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Comments of the Competitive Enterprise Institute, American Energy Alliance, Americans for Tax Reform, Freedom Works, Caesar Rodney Institute, Committee for a Constructive Tomorrow (CFACT), Energy and Environment Legal Institute, Roughrider Policy Center, and 60 Plus Association

Thank you for the opportunity to comment on the National Highway Traffic Safety Administration’s (NHTSA) notice of proposed rulemaking (NPRM)¹ to repeal portions of the Trump administration’s One National Program Rule, also known as Part 1 of the Safer Affordable Fuel Efficient (SAFE) Vehicles Rule.² Please refer all questions about these comments to Marlo Lewis, Senior Fellow, Competitive Enterprise Institute (marlo.lewis@cei.org).

Introduction

The SAFE 1 Rule, finalized in September 2019, determines that state policies regulating or prohibiting tailpipe carbon dioxide (CO₂) emissions “directly or substantially affect corporate average fuel economy” (84 FR 51313). Because such policies are “related to” fuel economy standards, they are expressly preempted under Section 32919(a) of the Energy Policy and Conservation Act (EPCA).³

The SAFE 1 Rule restores the pre-2009 institutional framework for determining Corporate Average Fuel Economy (CAFE) standards. By eliminating California’s tailpipe CO₂ emission standards and zero-emission vehicle (ZEV) mandates, SAFE 1 ends Sacramento’s power to bully automakers into serving its ideological agenda rather than the revealed preferences of consumers.⁴ That should relieve the political pressure on NHTSA, the Environmental Protection Agency (EPA), and manufacturers to ignore the adverse effects of CAFE standards on vehicle affordability, consumer choice, and occupant safety.

Repealing SAFE 1 and returning to the Obama administration’s unlawful exemption of California from EPCA preemption will result in more stringent CAFE standards. Those more stringent standards will increase new-car prices and further limit consumer choice by restricting the availability of larger, heavier vehicles. The immediate impact will be on new cars, but those effects will quickly extend to used cars as well.

The Biden administration seeks to rapidly phase out the fossil fuel industry.⁵ It therefore wants to reestablish the California Air Resources Board (CARB) as the nation’s vanguard fuel economy regulator. As explained in Appendix A, the Obama administration put CARB in the regulatory driver’s seat by giving it the power to create market chaos if automakers do not bend to its will. That negates EPCA preemption and inverts the statutory scheme Congress created.

While professing nondescript “doubts” about SAFE 1’s preemption analysis, the NPRM offers no reasoned rebuttal. Instead, the NRPM argues that NHTSA has no authority to promulgate regulations interpreting and applying EPCA preemption. The NPRM would have us believe Congress enacted a broad, clear, and categorical preemption just so states (and their allies in the White House and federal agencies) could evade it.

Overview

Our comments develop the following points:

1. The SAFE 1 Rule conclusively demonstrates that California’s tailpipe CO₂ standards and ZEV mandates are directly and substantially “related to” fuel economy standards and, thus, are preempted by EPCA Section 32919(a).
2. The SAFE 1 Rule is an “unprecedented” rulemaking but so was the Obama administration’s collusion with California to evade EPCA preemption. Unprecedented violations require unprecedented corrections.
3. The NPRM is itself unprecedented—the first-ever assertion of regulatory cancel culture. It proposes to delete not only the SAFE 1 Rule’s EPCA preemption analysis, but also all similar statements in previous rules with long-expired regulations that were not based on such statements in the first place. Moreover, the NPRM declines to debate the opinions it proposes to delete.
4. It strains credulity to suppose, as the NPRM does, that Congress would declare preemption in broad and categorical terms, textually link preemption to NHTSA’s “core

duties,” “substantive tasks,” and the CAFE program’s “substance,” and yet expect NHTSA to sit on the regulatory sidelines when states and other political actors collude to gut Congress’s express preemption.

5. The NPRM is confused about the nature of preemption. To say that a preemption statute is “self-executing” does not mean it is *self-explicating* or *self-implementing*. Self-executing simply means that any conflicting state policy is *automatically* void. Preemption occurs *ab initio*—at the moment such policy is enacted or adopted, not when a court later declares it so. However, a preemption statute has no practical effect unless someone interprets and implements it. Who better than the agency Congress has authorized to administer the program that preempts state policymaking in the same field?
6. The NPRM infers from the absence of “express regulatory authority” in Section 32919(a) that NHTSA has no authority prescribe “legislative rules” addressing EPCA preemption. Two alternative explanations of the statute’s “silence” are more reasonable.
7. First, because EPCA preemption is broad, clear, and categorical, Congress in 1975 likely assumed no state would dare try to evade it. For example, because the scientific relationship between tailpipe CO₂ emissions and fuel consumption was the very basis for testing compliance with CAFE standards, the subterfuge of regulating fuel economy by regulating tailpipe CO₂ emissions would have seemed ridiculous to EPCA’s drafters. The provision’s “silence” regarding “supplemental regulations” partly reflects Congress’s inability in 1975 to anticipate the brazenness of 21st century “climate ambition.”
8. Second, and more importantly, as the NPRM’s examples of other preemption statutes confirm, Congress provides express regulatory authority when subsequent regulatory adjudication is required to *approve* state policies that a broad categorical preemption would prohibit. The absence of express regulatory authority in Section 32919(a) is simply a reflection of the preemption’s *absoluteness*. It in no way implies that NHTSA is prohibited from reasserting preemption when state and federal actors scheme to nullify it.
9. The clear meaning and straightforward application of EPCA 32919(a) are fatal to California’s tailpipe CO₂ standards and ZEV mandates. That is why the NPRM does not attempt to rebut SAFE 1’s analysis of “Congress’s purpose,” and instead proposes to cancel statutory interpretations it declines to debate. The NPRM abandons reasoned decision making. It cannot stand.
10. The July 2009 EPA waiver purporting to authorize California’s tailpipe CO₂ standards did not merely elevate California from fuel economy stakeholder to decision maker. It also gave CARB the whip hand in fuel economy negotiations, empowering the agency to balkanize auto markets unless it gets its way. That dynamic is antithetical to Congress’s purpose. We discuss it in Appendix A.

SAFE 1 Preemption Analysis

SAFE 1's preemption analysis may be summarized as follows. EPCA 32919(a) prohibits states from adopting or enforcing laws or regulations "related to" fuel economy standards. California's tailpipe CO₂ standards are physically and mathematically "related to" fuel economy standards. An automobile's CO₂ emissions per mile are directly proportional to its fuel consumption per mile. If an agency regulates tailpipe CO₂ emissions, it also regulates fuel economy, and vice versa.

In addition, tailpipe CO₂ standards are *fleet average* standards, just like the fuel economy standards they mimic, and unlike tailpipe emission standards for criteria and toxic air pollutants, which apply to each vehicle. Tailpipe CO₂ standards and CAFE standards are "two sides (or, arguably, the same side) of the same coin" (83 FR 43327).⁶

The two types of standards will remain mathematically convertible as long as affordable and practical onboard carbon capture technologies do not exist (71 FR 17670).⁷ Since the start of the CAFE program in 1975 and for the foreseeable future, all design and technology options for reducing tailpipe CO₂ emissions, such as aerodynamic streamlining, low rolling resistance tires, and hybrid engines, are fuel-saving strategies by another name.

The Congress that enacted EPCA in 1975 understood the scientific relationship between CO₂ emissions and fuel economy. That is why it approved the EPA's procedure of testing automotive fuel economy by measuring tailpipe CO₂ emissions (83 FR 43234).

California's zero-emission vehicle (ZEV) mandates also have a substantial impact on corporate average fuel economy (84 FR 51314). As ZEV mandates tighten, fleet-average fuel economy increases in a mathematically predictable manner. Thus, EPCA also expressly preempts state ZEV mandates.

Furthermore, because the aforementioned California policies interfere with the national fuel economy system Congress created, they also are "impliedly" preempted. The interference occurs in three main ways.

First, the California policies revise regulatory determinations Congress authorized NHTSA to make. EPCA⁸ and D.C. Circuit case⁹ law require NHTSA to weigh and balance five factors when determining CAFE standards: technological feasibility, economic practicability, the effect of other federal emission standards on fuel economy, the national need to conserve energy, and the impact of fuel economy standards on occupant safety. California is not bound by those conditions, and is free to subordinate them to "climate ambition."¹⁰

Only by sheer improbable accident would CARB, when prescribing tailpipe CO₂ standards, weigh and balance such factors the same way NHTSA does when prescribing fuel economy standards. Indeed, there is no public policy rationale for elevating CARB from fuel economy stakeholder to decisionmaker *unless* its technical assessments and regulatory priorities differ from NHTSA's.

Second, California's ZEV mandates directly conflict with the CAFE program. ZEV standards are technology-prescriptive, requiring automakers to sell increasing percentages of vehicles powered by batteries or fuel cells. CAFE standards are technology-neutral. Manufacturers are "not

compelled to build vehicles of any particular size or type.” Rather, each manufacturer has its own fleet-wide performance standard that “reflects the vehicles it chooses to produce.”¹¹

By law, NHTSA’s standards are to be set in light of technological feasibility and economic practicability. The ZEV program is not similarly constrained. For example, in 1998, CARB required¹² ten percent of new car sales to be ZEVs by 2003—despite it being obvious that the mandate was neither feasible nor affordable.

The 2007 Energy Independence and Security Act (EISA) amended EPCA to prohibit NHTSA from considering the fuel economy of alternative vehicles (including EVs)¹³ when setting CAFE standards. See 49 USC § 32902(h)(1)¹⁴ and 77 FR 62656.¹⁵ That ensures CAFE standards never become so stringent automakers must sell EVs to comply (85 FR 25170).¹⁶ Mandating EV sales is the very purpose of the ZEV program, which logically culminates in banning the sale of new gasoline-powered vehicles.¹⁷

Third, California’s *modus operandi* is autocratic. CARB assures automakers it will not subject them to a market-balkanizing fuel economy patchwork—but *only if* the companies pledge not to contest California’s authority (75 FR 32528).¹⁸ It negotiates a deal allowing four automakers to meet reduced mileage standards—if they promise not to challenge California’s authority.¹⁹ It expels from the state’s government procurement market automakers who oppose California’s litigation against the SAFE 1 Rule.²⁰ The NPRM would re-empower CARB to pursue quid-pro-quo regulatory favoritism and infringe automakers’ due process and equal protection rights.

Federal preemption statutes derive their authority from the Supremacy Clause, which provides that constitutionally-valid federal laws “shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the contrary notwithstanding.”²¹ As the Supreme Court explained in *Maryland v. Louisiana (1981)*, “It is basic to this constitutional command that all conflicting state provisions be without effect.”²²

It is not always obvious whether a state policy conflicts with a federal statute or whether federal interest in a field is so dominant that it precludes enforcement of state laws on the same subjects. In such cases, the federal statute’s preemptive effect must be inferred. But in the case of EPCA, the preemption is both broad, clear, and categorical (non-waivable and allowing no exceptions).²³ As the proposed SAFE Rule explained:

Unlike the Clean Air Act [Section 209 preemption of state motor vehicle emission standards], EPCA does not allow for a waiver of preemption. Nor does EPCA allow for states to establish or enforce an identical or equivalent regulation. In a further indication of Congress’ intent to ensure that state regulatory schemes do not impinge upon EPCA’s goals, the statute preempts state laws merely related to fuel economy standards or average fuel economy standards (83 FR 43233).

Unprecedented Violations Call for Unprecedented Corrections

The NPRM notes that SAFE 1 “represented the first time, in the nearly 50-year history of the Corporate Average Fuel Economy (CAFE) program, that NHTSA had adopted regulations expressly defining the agency’s views on the scope of preemption of state laws that regulate fuel

economy” (86 FR 25981). That is correct. However, the innuendo that *unprecedented = unlawful* is false.

Unprecedented violations call for unprecedented corrections. All previous Clean Air Act preemption waivers granted by the EPA to California approved emission standards for criteria and toxic air pollutants. Such standards do not implicitly regulate fleet-average fuel consumption. The California standards approved by the EPA’s July 2009 waiver²⁴ were the first in the CAFE program’s nearly 35-year history that directly regulated fuel economy.

The 2009 waiver, moreover, was a key deliverable of secretive (“put nothing in writing, ever”) negotiations²⁵ between the Obama administration, California, and automakers. Never before had federal policymakers colluded with California to evade EPCA preemption.

It is a bit much to make novelty an objection to SAFE 1’s restoration of NHTSA’s fuel economy leadership, which was usurped by an unprecedented regulatory cabal.

Regulatory Cancel Culture

The NPRM proposes to “withdraw” not only the SAFE 1 Rule’s “interpretive views” on EPCA preemption but also all similar preamble language in rules going back 18 years or more. Specifically, the NPRM proposes withdraw the preemption interpretations in NHTSA’s 2003 rule establishing light truck fuel economy standards for model years 2005-2007 and the agency’s 2006 rule establishing fuel economy standards for model years 2008-2011. The NPRM also requests comment “on whether there are additional preamble statements that contain related statements, which should be included in this list” (86 FR 25982).

The NRPM claims such retroactive censorship “is appropriate to reaffirm the proper scope of NHTSA’s preemption authority and remove the uncertainty created by the SAFE 1 Rule” (86 FR 25982). But what those preamble statements exclusively discuss in the earlier rules and chiefly discuss in SAFE 1 is the scope of EPCA preemption, not the scope of NHTSA’s regulatory authority.

The only way an agency can reduce “uncertainty” about a statute’s meaning is to make a case for its own interpretation. The NPRM proposes instead to delete opinions it declines to debate.

This is regulatory cancel culture. It is one thing for an agency to withdraw preamble language linked to regulatory text it seeks to repeal. It is quite another to delete preamble language in rules with long-expired regulations that were not based on such language in the first place. Deleting the agency’s prior views without offering substantive criticism is arbitrary and capricious—and unprecedented too.

The NPRM says NHTSA “may decide to issue interpretations or guidance [regarding EPCA 32919(a)] at a later point, if warranted, after further consideration” (86 FR 25982). Where have we heard that before? When confronted with the same incompatibility between EPCA 32919(a) and California’s tailpipe CO₂ standards, NHTSA, in the Obama administration’s 2010 and 2012 CAFE rulemakings, opted to “defer” consideration of preemption issues until an unspecified

later date (75 FR 25546, 77 FR 63147).²⁶ NHTSA did not officially stop deferring until the Trump administration proposed the SAFE Rule in November 2018.

More importantly, the NPRM gets things exactly backwards. Uncertainty does not result from the SAFE 1 Rule, which sets forth NHTSA's consistent interpretation of EPCA 32919(a).²⁷ Rather, it results from the Obama and Biden administrations' ambition to legalize state policies Congress has prohibited.

As for the regulatory language the NPRM proposes to delete, it is a model of reasoned decision making.²⁸ The regulation is both text and commentary, quoting EPCA 32919 and applying it through a sequence of logical deductions to state policies that prohibit or regulate tailpipe CO₂ emissions. The force of argument explicates the force of law. To help preserve the record of this exemplary regulation, we reproduce it in full as Appendix B.

NPRM's Core Argument

The NPRM contends that neither EPCA 32919(a) nor any other provision "expressly authorizes" NHTSA "to adopt legislative rules implementing express preemption under EPCA." Although the agency may set forth "advisory views" about EPCA preemption (contrary to the NPRM's proposed cancellation of such opinions), "NHTSA appears to lack the authority to conclusively determine the scope or meaning of the EPCA preemption clauses with the force and effect of law." Accordingly, the NPRM proposes to repeal SAFE 1's regulatory requirements (86 FR 25982).

While it is axiomatic that agencies only have such power as Congress delegates, not all delegated powers are *expressly* delegated. Quoting *Cipollone v. Liggett Grp. Inc.* (1992), the NPRM reports that "the purpose of Congress is the ultimate touchstone of pre-emption analysis" (86 FR 25991). However, the NPRM does not mention the Court's further statement that "Congress' intent may be 'explicitly stated in the statute's language or implicitly contained in its structure and purpose.'"²⁹

Congress's intent to preempt state policies "related to" fuel economy standards is explicitly stated in the statute. Congress's preemptive intent is also implicitly contained in the statute's structure and purpose, which is to create a national (uniform) system of fuel economy requirements administered by one federal agency (NHTSA). The whole construct is for naught if a state or combination of states, whether acting separately or in cahoots with federal officials, is free act as if policies mathematically and physically related to fuel economy standards are not related at all.

If NHTSA cannot "conclusively" interpret EPCA preemption when states and their confederates ignore or defy its plain meaning, the statutory scheme Congress created is overturned. It is unreasonable to suppose that Congress enacted what may be the strongest preemption statute in history just so underhanded state and federal officials could evade it at their pleasure.

SAFE 1 cites the Secretary of Transportation's "general powers" under 49 U.S.C. 322 to "prescribe regulations to carry out" her "duties and powers."³⁰ California's tailpipe CO₂ standards and ZEV mandates encroach on her CAFE-specific duties and powers. She therefore

has “clear authority” to prescribe regulations needed “to effectuate a national automobile fuel economy program unimpeded by prohibited State and local requirements” (84 FR 53120).

The NPRM purports to find that unpersuasive, stating:

At most, the statute [EPCA 32919] merely refers to the *substantive tasks* of the agency to establish “fuel economy standard[s]” and “requirements” as set forth elsewhere in Chapter 329. Such references only connote the *core duties* borne by the agency to administer *the substance of the fuel economy program*, such as by setting “maximum feasible average fuel economy” standards under Section 32902 or establishing fuel economy labeling requirements under Section 32908 (86 FR 25986).³¹

The NPRM misses the obvious. EPCA 32919 references NHTSA’s “substantive tasks,” “core duties,” and the CAFE program’s “substance.” Preemption of state policies “related to” fuel economy is what enables NHTSA to carry out those tasks and duties. It strains credulity to suppose that Congress would declare preemption in broad and categorical terms, textually link preemption to NHTSA’s core duties and substantive tasks, and the CAFE program’s substance, yet expect NHTSA to sit on the regulatory sidelines when states and other political actors connive to gut Congress’s express preemption. The NPRM’s reading of 49 U.S.C. 322 turns the phrase “duties and powers” into empty words. It is absurd to suppose that Congress meant for NHTSA to be too weak to carry out its duties and powers.

Preemption Confusions

Noting that both NHTSA and courts “have repeatedly understood Section 32919 as self-executing and capable of direct application to state regulatory activity,” the NPRM concludes that the “statute does not require any supplemental agency regulations to implement this standard” (86 FR 25985).

The NPRM is confused. To say that a preemption statute is “self-executing” does not mean it is *self-explicating* or *self-implementing*. It simply means that any conflicting state policy is *automatically* void. Preemption occurs *ab initio*—at the moment such policy is enacted or adopted, not when a court later declares it so.³²

However, the “self-executing” preemption will have no practical effect unless someone interprets and implements it. Who better than the agency Congress authorizes to administer the program that expressly preempts state laws and regulations?

For its opinion that no “supplemental regulations” are required to interpret and implement EPCA, the NPRM (86 FR 29585) cites the 2007 district court decisions in Vermont and California.³³ Those courts misunderstood the nature of preemption. They supposed that if the EPA grants California a waiver of *Clean Air Act* preemption, the state’s tailpipe CO₂ standards and ZEV mandates become *federal standards*, which are not subject to EPCA preemption.

That is not how it works. To reiterate, preemption statutes void conflicting state policies *ab initio*. EPCA 32919(a) turned California’s tailpipe CO₂ standards and ZEV mandates into legal phantoms years before the EPA agreed to review them. The EPA could not give legal effect to state policies already voided by EPCA.

Nor was that the only confusion the district courts promoted. The courts agreed with California’s claim that AB 1493, the state’s motor vehicle greenhouse emissions law,³⁴ does not regulate fuel economy because the statute (1) expressly aims to mitigate climate change and improve air quality rather than increase fuel efficiency, and (2) includes greenhouse gas (GHG) air conditioner refringent standards, which do not affect fuel consumption.

That assessment is incorrect. EPCA preempts state laws “related to” fuel economy regardless of their self-described purposes. California’s GHG refrigerant standards are not preempted because they do not regulate fuel consumption, as the proposed SAFE Rule explains (83 FR 4324–35) and SAFE 1 reaffirms (84 FR 51338). However, commingling GHG refrigerant standards with tailpipe CO₂ standards does not shield the latter from preemption. The physical and mathematical relationship between tailpipe CO₂ standards and fuel economy standards is not disturbed by GHG refrigerant regulations.

Most importantly, the district courts’ “federalization” argument turns EPCA preemption into practical nullity. It implies that even if AB 1493 were titled the “Boost Fuel Economy Law” and contained only CO₂ tailpipe standards, the EPA could still negate EPCA preemption just by pronouncing the magic words: “Waiver granted!” The California and Vermont district courts’ legal theory implies that California—and states opting into the California vehicle emissions program under CAA Section 177³⁵—are free to adopt and enforce open and avowed fuel economy standards. That is the exact opposite of what Congress wrote and intended in EPCA 32919(a).

Incidentally, although AB 1493’s drafters kept the term “fuel economy” out of the bill, they could not keep the *concept* out of it. The statute set up a cost-effectiveness test that CARB’s tailpipe CO₂ standards cannot pass solely on the basis of their supposed air quality and climate benefits. Under AB 1493, motor vehicle GHG standards must be “economical to an owner or operator of a vehicle, taking into account the full life-cycle costs of a vehicle.” CARB’s 2004 Staff Report reasonably interpreted that provision to mean the reduction in vehicle “operating costs” must exceed the increase in vehicle purchase price.³⁶ Virtually all vehicle operating costs are expenditures for fuel. The AB 1493 standards cannot be “economical to an owner or operator” unless CARB regulates fuel economy.

Section 32919’s “Notable Silence”

The NPRM asks why EPCA 32919 does not expressly authorize NHTSA “to issue regulations with the force of law that regulate and define the scope of preemption.” It purports to infer from the statute’s “notable silence” that Congress did not give NHTSA such power (86 FR 25987). Three alternative explanations for the statute’s terse language spring to mind.

First, because EPCA preemption is broad, clear, and categorical, Congress in 1975 may have assumed no state would dare try to evade it. For example, because the scientific relationship between tailpipe CO₂ emissions and fuel consumption was the very basis for testing compliance with CAFE standards, the subterfuge of regulating fuel economy by regulating tailpipe CO₂ emissions would have seemed ridiculous to EPCA’s drafters.

Consistent with that explanation, we note that not until 2003 (27 years later) did California enact AB 1493, and not until 2009 did the EPA team with CARB to subvert EPCA preemption. The provision's "silence" regarding "supplemental regulations" may partly reflect Congress's inability in 1975 to anticipate the brazenness of 21st century "climate ambition."

Second, Congress includes express regulatory authority in preemption statutes when the scope of preemption is narrow, indeterminate, or less than categorical. For such statutes, agencies need express regulatory authority to identify exceptions and grant waivers. As shown in the next section, all the NPRM's examples of express regulatory authority in preemption statutes are cases where agency adjudication is required to approve state policies that a broad categorical preemption would prohibit.

A third and related reason for EPCA's "silence" is that including express regulatory authority could foster confusion and uncertainty. It would create the appearance that, despite the statute's categorical language, EPCA 32919(a) is a "general rule of preemption" allowing exceptions in certain circumstances. That misperception could beget the very state interference Congress sought to prevent.

NPRM's Inapposite Examples of Express Regulatory Authority

All the NPRM's examples of preemption statutes with express regulatory authority have one thing in common that clearly distinguishes them from EPCA 32919. In each case, the statute narrows the scope of preemption, does not fully determine the scope of preemption, or establishes a program to waive preemption. In each case, the statute's application to particular state policies requires subsequent adjudication by the agency. Express regulatory authority is provided so that the agency may fine tune the scope of preemption through a formal proceeding. The absence of such authority in EPCA 32919 is thus a reflection of the preemption's *absoluteness*, not of any supposed lack of authority on NHTSA's part to enforce it. The examples occur at 86 FR 25986-87.

EPCA Section 327(b). This statute grants the Federal Energy Administration (FEA), the predecessor agency to the Department of Energy, express authority to "prescribe . . . rule[s]" preempting state and local appliance-efficiency standards.

Section 327(a) states that EPCA's energy conservation program for consumer products other than automobiles "supersedes any state regulation" once the FEA promulgates rules applicable to the covered products. However, before FEA issues such rules, "any person" subject to a state energy efficiency regulation may petition the FEA to prescribe a rule superseding the state regulation in whole or in part. Under Section 327(b), the administrator "shall" within six months "either deny such petition or prescribe a rule under this subsection superseding such state regulation." In addition, the administrator "shall" issue such a rule "if and only if" he determines "there is no significant state or local interest to justify the state regulation, and the regulation unduly burdens interstate commerce."

This example does not support the NPRM's legal theory. Section 32919(a) does not include any similar petition process culminating in preemption "if and only if" the secretary makes certain

regulatory determinations. It is irrelevant to 32919(a) whether a state law or regulation related to fuel economy serves a “significant state or local interest” or “unduly burdens interstate commerce.” All such policies by definition are prohibited.

42 U.S.C. § 6297(d). The NPRM notes that EPCA Section 327(b) has since been “re-codified and amended as 42 U.S.C. § 6297(d).”³⁷ A cursory inspection of the text further undermines the hypothesis that Section 32919(a) deliberately withholds from NHTSA the power to enforce EPCA preemption.

42 U.S.C. § 6297(d) is a “general rule of preemption.” That is, it preempts state regulations of energy use, energy efficiency, and water use products “unless” the regulation was issued before certain dates and covers certain types of products. The many exceptions include state efficiency regulations for fluorescent lamp ballasts, incandescent lamps, shower heads, faucets, water closets, urinals, general service lamps, pool heaters, television sets, and metal halide lamp fixtures. The provision also includes regulations specifying a process for obtaining waivers of federal preemption.

42 U.S.C. § 6297(d) is evidence that when Congress wants an agency to *exempt* certain state policies from federal preemption, or administer a waiver program, it will require the agency to prescribe the exceptions and waiver process by rule. It hardly follows that EPCA 32919(a), which allows neither exceptions nor waivers, bars NHTSA from prescribing regulations to uphold Congress’s purpose when state and federal actors scheme to subvert it.

U.S.C. 42 § 5125.³⁸ This statute deals with the transportation of hazardous materials. It contains a qualified or conditional preemption rather than a categorical preemption, and establishes a waiver program.

State and tribal hazmat rules are preempted if the Secretary of Transportation determines (a) compliance “is not possible,” (b) the state regulation is “an obstacle to carrying out” the federal program, or (c) the state regulation is not “substantively the same” as the federal program. By implication, state or local hazmat rules are not preempted if the Secretary determines compliance is possible, the state regulation is not an obstacle to the federal program, and is substantively the same as the federal program.

Such preemption determinations are to be made through a process “provided by regulations prescribed by the Secretary.” In EPCA 32919(a), Congress preempted *all* state policies related to fuel economy standards in advance, so there was no point in directing NHTSA to *prescribe* a similar adjudicatory process.

The hazmat statute also allows states, local governments, and tribes to apply for a waiver of federal preemption. The Secretary may grant a waiver under a “procedure [he] prescribes by regulation.” There is no waiver program in EPCA 32919(a), so for that reason too the one-sentence categorical preemption is “silent” about NHTSA’s regulatory authority.

49 U.S.C. § 31141.³⁹ This statute declares that “[a] state may not enforce a state law or regulation on commercial motor vehicle safety that the Secretary of Transportation decides under this section may not be enforced.” That decision is to be based on the stringency of the state

safety regulation compared to the applicable federal standard. If the state regulation is less stringent, it may not be enforced. If it is as stringent, it may be enforced. If it is more stringent, it may be enforced unless the secretary determines the additional regulatory stringency provides no safety benefit, is incompatible with federal regulation, or would unreasonably burden interstate commerce.

In addition, any person may petition the secretary for a waiver of federal preemption. The secretary's determinations are subject to judicial review, and the secretary "may" initiate a "regulatory proceeding" to review a state law or regulation on commercial motor vehicle safety.

In short, the statute *requires* the secretary to make a host of policy judgments about which state standards to preempt or exempt, and which waiver requests to grant or deny. No similar express language is included in EPCA 32919(a) because the statute allows no exceptions and has no waiver provision.

Put somewhat differently, 49 U.S.C. § 31141 contains express regulatory authority because adjudicating preemption of state commercial vehicle safety requirements is anticipated to be part of NHTSA's normal business. The challenge addressed by SAFE 1 is not normal business. SAFE 1 responds to a climate coup executed by California and the Obama administration through secretive ("put nothing in writing, ever") negotiations.

The NPRM sets up a rigged test the SAFE 1 Rule cannot possibly meet. It demands that the Rule cite statutory language expressly authorizing NHTSA to break up federal-state collusion to nullify EPCA's preemptive force. Finding "silence" rather than a set of instructions for dealing with an unprecedented usurpation, it concludes that NHTSA is prohibited from enforcing Congress's express prohibition.

Section 521 of the Medical Device Amendments of 1976 (MDA).⁴⁰ This is another statute providing a "general rule" of preemption. No state may establish or retain safety and effectiveness requirements for medical devices "different from, or in addition to" the requirements set forth in the MDA.

By implication, states may establish or retain *identical* requirements, which could require the Food and Drug Administration (FDA) to make adjudicative determinations. As noted, EPCA does not allow states to adopt identical or equivalent fuel economy standards.

The MDA also authorizes states to apply for preemption waivers under a process prescribed by rule. Waivers are to be granted if the state requirement is more stringent than the federal requirement, or if the state policy is required by compelling local conditions. In contrast, EPCA preemption cannot be waived, and it prohibits all state policies "related to" fuel economy standards, including standards that are more stringent than NHTSA's, and regardless of local conditions. Again, the absence of "express" regulatory authority in Section 32919(a) merely underscores Congress determination to deny states any role in regulating fuel economy.

City of New York v. F.C.C. (1988).⁴¹ Quoting this Supreme Court decision, the NPRM asserts that when interpreting the preemptive force of a federal regulation, "a narrow focus on Congress'

intent to supersede state law [is] misdirected.” Courts should focus instead on the “proper bounds of [the agency’s] lawful authority.”

That seeming gotcha evaporates when read in context. *City of New York* concerned the scope of preemption under the Cable Act of 1984.⁴² The statute specifically exempts from preemption state and municipal regulation of cable company facilities, services, and equipment. The issue was whether that carve-out also allows municipalities to impose cable signal quality standards more stringent than those set forth in F.C.C. regulations. The Commission promulgated a rule preempting the municipalities’ signal standards. The cities sued. The Court upheld the Commission’s preemption rule (a detail not mentioned in the NPRM).

In reviewing the Cable Act, a “narrow focus on Congress’s intent to supersede state law” would be “misdirected” because Congress allowed states some role in regulating the cable industry. That created a gray area requiring subsequent regulatory clarification. In contrast, EPCA 32919(a) gives states no role in determining national fuel economy requirements. When interpreting EPCA, a “narrow focus” on Congress’s intent to supersede state law is right on target.

To sum up, the “silence” of EPCA 32919(a) reflects the *absoluteness* of the preemption. Agencies need “express authority” to adjudicate preemption when Congress does not completely exclude state and local laws from the policy domain. Express regulatory authority is absent from EPCA 32919(a) precisely because the preemption is broad, clear, and categorical. When Congress enacted EPCA 32919(a), it meant to avoid circumstances in which any kind of regulatory adjudication would be required. EPCA’s “silence” in no way implies that NHTSA is prohibited from reasserting preemption when state and federal actors collaborate to eviscerate it.

Conclusion: Congress’s Purpose and the NPRM’s Disqualifying Silence

Quoting *Cipollone v. Liggett Grp. Inc.* (1992), the NPRM acknowledges that “the purpose of Congress is the ultimate touchstone of pre-emption analysis.” The NPRM does not mention the Court’s further statement that “Congress’ intent may be ‘explicitly stated in the statute’s language or implicitly contained in its structure and purpose.’”

Congress’s intent in Section 32919(a) is both explicitly stated and implicit in EPCA’s “structure and purpose.” Congress’s purpose is to create a uniform system of fuel economy requirements based on NHTSA’s evaluation of specific statutory factors. Section 32919(a) is the *structural linchpin* of the CAFE program. It is what ensures that power is exercised by the agency specifically authorized to carry out Congress’s purpose. Nullifying EPCA 32919(a), as the NPRM effectively proposes to do, transfers power from NHTSA to CARB, an agency not accountable to Congress and not bound by the statutory factors ECPA prescribes.

The NPRM’s examples of express regulatory authority in other preemption statutes do not support the inference that NHTSA is powerless to prescribe regulations interpreting and upholding EPCA preemption. All the examples show is that EPCA preemption is broad, clear, and categorical. There are no exceptions to EPCA preemption and no waiver program. Consequently, no express provision is made for subsequent regulatory adjudication. The

“silence” (actually, terseness) of EPCA 32919(a) is just the flip side of the statute’s blunt message to states: Don’t even think about it!

The NPRM insinuates that California’s motor vehicle program is lawful under EPCA 32919(a) but declines to make a reasoned case for that opinion. EPCA 32919(a) is only one sentence long. Yet the NPRM makes no effort to explain what the provision means or how it applies to state standards that prohibit or regulate tailpipe CO₂ emissions. The NPRM’s silence about “the ultimate touchstone of pre-emption analysis” is disqualifying.

The clear meaning and straightforward application of EPCA 32919(a) are fatal to California’s tailpipe CO₂ standards and ZEV mandates. That is why the NPRM does not attempt to rebut the SAFE 1 Rule’s analysis of “Congress’s purpose” and instead proposes to cancel it and all prior iterations of the same viewpoint in earlier NHTSA rulemakings. The NPRM abandons reasoned decision making. It cannot stand.

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Appendix A: The Greenhouse Protection Racket

The Obama-era EPA’s July 2009 waiver⁴³ of Clean Air Act (CAA) preemption, which purported to authorize California’s implementation of the AB 1493 tailpipe CO₂ standards, effectively made the California Air Resources Board (CARB) the nation’s vanguard fuel-economy regulator. That is so for three reasons. First, as this comment letter painstakingly demonstrates, CO₂ standards are implicit fuel economy standards. Second, because California has comparatively few conventional automobile manufacturing facilities and auto workers,⁴⁴

Sacramento politicians face no blowback at the polls for indulging in fuel economy zealotry. Third, and most importantly, the waiver empowered California and its allies to endanger automakers if they or federal policymakers resist CARB's demands.

The EPA waiver gave CARB the whip hand in fuel economy deliberations for the following reasons.⁴⁵ Under CAA section 177, once the EPA grants California a CAA section 209(b) waiver to adopt separate vehicle emission standards, other states may opt into the California program.⁴⁶ That is a manageable inconvenience when California sets criteria and toxic air pollutant standards, which apply to each vehicle sold. At most there are just two national fleets for automakers to manage—federal and “California.”

However, when the standards are for CO₂ emissions, automakers face a potential administrative nightmare. Like the CAFE standards they implicitly establish, tailpipe CO₂ standards apply to fleets or segments of fleets on average. And there's the rub. Each automaker typically sells a different mix of vehicles in each state because consumer preferences differ from one state to the next. To achieve the same average tailpipe CO₂/fuel economy in two different states, automakers would have to reshuffle the mix of vehicles delivered for sale in those states.

If all states were to opt into the California program, each automaker would have to continually adjust its production and sales to achieve the same fleet average tailpipe CO₂/mileage standards in 50 separate markets—an extreme version of the chaos Congress enacted EPCA 32919(a) to prevent.

The prospect of market fragmentation terrified the auto industry when EPA Administrator Lisa Jackson decided to reconsider⁴⁷ her predecessor Stephen Johnson's denial of California's AB 1493 waiver request.⁴⁸ Having imperiled automakers, the Obama administration, in a classic Machiavellian move resembling a protection racket, made them an offer they could not refuse.

In closed-door, “put nothing in writing, ever” negotiations run by Obama climate czar Carol Browner, California and its state allies agreed to deem compliance with EPA's tailpipe CO₂ standards as compliance with their own. As in the traditional CAFE program, compliance would be based on national sales rather than state-by-state sales. However, in return for averting a fuel economy “patchwork,” automakers had to surrender basic legal rights.

Auto companies and their trade associations pledged “not to contest forthcoming CAFE and GHG standards for MYs 2012-2016; not to challenge any grant of a CAA preemption waiver for California's GHG standards for certain model years, and to stay and then dismiss all pending litigation challenging California's regulation of GHG emissions, including litigation concerning EPCA preemption of state GHG standards” (83 FR 43233, citing 75 FR 35328).

Circumstantial evidence also suggests that Ms. Browner conditioned the availability of bailout money on automakers' support for the new “National Program” jointly administered by EPA, NHTSA, and CARB.⁴⁹

Dubbed the “Historic Agreement” by President Obama,⁵⁰ the deal supposedly created One National Program. In fact, unlike the traditional CAFE program, in which one agency

administered one set of standards under one statute, automakers now had to meet three standards, administered by three agencies, under three statutes.

More importantly, the agreement did not eliminate—it only suspended—the threat of market balkanization. The deal left California and its allies free to reactivate the patchwork peril whenever they decide the One National Program no longer serves their interests. The so-called Historic Agreement was actually an uneasy truce wired to fall apart whenever CARB does not get its way.

As early as July 2011, CARB Chairman Mary Nichols, in a letter to EPA Administrator Lisa Jackson and Transportation Secretary Ray LaHood, clarified that CARB would participate in the National Program only if the EPA and NHTSA “adopt standards [for model years 2017-2025] substantially as proposed.”⁵¹ The letter further stated that “California reserves all rights to contest final actions taken or not taken by EPA or NHTSA as part of or in response to the mid-term evaluation,” i.e., the agencies’ review to determine by April 1, 2018 whether model year 2022-2025 standards remain appropriate in light of updated economic, technological, or energy security assumptions (77 FR 62652).

The specter of market fragmentation has haunted all subsequent fuel economy deliberation and litigation, including the SAFE 1 rulemaking and litigation. It hangs like a regulatory Sword of Damocles over the auto industry, and will continue to influence fuel economy proceedings until the Supreme Court upholds SAFE 1 or its statutory interpretation.

CARB took, or threatened to take, legal action against the Trump administration throughout the midterm evaluation and SAFE Rule proceeding. In March 2018, six months before the EPA and NHTSA proposed any specific revisions to the Obama administration standards, CARB threatened to enforce its own separate standards, warning that vehicles sold in California would no longer be “deemed to comply” with the state’s greenhouse gas/fuel economy standards unless those vehicles comply the Obama standards.⁵² In May 2018, CARB filed a preemptive lawsuit on behalf of 16 state agencies against any change in the standards.⁵³

In September 2018, CARB voted to retract the deemed-to-comply policy memorialized in the EPA and NHTSA’s joint 2010 rulemaking (75 FR 35328), and invited its 13 state allies to follow suit.⁵⁴ In December 2018, CARB unilaterally amended its “deemed to comply” option such that it applies only if the EPA and NHTSA retain the 2017-2025 standards set forth in the agencies’ 2012 rulemaking and the EPA’s January 2017 midterm evaluation.⁵⁵

In short, the July 2009 CAA waiver made California the proverbial 500-pound gorilla in deliberations over the future of the One National Program. The waiver empowered California to imperil businesses and jobs beyond its borders just by threatening to “de-couple” from the EPA and NHTSA should any future administration dare decrease the stringency of the “augural” 2022-2025 CAFE standards provisionally adopted by NHTSA in 2012. “Harmony” would exist in the One National Program as long as the feds and automakers dance to CARB’s tune. This California-led decision framework cannot be reconciled with the NHSTA-led framework established by EPCA 32919.

The SAFE 1 Rule, if upheld in court, puts an end to this mischief. The NPRM seeks to overturn the SAFE 1 Rule before courts can review it on the merits.

Appendix B: SAFE 1 Rule’s Regulatory Texts (Passenger Cars)

49 CFR § 531.7 – Preemption.

(a) General. When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for [automobiles](#) covered by an average fuel economy standard under this chapter.

(b) Requirements must be identical. When a requirement under [section 32908](#) of title 49 of the United States Code is in effect, a State or a political subdivision of a State may adopt or enforce a law or regulation on disclosure of fuel economy or fuel operating costs for an [automobile](#) covered by section 32908 only if the law or regulation is identical to that requirement.

(c) State and political subdivision automobiles. A State or a political subdivision of a State may prescribe requirements for fuel economy for [automobiles](#) obtained for its own use.

[[84 FR 51361](#), Sept. 27, 2019]

49 CFR Appendix B to Part 531 - Preemption

(a) Express Preemption:

(1) To the extent that any law or regulation of a State or a political subdivision of a State regulates or prohibits tailpipe carbon dioxide emissions from automobiles, such a law or regulation relates to average fuel economy standards within the meaning of [49 U.S.C. 32919](#).

(A) Automobile fuel economy is directly and substantially related to automobile tailpipe emissions of carbon dioxide;

(B) Carbon dioxide is the natural by-product of automobile fuel consumption;

(C) The most significant and controlling factor in making the measurements necessary to determine the compliance of automobiles with the fuel economy standards in this part is their rate of tailpipe carbon dioxide emissions;

(D) Almost all technologically feasible reduction of tailpipe emissions of carbon dioxide is achievable through improving fuel economy, thereby reducing both the consumption of fuel and the creation and emission of carbon dioxide;

(E) Accordingly, as a practical matter, regulating fuel economy controls the amount of tailpipe emissions of carbon dioxide, and regulating the tailpipe emissions of carbon dioxide controls fuel economy.

(2) As a law or regulation related to fuel economy standards, any law or regulation of a State or a political subdivision of a State regulating or prohibiting tailpipe carbon dioxide emissions from automobiles is expressly preempted under [49 U.S.C. 32919](#).

(3) A law or regulation of a State or a political subdivision of a State having the direct or substantial effect of regulating or prohibiting tailpipe carbon dioxide emissions from automobiles or automobile fuel economy is a law or regulation related to fuel economy standards and expressly preempted under [49 U.S.C. 32919](#).

(b) Implied Preemption:

(1) A law or regulation of a State or a political subdivision of a State regulating tailpipe carbon dioxide emissions from automobiles, particularly a law or regulation that is not attribute-based and does not separately regulate passenger cars and light trucks, conflicts with:

(A) The fuel economy standards in this part;

(B) The judgments made by the agency in establishing those standards; and

(C) The achievement of the objectives of the statute ([49 U.S.C. Chapter 329](#)) under which those standards were established, including objectives relating to reducing fuel consumption in a manner and to the extent consistent with manufacturer flexibility, consumer choice, and automobile safety.

(2) Any law or regulation of a State or a political subdivision of a State regulating or prohibiting tailpipe carbon dioxide emissions from automobiles is impliedly preempted under [49 U.S.C. Chapter 329](#).

(3) A law or regulation of a State or a political subdivision of a State having the direct or substantial effect of regulating or prohibiting tailpipe carbon dioxide emissions from automobiles or automobile fuel economy is impliedly preempted under [49 U.S.C. Chapter 329](#).

[[84 FR 51362](#), Sept. 27, 2019]

¹ National Highway Traffic Safety Administration (NHTSA), Corporate Average Fuel Economy (CAFE) Preemption, Notice of Proposed Rulemaking, 86 FR 25980, May 12, 2021, <https://www.govinfo.gov/content/pkg/FR-2021-05-12/pdf/2021-08758.pdf>.

² NHTSA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 FR 51310, September 27, 2019, <https://www.govinfo.gov/content/pkg/FR-2019-09-27/pdf/2019-20672.pdf>.

³ 49 U.S. Code § 32919. Preemption, <https://www.law.cornell.edu/uscode/text/49/32919>.

⁴ California's unlawful power to threaten automaker bottom lines is explained in Appendix A.

⁵ The White House, FACT SHEET: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies, April 22, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/>.

⁶ NHTSA and Environmental Protection Agency (EPA), The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, Proposed Rule, 83 FR 42986, August 24, 2018, <https://www.govinfo.gov/content/pkg/FR-2018-08-24/pdf/2018-16820.pdf>.

⁷ NHTSA, Average Fuel Economy Standards for Light Trucks Model Years 2008–2011, 71 FR 17566, April 6, 2006, <https://www.govinfo.gov/content/pkg/FR-2006-04-06/pdf/FR-2006-04-06.pdf> (“Even if a practical process to separate carbon dioxide from the exhaust stream were available, the carbon dioxide would, to prevent its release, need to be compressed or solidified for temporary onboard storage, and frequently removed for disposal (e.g., in underground facilities). For example, if fifteen gallons of gasoline are added at each refueling of a vehicle, about

290 pounds of carbon dioxide (or, without any separation of the carbon dioxide, about 1,400 pounds of exhaust gases) would be produced through the combustion of that fuel. At these rates of production, no practical means of onboard storage and periodic removal are foreseeable.”)

⁸ 49 U.S. Code § 32902. Average fuel economy standards, <https://www.law.cornell.edu/uscode/text/49/32902>.

⁹ 956 F. 2d 321 - *Competitive Enterprise Institute v. National Highway Traffic Safety* (1992), <https://openjurist.org/956/f2d/321/competitive-enterprise-institute-v-national-highway-traffic-safety-administration>.

¹⁰ Climate ambition is the central organizing concept of the Paris climate treaty (https://unfccc.int/sites/default/files/english_paris_agreement.pdf), which explicitly incorporates the term into international law. Article 4, Section 3 states: “Each Party’s successive nationally determined contribution will represent a progression beyond the Party’s then current nationally determined contribution and reflect its highest possible ambition.” Article 4, Section 13 states: “A Party may at any time adjust its existing nationally determined contribution with a view to enhancing its level of ambition.” Policymakers demonstrate “climate ambition” by setting aggressive emission-reduction targets and implementing the policies required to achieve them. Climate ambition is an expansive concept with moving goal posts. A \$2 trillion Green New Deal program is not ambitious compared to a \$16 trillion program. A 20 percent ZEV mandate is not ambitious compared to a 100 percent mandate.

¹¹ EPA, “EPA and NHTSA Propose to Extend the National Program to Improve Fuel Economy and Greenhouse Gases for Passenger Cars and Light Trucks,” November 2011, p. 3, <https://nepis.epa.gov/Exe/ZyPDF.cgi/P100CVIJ.PDF?Dockkey=P100CVIJ.PDF>.

¹² CARB, Zero-Emission Vehicle Program, <https://ww2.arb.ca.gov/our-work/programs/zero-emission-vehicle-program/about>.

¹³ 49 U.S. Code § 32901. Definitions, <https://www.law.cornell.edu/uscode/text/49/32901>.

¹⁴ 49 U.S. Code § 32902. Average fuel economy standards, <https://www.law.cornell.edu/uscode/text/49/32902>.

¹⁵ EPA and NHTSA, 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 FR 62624, <https://www.govinfo.gov/content/pkg/FR-2012-10-15/pdf/2012-21972.pdf>.

¹⁶ EPA and NHTSA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 85 FR 24174, April 30, 2020, <https://www.govinfo.gov/content/pkg/FR-2020-04-30/pdf/2020-06967.pdf>.

¹⁷ Office of Governor Gavin Newsom, “Governor Newsom Announces California Will Phase Out Gasoline-Powered Cars & Drastically Reduce Demand for Fossil Fuel in California’s Fight Against Climate Change,” September 23, 2020, <https://www.gov.ca.gov/2020/09/23/governor-newsom-announces-california-will-phase-out-gasoline-powered-cars-drastically-reduce-demand-for-fossil-fuel-in-californias-fight-against-climate-change/>.

¹⁸ EPA and NHTSA, Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 FR 25324, May 7, 2010, <https://www.govinfo.gov/content/pkg/FR-2010-05-07/pdf/2010-8159.pdf>.

¹⁹ CARB, “Terms for Light-Duty Greenhouse Gas Emission Standards,” July 22, 2019, <https://ww2.arb.ca.gov/sites/default/files/2019-07/Auto%20Terms%20Signed.pdf>.

²⁰ David Shepardson, “California to stop buying GM, Toyota and Fiat Chrysler vehicles over emissions fight,” Reuters, November 18, 2019, <https://www.reuters.com/article/us-autos-emissions-california/california-to-stop-buying-gm-toyota-and-fiat-chrysler-vehicles-over-emissions-fight-idUSKBN1XS2B2>.

²¹ Article VI, Clause 2: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

²² *United States v. Maryland* (1981), <https://caselaw.findlaw.com/us-supreme-court/451/725.html>.

²³ Subsections (b) and (c) of EPCA 32919 are not actual exceptions. Under EPCA 32919(b), a state “may adopt or enforce a law or regulation on disclosure of fuel economy or fuel operating costs.” Regulating *disclosure* of fuel economy *information* does not regulate *fuel economy*. Note, too, that even with respect to fuel economy information, state laws or regulations must be “identical to” the federal requirement set forth in 49 U.S. Code § 32908, <https://www.law.cornell.edu/uscode/text/49/32908>. Under EPCA 32919(c), a state “may prescribe requirements for fuel economy for automobiles obtained for its own use.” Such requirements do not regulate the

fuel economy of vehicles in general commerce. In their capacity as *consumers*, states—like private companies or households—are free to purchase the type or types of vehicles it likes best. A state may, for example, set a requirement to purchase only purple cars with pink polka dots.

²⁴ EPA, California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles; Notice, 74 FR 32744, July 8, 2009, <https://www.govinfo.gov/content/pkg/FR-2009-07-08/pdf/E9-15943.pdf>.

²⁵ Colin Sullivan, “Vow of silence key to White House fuel-economy talks,” *New York Times*, May 20, 2009, <https://archive.nytimes.com/www.nytimes.com/gwire/2009/05/20/20greenwire-vow-of-silence-key-to-white-house-calif-fuel-e-12208.html> (quoting CARB Chair Mary Nichols: “We put nothing in writing, ever”).

²⁶ When asked by the House Oversight and Government Reform Committee whether California’s tailpipe GHG standards are “related to” fuel economy standards, NHTSA Administrator David Strickland, EPA Administrator Gina McCarthy, and EPA Director of Transportation and Air Quality Margo Oge all denied under oath that the two types of standards are related. The gist of their explanation is that tailpipe GHG and fuel economy standards are not related because they are “different.” By that logic, identical twins are not related because they are different people. See Darrell Isa, Chairman, House Committee on Oversight and Government Reform, Letter to David Strickland, Administrator, National Highway Traffic Safety Administration, October 18, 2011, <http://www.globalwarming.org/wp-content/uploads/2011/10/2011-10-18-DEI-to-David-Strickland-re-reg-affairs-hearing.pdf>.

²⁷ FR 84 51312. See also Marlo Lewis, “NHTSA’s Consistent Understanding that California’s Tailpipe GHG Standards Are Unlawful,” *Open Market*, October 21, 2020, <https://cei.org/blog/nhtsas-consistent-understanding-that-californias-tailpipe-ghg-standards-are-unlawful/>.

²⁸ There are two sets of identical requirements because CAFE standards apply to two classes of vehicles: passenger cars and light trucks. For passenger vehicles, EPCA 32919 is codified as 49 CFR § 531.7 – Preemption, <https://www.law.cornell.edu/cfr/text/49/531.7>. For light trucks, EPCA 32919 is codified as 49 CFR § 533.7 – Preemption, <https://www.law.cornell.edu/cfr/text/49/533.7>. The exegesis applying EPCA 32919 to state policies prohibiting or regulating tailpipe CO₂ emissions from passenger cars is codified as 49 CFR Appendix B to Part 531 – Preemption, [https://www.law.cornell.edu/cfr/text/49/appendix-B to part 531](https://www.law.cornell.edu/cfr/text/49/appendix-B%20to%20part%20531). The exegesis applying EPCA 32919 to state policies prohibiting or regulating tailpipe CO₂ emissions from light trucks is codified as 49 CFR Appendix B to Part 533 – Preemption, [https://www.law.cornell.edu/cfr/text/49/appendix-B to part 533](https://www.law.cornell.edu/cfr/text/49/appendix-B%20to%20part%20533).

²⁹ *Cipollone v. Liggett Grp.* (1992), <https://www.lexisnexis.com/community/casebrief/p/casebrief-cipollone-v-liggett-grp>.

³⁰ 49 U.S. Code § 322 - General powers, <https://www.law.cornell.edu/uscode/text/49/322>.

³¹ Emphasis added.

³² United States Court of Appeals, Ninth Circuit, *Cabazon Band of Mission Ind. v. City of Indio* (1982), <http://www.globalwarming.org/wp-content/uploads/2021/05/Cabazon-Band-of-Mission-Ind.-v.-City-of-Indio.pdf>.

³³ *Green Mountain Chrysler Plymouth Dodge v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007), <https://www.courtlistener.com/opinion/1483620/green-mountain-chrysler-plymouth-dodge-v-crombie/>; *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007), <https://www.courtlistener.com/opinion/2355006/central-valley-chrysler-jeep-inc-v-goldstene/>.

³⁴ California Legislative Bill Information, AB-1493 Vehicular emissions; greenhouse gases. 2001-2002, https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=200120020AB1493.

³⁵ 42 U.S.C. § 7507. New motor vehicle emission standards in nonattainment areas, <https://www.govinfo.gov/content/pkg/USCODE-2013-title42/html/USCODE-2013-title42-chap85-subchapl-partD-subpart1-sec7507.htm>.

³⁶ California Air Resources Board, Staff Report: Initial Statement of Reasons for Proposed Rulemaking, Public Hearing to Consider Adoption of Regulations to Control Greenhouse Gas Emissions from Motor Vehicles, August 6, 2004, pp. ix, 42, 46, 60, 99, 100, 148, <https://www.arb.ca.gov/regact/grnhsgas/isor.pdf>.

³⁷ 42 U.S. Code § 6297 – Effect on other law, <https://www.law.cornell.edu/uscode/text/42/6297>.

³⁸ 49 U.S. Code § 5125 – Preemption, <https://www.law.cornell.edu/uscode/text/49/5125>.

³⁹ 49 U.S. Code § 31141. Review and preemption of State laws and regulations, <https://www.law.cornell.edu/uscode/text/49/31141>.

⁴⁰ Public Law 94-295, An Act To amend the Federal Food, Drug, and Cosmetic Act to provide for the safety and effectiveness of medical devices intended for human use, and for other purposes, May 28, 1976, <https://www.govinfo.gov/content/pkg/STATUTE-90/pdf/STATUTE-90-Pg539.pdf>.

⁴¹ *City of New York v. FCC* (1988), <https://caselaw.findlaw.com/us-supreme-court/486/57.html>.

⁴² S. 66, Cable Communications Policy Act of 1984, <https://www.congress.gov/bill/98th-congress/senate-bill/66/text>.

⁴³ EPA, California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles; Notice, 74 FR 32744, July 8, 2009, <https://www.govinfo.gov/content/pkg/FR-2009-07-08/pdf/E9-15943.pdf>.

⁴⁴ David Muller, "These are the top 10 states for auto manufacturing in the U.S.," *Michigan Live*, March 21, 2019, <https://www.mlive.com/auto/2015/03/these-are-the-top-10-states-fo.html>. California is not among the top 10.

⁴⁵ National Automobile Dealers Association, *Patchwork Proven: Why a Single National Fuel Economy Standard Is Better for America than a Patchwork of State Regulations*, January 2009, <https://www.nada.org/WorkArea/DownloadAsset.aspx?id=21474838588>.

⁴⁶ The SAFE 1 Rule argued that CAA Section 177 only applies to air pollutants regulated by the National Ambient Air Quality Standards (NAAQS) program, and only to states in non-attainment with those NAAQS. Since there are currently no NAAQS for CO₂ and other GHGs, other states would not be able to adopt California's tailpipe CO₂ standards even if those standards were valid (83 FR 43253). This theory has not been tested in court.

⁴⁷ EPA, California State Motor Vehicle Pollution Control Standards; Greenhouse Gas Regulations; Reconsideration of Previous Denial of a Waiver of Preemption, 74 FR 7040-42, February 12, 2009, <https://www.gpo.gov/fdsys/pkg/FR-2009-02-12/pdf/E9-2913.pdf>.

⁴⁸ EPA, California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles; 73 FR 12156-69, March 6, 2008, <https://www.gpo.gov/fdsys/pkg/FR-2008-03-06/pdf/E8-4350.pdf>.

⁴⁹ House Committee on Government Oversight and Reform, Staff Report, A Dismissal of Safety, Choice, and Cost: The Obama Administration's New Auto Regulations, August 10, 2012, <http://oversight.house.gov/wpcontent/uploads/2012/08/CAFE-Report-8-10-12-FINAL.pdf>.

⁵⁰ The White House, Remarks by the President on national fuel efficiency standards, May 19, 2009, <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-national-fuel-efficiency-standards>.

⁵¹ Honorable Mary D. Nichols, Chairman, California Air Resources Board, Letter to Honorable Lisa Jackson, Administrator, EPA, and Honorable Ray LaHood, Secretary, Department of Transportation, July 28, 2011, <https://www.epa.gov/sites/production/files/2016-10/documents/carb-commitment-ltr.pdf>.

⁵² Bloomberg, "As Trump begins dismantling auto efficiency rules, California is doubling down on its own, sources say," *Los Angeles Times*, March 27, 2018, <http://www.latimes.com/business/la-fi-hy-epa-california-fuel-economy20180327-story.html>.

⁵³ *California et al. v. EPA*, May 1, 2018, https://oag.ca.gov/system/files/attachments/press_releases/2018-05-01%20Petition%20Revised%20MTE.pdf.

⁵⁴ California Air Resources Board, "Statement of CARB Chair on action to preserve California vehicle standards," September 28, 2018, <https://ww2.arb.ca.gov/index.php/news/statement-carb-chair-action-preserve-californiavehicle-standards>.

⁵⁵ State of California Office of Administrative Law, In re: Air Resources Board, Title 13, Code of California Regulations, December 12, 2018, https://ww3.arb.ca.gov/regact/2018/leviii2018/form400dtc.pdf?_ga=2.183723951.866759811.1568583699%20180931441462912.1552677736.