its "equal sovereignty."[54] The D.C. Circuit ultimately threw out most of the claims on standing grounds, while deciding the equal sovereignty arguments were inapplicable.[55] However, cert petitions are a certainty. Even if such petitions are not granted, the same arguments are likely to be raised (doubtless with strengthened standing affidavits) on future CARB programs and EPA waiver grants, potentially along with shadow docket stay motions requests.

F. Meanwhile, Truck Engine Manufacturers (But Not the Trucking Industry) Learn from Auto Examples.

Heavy-duty vehicle manufacturers only recently found their way into the shadow of legal uncertainty cast by the Court. However, it appears they have more quickly understood the need to avoid the chaos that litigation can cause because they dropped pending litigation over California programs.

CARB recently promulgated emissions standards setting a path to 100% zero emission truck sales by 2036, along with stringent standards for remaining combustion engines.[56] Last year, the Engine Manufacturers Association (EMA) filed suit against CARB over its combustion standards[57] and signaled a coming suit against EPA should it approve the electrification rules, but those suits did not

51. Claire Mindock, *U.S. appeals court judges appear skeptical of challenge to Biden clean car rule*, REUTERS (Sept. 14, 2023), https://www.reuters.com/legal/government/us-appeals-court-judges-appear-skeptical-challenge-biden-clean-car-rule-2023-09-14/.

52. *See Ohio v. EPA*, CLIMATE CASE CHART, https://climatecasechart.com/case/ohio-v-epa/ (last visited Sept. 27, 2024) for the case over the California waiver, and *Texas v. EPA*, CLIMATE CASE CHART, https://climatecasechart.com/case/texas-v-epa-2/ (last visited Sept. 27, 2024) for the primary case over EPA's standards. Ohio's opening brief outlines its preemption (pp.33-42) and equal sovereignty arguments (pp. 17-33) in detail and is available online at https://climatecasechart.com/wp-content/uploads/case-documents/2022/20221102_docket-22-1081_brief.pdf.

53. *See* briefs cited *supra* note 52.

54. *See* briefs cited *supra* note 52.

55. *Ohio v. EPA*, 98 F.4th at 307-08; 314.

56. *See California approves groundbreaking regulation, supra* note 50.

57. *See Advanced Clean Cars Program, supra* note 49.

persist.[58] Facing a public outcry,[59] and potentially years of back-and-forth in the courts, EMA and its members voluntarily dismissed the suit. Instead, less than a year later, EMA followed the Framework example and formed the "Clean Truck Partnership" with CARB. The agreement committed EMA to 100% zero emission truck sales in California regardless of litigation in exchange for CARB's commitment to propose partial alignment of its combustion rules with EPA's, and a few other proposed regulatory flexibilities.[60]

G. Reflections.

A different history was possible here. In a more rational system, we could have expected the well-functioning troika of vehicle regulators to finalize rules for light- and heavy-duty vehicles to speed the zero emission vehicle transition—even under the Trump administration given the clarity of the relevant statutory commands—and issue the necessary waivers and authorizations to put the most aggressive of these rules, passed in California, into action. Then, as new on-road vehicles shifted steadily to electric, we might expect continued public and private funding of infrastructure while regulatory efforts moved on to address other aspects of the transportation system.

But that, of course, is not what happened. Instead, industry actors sought unwise (but relatively modest) rollbacks and were met with ideological radicalism from the executive branch—a radicalism that has since infected the Supreme Court as well. The result was a careening set of switchbacks on policy and law that ultimately was so costly and complex that key manufacturers instead had to seek certainty by new means in a series of non-regulatory agreements with California. In essence, because of the breakdown in the Republican-led executive branch and Court, the old industry/environmentalist dance moves around regulation instead turned into chaos that required repair.

The problem now is that, going forward, the Court (and perhaps the next President if Trump is reelected) is more likely to chaotically attack core Clean Air Act and administrative law structures than to speed the necessary transition. Litigation intended to give the Court a path to bar or limit regulatory moves away from fossil fuels in this sector is currently at the appellate level (as I noted above)

---

58. *See* Eric Miller, *EMA Drops Lawsuit Challenging CARB Rule*, TRANSPORT TOPICS (Aug. 25, 2022), https://www.ttnews.com/articles/ema-drops-lawsuit-challenging-carb-rule-lead-time (describing the brief life and swift death of EMA's lawsuit).

59. For a sense of the outraged response at EMA's actions, *see* the multi-organization letter posted online at *Letter to Truck and Engine Manufacturer's Association*, PUBLIC CITIZEN (Aug. 8, 2022), https://www.citizen.org/article/letter-to-ema/ and the immediate responses by EMA member companies: *Ford Statement on EMA Litigation Challenging California Air Resources Board's Omnibus Low-NOx Regulations*, FORD (June 13, 2022), https://media.ford.com/content/fordmedia/fna/us/en/news/2022/06/13/ford-statement-on-ema-litigation.html; and *GM Statement on EMA Litigation Challenging California Air Resources Board's Omnibus Low-Nox Regulations*, GM, https://news.gm.com/newsroom.detail.html/Pages/news/us/en/2022/jun/0630-ema-statement.html (last visited Sept. 27, 2024) to distance themselves from the ill-advised litigation.

60. *See Framework Agreements on Clean Cars, supra* note 21.

and may be heard by the Court in the next year, and there is a real chance of a Trump restoration. Claims may also swiftly be brought against new waivers issued to California for its recent, and even more ambitious, round of vehicle rules. These claims will re-raise the risks of systemic legal disruption each time they are brought and create a risk of requests for immediate stays from the Supreme Court, which it is now more commonly granted.[61] Without defensive measures, another round of chaos may await what would otherwise be a rational and necessary agenda.

It is heartening that, despite these threats, anti-regulatory efforts intended to hold back the rise of ZEVs have largely turned to ashes as a practical matter. Deals to promote clear paths to ZEVs have succeeded on both public health and investment certainty metrics. That makes sense: The internal combustion engine is an inferior technology to ZEVs because ZEVs last longer, are cheaper to fuel and own, are absolutely necessary in the face of the climate crisis, and are equally necessary for states to comply with federal air quality laws.[62] Strategies that prolong investments are ultimately unstable and uneconomic. Alternate contractual mechanisms were, and are, available to maintain progress—as are a broader array of policies that can buffer against the potential disfunction we are now facing. Those mechanisms are critically important as a matter of domestic public policy, as the pace of change is at stake, and the role of American industry in a major global economic transition. Litigation challenging the laws backing that transition does not just produce costly inefficiencies and unwise investment in stranded combustion assets; it threatens to overturn core regulatory systems. Thus, what was always a poor moral and economic strategy increasingly threatens wholesale damage to all involved, including the broader American public.

IV. NEW TOOLS FOR POLICY COHERENCE DESPITE LEGAL INCOHERENCE

We will all shortly have the chance to demonstrate what we have learned. The Clean Air Act and related law should, in principle, produce a measured regulatory progression over the coming years as the three regulators conclude or soon complete what should be among the last major combustion and carbon pollution rules for each vehicle class as the sector decarbonizes and internal combustion engines become historical artifacts. But the political and legal possibilities of major system disruption are real.

Now, in a more rational polity, one might simply argue for new federal statutes to guarantee stability. After all, states blue and red have a strong interest

61. *See, e.g.*, Sean H. Donahue & Megan M. Herzog, *The Bonfire of the Equities: Judicial Stays of Federal Environmental Regulations*, 62 HARV. L. SCHOOL J. ON LEGISLATION 1, 1-2 (2024), https://journals.law.harvard.edu/jol/2024/06/24/the-bonfire-of-the-equities-judicial-stays-of-federal-environmental-regulations/.

62. *See Zero-Emission Vehicle Program*, CAL. AIR. RES. BD., https://ww2.arb.ca.gov/our-work/programs/zero-emission-vehicle-program (last visited Sep. 17, 2024) and an extensive analysis of ZEV technology and its performance is within the Air Board's analyses at https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2022/accii/appg.pdf.

in the transition as facilities and investments spread nationally, just as they all share an interest in a stable climate and good air quality. Indeed, a national ZEV transition statute, setting out clear timelines for each vehicle class, coordinating IRA and other federal funds, setting standards, and integrating charging infrastructure with the grid, would be helpful. But in the face of hyper-partisanship on climate, as well as the filibuster, we will likely need to manage with current law for the time being.

Attorneys interested in safeguarding certainty and the climate, should therefore learn from recent history and work to build coordination and clarity mechanisms to safeguard the transition while attending to relevant client interests. And, more broadly, state and federal policymakers and corporate actors should actively work to ensure stability in this transition, as it is both consistent with law and wholly consistent with the public interest.

A. Contractual and Public Commitments

First, given recent history, both the bar and relevant policymakers should take a serious look at non-regulatory mechanisms that can support continued progress. After all, contractual instruments with regulators in California and recognized in states following CARB rules now cover both light- and heavy-duty vehicle makers and a substantial portion of the overall market. As a result, the regulatory regime is able to rely on a measure of certainty from these agreements, private investments can be made with some protection from the Court, and both economic value and public health are protected. Given continuing risks, the expiration of some of these agreements in the near future, and their limited coverage, it is time to seriously consider what sorts of extra-regulatory arrangements can define a clear path out of combustion for both sectors.

The light-duty side is ripe to revisit this question, as current agreements soon expire. Automakers with market share sufficient to weigh strongly towards ZEVs are committed to reductions through 2026 (and Stellantis through 2030), regardless of regulatory and litigation outcomes, and now have an opportunity to negotiate towards 100% ZEV sales in the 2030s, as CARB regulations require. As cases come closer to the Court, and as EPA and NHTSA finalize their regimes, the time is ripe for companies to consider *contractually* committing to the finalized three-regulator regime. Such commitments could come in the form of renewed Framework agreements with CARB, agreements or MOUs with all three regulators, or even contracts with third parties, such as investors, environmental institutions, or others with an interest in defining the course of the ZEV trajectory.

The same equities that motivated dealmaking previously are now amply present. Ongoing and likely future litigation creates the same questions about enforcement and compliance with the potentially shifting regimes that warranted the enforcement settlements that underwrote the prior light-duty agreements. Indeed, with the IRA underwriting even larger investments now, companies, if anything, have a stronger interest in stability. State and federal policymakers,

who continue to need to fulfill binding federal public health and state climate law mandates regardless of the fate of any particular regulatory regime and who seek to deliver a safe climate and efficient transportation system to their constituents, have a similar interest in stability.

Though not the only mechanism available, contractual settlements remain of considerable utility. Such contracts would provide clarity and certainty to investors and corporate boards and could also maintain the value of the "credits" for ZEVs, pollution reduction, or fuel economy (used as currency in the regulatory regimes even in the face of a litigation-driven collapse).

The heavy-duty market also has paths toward stability. Truck manufacturers have already committed to CARB for 100% ZEV sales by 2036, but that instrument is laxer with regard to states following CARB standards and offers other opportunities for clarification with regard to the national market as a whole. There is ample room to strengthen those commitments, for instance, with a recent federal strategy that helps guarantee necessary infrastructure build-out in tandem with growing truck electrification.[63]

To be sure, contracts are not simple and are not a substitute for thoughtful publicly-developed regulation. All else equal, the regulatory notice and comment process provides a greater opportunity to balance equities, seek feedback, and deliver public benefits. But the trouble is that the Court (and a potential Trump presidency) disfavor these mechanisms. Indeed, one of the ironies of the recent wave of Supreme Court opinions unsettling settled law is that though they are rhetorically couched in language about the role of the Court in preventing unexpected or sweeping regulatory overreaches and in producing predictable results, those opinions are actually sufficiently radical and unexpected as they have functionally required decision makers to seek somewhat less transparent mechanisms to respond. In essence, the Court is rhetorically calling for reasoned public decision making even as it is actually forcing the development of novel "kludges" like the enforcement settlements that are the least-bad substitute to superior regulatory solutions.

But there is room to pair regulatory approaches and new mechanisms that are in the public interest—and ways to build some of the public equities inherent to regulation into new deals. For instance, any deals must carefully account for considerations ranging from antitrust to the particularized authorities of government counterparties to contract and can also account for public feedback and comment on the equities to date and on paths forward on electrification. Public counter parties should consider how best to secure additional certainty while maintaining public transparency in this novel context. But difficulty is not a good reason to abandon the mechanism. Companies have real obligations to

63. *See FACT SHEET: Biden-Harris Administration Sets First-Ever National Goal of Zero-Emissions Freight Sector,* THE WHITE HOUSE (APRIL 24, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/04/24/fact-sheet-biden-harris-administration-sets-first-ever-national-goal-of-zero-emissions-freight-sector-announces-nearly-1-5-billion-to-support-transition-to-zero-emission-heavy-duty-vehicles/.

investors and to society to protect certainty and accelerate the ZEV transition; regulators have obligations to the public to protect public health. Both sides need durable hedge strategies that can protect progress in the face of retrenchment, and these instruments, already productive, are worth revisiting.

B. Mobilizing Alternative Public Actors with Alternate Tools

We should also consider solutions that help re-balance the destabilized government regime we face by creating other centers of policy and power that are less subject to ideological disruption by the federal judiciary or a potentially captured federal executive. We may need multiple tools to restore institutional stability. The core problem is one of political minority rule—essentially of right-wing ideological capture of the Court after a multi-decade campaign financed substantially by fossil fuel interests. Just as state agencies and corporate executives responded in the framework agreement context by building new tools to reflect the actual interest of the majority, other actors in our larger system, from governors to state legislators to members of civil society, will need to continue to find new approaches to vindicate the majority interest in environmental regulation that is repeatedly expressed in our core environmental statutes. Put plainly: The public has, for decades, voted for environmental protection and Congress has legislated accordingly. The Court is not the only Constitutional actor in this system, and it is the least democratically responsive one; other actors may need to step in to reflect the public interest.

Thus, there is a real need, now, to safeguard the ZEV transition via policy anchored by other centers of power that are relatively resilient to federal churn—especially governors and state legislatures who have a wide range of tools available to support electrification, including but extending beyond the contractual mechanisms just discussed. For example, the Clean Air Act includes broad planning and regulatory obligations extending beyond new vehicle standards; because electrification is needed to meet the Act's public health standards, states can and should continue to use all tools available to promote it. The options for policy are ample. Land-use prohibitions on internal combustion engines in certain spaces, so-called "feebates" that help fund ZEVs and disfavor internal combustion via a fee on internal combustion engines that is automatically transferred as a rebate to ZEV purchasers,[64] toxics or fuels rules requiring no further use of dangerous gasoline or diesel fuel by a certain date, liability provisions that impose substantial liability on internal combustion engine manufacturers over time, road charges that strongly favor ZEVs, fleet or indirect source rules that engage building owners and utilities in electrification, ratemaking proceedings that extend charging infrastructure … the field is open.

64. *See e.g.*, Alan Jenn & Daniel Sperling, *California Feebate: Revenue Neutral Approach to Support Transition Towards More Energy Efficient Vehicles*, UC DAVIS INST. FOR TRANSPO. STUDIES REPORTS (2017), https://escholarship.org/uc/item/7jj0x8dk.

V. CONCLUSION

We are collectively deciding, now, the trajectory of planetary climate and of our civilization. We are out of time for the usual games of cat and mouse played by industry litigators, and we certainly no longer have time for the Court's ongoing ideological deregulatory project. The adults in the room have, at this point, demonstrated that progress is possible even at times of real instability. It is time to learn that lesson by pairing an ongoing regulatory push with a wider array of tools to drive forward the necessary economic and environmental transition and vindicate the public interest and the core intent of our foundational environmental statutes.

We should all hope for ambitious regulations from EPA and NHTSA, full implementation of CARB's leading program, continued equitable and deep investment from IRA programs, and legal progress on the system as a whole. Nothing in this piece is intended to suggest that these regulatory and legal mechanisms are anything other than legally necessary, scientifically essential, and morally pressing. But we also need not be sitting ducks for the latest Federalist Society pet legal theory about what eighteenth century framers might think about the power grid or Republican ideological attack on the administrative state. It is time to complement regulatory efforts with substantial additional measures to protect progress.