July 6, 2021
Docket ID No. EPA-HQ-OAR-2021-0257

Thank you for the opportunity to submit comments on the Environmental Protection Agency's (EPA) reconsideration[1] of Part One of the Trump administration's Safer Affordable Fuel-Efficient Vehicles Rule (SAFE 1).[2] The Competitive Enterprise Institute (CEI) strongly supports the SAFE 1 Rule, and urges the EPA to leave it in place. Please direct any questions about these comments to CEI Senior Fellow Marlo Lewis (marlo.lewis@cei.org).[3]

Background

SAFE 1, finalized on September 27, 2019, is a joint product of the EPA and the National Highway Traffic Safety Administration (NHTSA). NHTSA determined that California's tailpipe carbon dioxide (CO_2) emission standards and zero-emission vehicle (ZEV) mandates are "related to" fuel economy standards and, thus, are preempted by Section 32919(a) of the Energy Policy and Conservation Act (EPCA).[4] The EPA, for its part, withdrew its January 2013 Clean Air Act (CAA) preemption waiver[5] authorizing California to enforce those policies.

The EPA based its decision on two separate grounds. First, it determined, based on NHTSA's determination regarding EPCA's preemptive effect, that the January 2013 preemption waiver for California's tailpipe CO_2 standards and ZEV mandates

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[1] Environmental Protection Agency (EPA), California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Opportunity for Public Hearing and Public Comment, 86 FR 22421, April 28, 2021, https://www.govinfo.gov/content/pkg/FR-2021-04-28/pdf/2021-08826.pdf.

[2] EPA and National Highway Traffic Safety Administration, 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] Typos in the comments submitted to the EPA have been fixed in this document (7-7-2021).

[4] 84 FR 51311-51328.

[5] EPA, California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's Advanced Clean Car Program and a Within the Scope Confirmation for California's Zero Emission Vehicle Amendments for 2017 and Earlier Model Years, 78 FR 2112, January 9, 2013, https://www.govinfo.gov/content/pkg/FR-2013-01-09/pdf/2013-00181.pdf.

was "invalid, null, and void."[6] The agency also concluded, based on a lengthy review of the text, structure, and legislative history of CAA Section 209(b), that those policies do not qualify for a Clean Air Act preemption waiver because California does not "need" such policies to "meet compelling and extraordinary conditions."[7]

Nothing to See Here (EPCA Preemption)

The EPA makes no bones about the fact that it is reconsidering SAFE 1 "for purposes of rescinding that action."[8] Unsurprisingly, the EPA does not invite comment on SAFE 1's core argument that EPCA 32919(a) automatically voids state policies that regulate or prohibit CO_2 emissions from new motor vehicles. The EPA suggests that because EPCA preemption is "beyond the scope" of the three waiver denial criteria set forth in CAA 209(b), it need not inquire about EPCA preemption.[9] But EPCA preemption is the proverbial elephant in the room. If SAFE 1's EPCA preemption argument is correct, the EPA could not grant a valid CAA preemption waiver for California's tailpipe CO_2 standards and ZEV mandates, because EPCA had already turned those policies into legal phantoms—mere proposals without legal force or effect.

Only once in its reconsideration does the EPA obliquely ask about EPCA's preemptive effect: "Because EPA relied on NHTSA's regulation on preemption, what significance should EPA place on the repeal of that regulation if NHTSA does take final action to do so?"[10] The prior question—what significance the EPA should place on EPCA preemption if SAFE 1 got it exactly right—is never asked.

One might assume the EPA's lack of curiosity about EPCA preemption reflects a division of labor, with NHTSA, in its reconsideration of SAFE 1, addressing EPCA-specific issues on the merits. Not so. NHTSA says even less about the substance of SAFE 1's EPCA preemption argument than the EPA does.

Indeed, NHTSA proposes to delete what it declines to debate—SAFE 1's regulatory text and the associated preemption analysis in the rule's preamble. The agency professes to have "significant doubts" about the validity of that analysis,

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[6] 84 FR 51328.

[7] 84 FR 51328-51350.

[8] 86 FR 22421. "[EPA] encourages interested parties to provide comments on the topics below for consideration by EPA, in the context of reconsidering SAFE 1 and reaching a decision on rescinding that prior agency action." 86 FR 22428.

[9] 86 FR 22428, 22429.

[10] 86 FR 22429.

but never articulates those doubts.[11] Nor is that all. NHTSA proposes to delete all similar utterances in previous rulemakings going back to 2003 or earlier even though the regulations codified by those rules expired long ago and were not based on preemption language in the first place.[12]

This plan to delete all previous instances of NHTSA's consistent view of EPCA preemption,[13] while offering no reasoned rebuttal or alternative interpretation, is unprecedented. We appear to be witnessing the birth of regulatory cancel culture.

The seeds of this behavior appear to have been sewn during the Obama-Biden administration. When confronted with the incompatibility between EPCA 32919(a) and California's tailpipe CO_2 standards, NHTSA, in the 2010 joint fuel economy/greenhouse gas (GHG) motor vehicle standards rule, opted to "defer" consideration of preemption issues until an unspecified later date.[14] It did so again in the 2012 joint rulemaking.[15] NHTSA did not officially stop deferring until the Trump administration proposed the SAFE Rule in November 2018.

The EPA's forthright approach in SAFE 1 is in sharp contrast to the agencies' current efforts to ignore or divert public attention from the elephant. The EPA stated:

> But the unique situation in which EPA and NHTSA, coordinating their actions to avoid inconsistency between their administration of their respective statutory tasks, address in a joint administrative action the issues of the preemptive effect of EPCA and its implications for EPA's waivers, has no readily evident analogue. EPA will not dodge this question here.[16]

Before commenting on the specific issues the EPA raises, we want to put on the record the clear logic of SAFE 1's EPCA preemption analysis, which the agencies' reconsiderations thrust into the shadows. The bottom line conclusion may be summarized as follows. EPCA 32919(a) voided California's tailpipe CO_2 standards and ZEV mandates before California could request, or the EPA grant, a waiver of

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[11] NHTSA, Corporate Average Fuel Economy (CAFE) Preemption, Notice of Proposed Rulemaking, 86 FR 25980, 25982, 25990, May 12, 2021, https://www.govinfo.gov/content/pkg/FR-2021-05-12/pdf/2021-08758.pdf.
[12] 86 FR 25982.
[13] 84 FR 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/.
[14] EPA and NHTSA, Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 FR 25324, 25546, May 7, 2010, https://www.govinfo.gov/content/pkg/FR-2010-05-07/pdf/2010-8159.pdf.
[15] EPA and NHTSA, 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 FR 62624, 63147, October 15, 2012, https://www.govinfo.gov/content/pkg/FR-2012-10-15/pdf/2012-21972.pdf.
[16] 86 FR 51338.

Clean Air Act preemption. EPCA preemption is clear (expressly stated), broad (prohibiting policies merely "related to" fuel economy standards), and categorical (non-waivable and allowing no exceptions). A waiver of Clean Air Act preemption cannot give legal force and effect to emission standards EPCA automatically nullified.

EPCA Preemption

EPCA 32919(a) states:

> When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.[17]

Section 32919(a) expressly prohibits state policies merely "related to" fuel economy standards. The statute envisions no exceptions, does not even allow equivalent or identical state regulations, and provides no authority to waive preemption of state laws or regulations. That means EPCA 32919(a) is not a "general rule of preemption" requiring subsequent regulatory adjudication to fine tune the boundaries of permissible state action. It is difficult to imagine a clearer, broader, or more categorical preemption statute.[18]

Federal preemption statutes derive their authority from the Supremacy Clause (Article VI, Clause 2), which states:

> 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.

As the Supreme Court explained in *Maryland v. Louisiana (1981),* "It is basic to this constitutional command that all conflicting state provisions be without

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[17] 49 U.S. Code § 32919. Preemption, https://www.law.cornell.edu/uscode/text/49/32919.

[18] NHTSA and EPA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, Proposed Rule, 83 FR 42986, 43233, August 24, 2018, https://www.govinfo.gov/content/pkg/FR-2018-08-24/pdf/2018-16820.pdf.

effect."[19] That means any conflicting state policy is void *ab initio*—from the moment the policy is adopted or enacted, not when a court later declares it so.[20]

California's tailpipe CO_2 standards are physically and mathematically "related to" fuel economy standards. An automobile's CO_2 emissions per mile are directly proportional to its fuel consumption per mile. If an agency regulates tailpipe CO_2 emissions, it also regulates fuel economy, and vice versa.[21]

In addition, tailpipe CO_2 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 CO_2 standards and Corporate Average Fuel Economy (CAFE) standards are "two sides (or, arguably, the same side) of the same coin."[22]

The two types of standards will remain mathematically convertible as long as affordable and practical onboard carbon capture technologies do not exist.[23] Since the start of the CAFE program in 1975 and for the foreseeable future, all design and technology options for reducing tailpipe CO_2 emissions, such as aerodynamic streamlining, low rolling resistance tires, and vehicle electrification, are fuel-saving strategies by another name.

The Congress that enacted EPCA in 1975 understood the scientific relationship between CO_2 emissions and fuel economy. That is why it approved the EPA's procedure of testing automotive fuel economy by measuring tailpipe CO_2 emissions.[24]

California's ZEV mandates also have a substantial impact on corporate average fuel economy.[25] As ZEV mandates tighten, average fuel consumption per mile

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[19] *United States v. Maryland* (1981), https://caselaw.findlaw.com/us-supreme-court/451/725.html.
[20] 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.
[21] 84 FR 51313.
[22] 83 FR 43327.
[23] NHTSA, Average Fuel Economy Standards for Light Trucks Model Years 2008–2011, 71 FR 17566, 17670, April 6, 2006, https://www.govinfo.gov/content/pkg/FR-2006-04-06/pdf/FR-2006-04-06.pdf. Consider this excerpt: "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."
[24] 83 FR 43234; EPCA, Section 503(d)(1), https://www.govinfo.gov/content/pkg/STATUTE-89/pdf/STATUTE-89-Pg871.pdf.
[25] 84 FR 51314.

decreases, and fleet-average fuel economy increases. Thus, EPCA also expressly preempts state ZEV mandates.

Furthermore, the aforementioned California policies interfere with the national fuel economy system Congress created; hence they also are implicitly preempted. The California policies interfere with the congressional scheme in three main ways.

First, California's policies revise regulatory determinations Congress authorized NHTSA to make. EPCA[26] and D.C. Circuit case[27] 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 factors, and is free to subordinate them to climate ambition.

Only by sheer improbable accident would CARB, when prescribing tailpipe CO_2 standards, weigh and balance such factors the same way NHTSA does when prescribing fuel economy standards. Indeed, there is no 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."[28]

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 required ten percent[29] of new car sales to be ZEVs by 2003—despite it being obvious that the mandate was neither feasible nor affordable.

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[26] 49 U.S. Code § 32902.Average fuel economy standards, https://www.law.cornell.edu/uscode/text/49/32902.
[27] 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.
[28] 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?Dockey=P100CVIJ.PDF.
[29] CARB, Zero-Emission Vehicle Program, https://ww2.arb.ca.gov/our-work/programs/zero-emission-vehicle-program/about.

The 2007 Energy Independence and Security Act (EISA) amended EPCA to prohibit NHTSA from considering the fuel economy of alternative vehicles (including EVs)[30] when setting CAFE standards.[31] The amendment aims to ensure that CAFE standards never become so stringent automakers must sell EVs to comply.[32] Mandating EV sales is the very purpose of the ZEV program, which logically culminates in banning the sale of new gasoline-powered vehicles.[33]

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.[34] It negotiates a deal allowing four automakers to meet reduced mileage standards—*if* they promise not to challenge California's authority.[35] It expels from the state's government procurement market automakers who oppose California's litigation against the SAFE 1 Rule.[36] Rescinding SAFE 1 would re-empower CARB to pursue quid-pro-quo regulatory favoritism and infringe automakers' due process and equal protection rights.

Consumer Impacts

Although the rule of law and due process issues discussed above are dispositive and require retention of the SAFE 1 Rule, a brief comment on SAFE 1's value to consumers is in order.

SAFE 1 restores the pre-2009 institutional framework for determining Corporate Average Fuel Economy (CAFE) standards. By eliminating California's tailpipe CO_2 emission standards and ZEV mandates, SAFE 1 ends Sacramento's power to

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[30] 49 U.S. Code § 32901. Definitions, https://www.law.cornell.edu/uscode/text/49/32901.

[31] 49 U.S. Code § 32902. Average fuel economy standards, https://www.law.cornell.edu/uscode/text/49/32902E; EPA and NHTSA, 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 FR 62624, 62656, https://www.govinfo.gov/content/pkg/FR-2012-10-15/pdf/2012-21972.pdf.

[32] EPA and NHTSA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 85 FR 24174, 25170, April 30, 2020, https://www.govinfo.gov/content/pkg/FR-2020-04-30/pdf/2020-06967.pdf.

[33] 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/.

[34] EPA and NHTSA, Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 FR 25324, 25328, May 7, 2010, https://www.govinfo.gov/content/pkg/FR-2010-05-07/pdf/2010-8159.pdf.

[35] 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.

[36] 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.

bully automakers into serving its ideological agenda rather than the revealed preferences of consumers.[37] That should relieve the political pressure on NHTSA, the EPA, state governments, and manufacturers to ignore the adverse effects of CAFE standards and ZEV mandates on vehicle affordability, consumer choice, and occupant safety.

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

Issues for Comment

We now offer comment on the EPA's stated issues. The EPA's statements are indented in blue; our comments are flush left.

> EPA now believes that there are significant issues with the SAFE 1 action, including the time elapsed since EPA's 2013 waiver decision (and associated reliance interests), the novel statutory interpretations set forth in SAFE 1, and whether EPA took proper account of the environmental conditions in California and the environmental consequences of the waiver withdrawal in SAFE 1. 86 FR 22422

Time elapsed is a frivolous objection. After EPCA's enactment in 1975, 30 years elapsed before California applied for a Clean Air Act preemption waiver implicitly authorizing the State to regulate fuel economy. If time elapsed counted for anything, it would be as a reason to uphold 30 years of preempting state laws and regulations "related to" fuel economy.

The time elapsed between the 2013 waiver and the final SAFE 1 Rule was six years—less than the two terms of the Obama presidency. If six years locks a policy in place and puts it beyond revision or repeal by the next administration, elections no longer matter.

[37] Marlo Lewis, "Fuel Economy Chaos—What Is It, Who Caused It, What's the Cure?" Open Market, February 5, 2020, https://cei.org/blog/fuel-economy-chaos-what-is-it-who-caused-it-whats-the-cure/.

As for reliance interests, all costly, wasteful, or otherwise defective government programs create reliance interests. Usurpations of power do so as well. If the creation of reliance interests is enough to legitimize bad or unlawful policies, anything goes.

The reliance interest critique of SAFE 1 is self-contradictory. Usurpations damage or destroy as well as create reliance interests. As noted above, the Obama administration's 2010 motor vehicle rule, which purported to establish one national program jointly administered by the EPA, NHTSA, and CARB, eroded lawmakers' judicial rights vis-à-vis CARB—rights on which they previously relied.

CARB also tossed automakers' reliance interests out the window when it refused to be bound by the results of the EPA and NHTSA's Mid-Term Evaluation (MTE) of model year 2021-2025 GHG and fuel economy standards, and refused to honor its "deemed to comply" pledge to automakers unless they complied with the standards set by the EPA in 2012 and 2017.[38]

Automobile consumers, too, have reliance interests. They rely on marketplace competition to expand vehicle choice make cars more affordable. CARB's vehicle electrification crusade runs directly counter to that reliance interest.

> Prior to SAFE 1, EPA has consistently declined to consider other potential bases for denying a waiver such as Constitutional claims or the preemptive effect of other Federal statutes. 86 FR 22432

Unprecedented usurpations call for unprecedented restorations. Prior to July 2009, CAA 209(b) waivers never raised constitutional issues. Never before did the EPA authorize state motor vehicle standards expressly prohibited by Congress. Never before 2010 did an administration negotiate an auto regulation under a vow of silence.[39] Never before did an auto rule forbid automakers to challenge a California waiver in court.

> Where the Court of Appeals for the District of Columbia Circuit has reviewed EPA decisions declining to deny waiver requests based on criteria not found in section 209(b), the court has upheld and agreed with EPA's determination.'' *See MEMA II* at 462–63, *MEMA* I at 1114–20. 86 FR 22423

[38] 84 FR 51336.

[39] Collin Sullivan, "Vow of silence key to White House-Calif. fuel economy talks," *The 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.

The EPA exaggerates the Court's position. In the SAFE proposal, the EPA acknowledged that it has "historically declined to consider as part of the waiver process whether California standards are constitutional or otherwise legal under other Federal statutes apart from the Clean Air Act."[40] The agency quoted the D.C. Circuit's 1979 case of *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA* (MEMA I): "[T]he Administrator operates in a narrowly circumscribed proceeding requiring no broad policy judgments on constitutionally sensitive matters. Nothing in CAA section 209 requires him to consider the constitutional ramifications of the regulations for which California requests a waiver." Note, the court did not say that the EPA is *forbidden* to take constitutional ramifications into consideration, only that it is *not required* to do so.

In a footnote, the court adds: "We need not decide here whether the Administrator is authorized to deny a waiver on the ground that the proposed California regulations are on their face violative of the Constitution." So, the court did not purport to resolve the issue of whether constitutional concerns may inform a Section 209(b) waiver decision.

Tellingly, the court goes on to state:

> While nothing in section 209 categorically forbids the Administrator from listening to constitutionally-based challenges, petitioners are assured through a petition for review here that their contentions will get a hearing. If petitioners dislike the substance of the CARB's regulations, or if they believe the procedures the CARB used to enact them were unsatisfactory, then they are free to challenge the regulations in the state courts of California.

Actually, petitioners cannot do that, thanks to the May 2009 "historic agreement" between the automakers, California, and the Obama administration,[41] memorialized by the EPA and NHTSA in the 2010 joint GHG/fuel economy rule. An arrangement in which agencies collude to suppress automakers' access to judicial remedies is a policy context the court could not have foreseen.

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[40] 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, 42340, August 24, 2018, https://www.govinfo.gov/content/pkg/FR-2018-08-24/pdf/2018-16820.pdf.

[41] 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.

In the January 2013 waiver authorizing California's Advanced Clean Car (ACC) program, the EPA stated: "EPA may only deny waiver requests based on the criteria in section 209(b), and inconsistency with EPCA is not one of those criteria."[42] In SAFE 1, the EPA decided that "this January 2013 statement was inappropriately broad, to the extent it suggested that EPA is categorically forbidden from ever determining that a waiver is inappropriate due to consideration of anything other than the 'criteria' or 'prongs' at CAA section 209(b)(1)(B)(A)–(C)."[43] That opinion is consistent with MEMA I, especially in light of the court's mistaken assumption that access to judicial remedies would never be infringed.

We would go further than SAFE 1 in questioning the ACC waiver's 209(b) criteria absolutism. Suppose bribery and extortion had been instrumental in assembling the legislative majorities that passed AB 1493, California's motor vehicle greenhouse gas emission standards law. Or suppose CARB adopted the standards solely on its own initiative, without benefit of any authorizing legislation and in open defiance of state's governor and lawmakers. Would the EPA still claim it must approve the standards because 209(b) does not list criminality and unconstitutionality as criteria for rejecting waiver requests? We would hope not.

Congress undoubtedly intended for the EPA to grant waivers for lawful standards, not unlawful ones. But that is exactly what the core issue is here. Are California's tailpipe CO_2 standards and ZEV mandates lawful under EPCA 32919(a)? If the standards are unlawful, is the EPA's only obligation to approve them? Does 209(b) also obligate the EPA to ignore NHTSA's assessment, in a joint rulemaking, that Congress prohibited California's standards? Can an executive agency reasonably claim that the lawfulness and constitutionality of state actions over which it has supervision are issues outside the scope of its responsibility?

In any case, NHTSA's determination that EPCA preempts state policies that regulate or prohibit tailpipe CO_2 emissions changed the legal equation facing the EPA. The EPA has no special competence to interpret EPCA, but NHTSA most certainly does. The SAFE Rule is a joint rulemaking, which, like the 2010 and 2012 rulemakings, aspires to fulfill the Supreme Court's expectation, in *Massachusetts v. EPA* (2007), that the two agencies "both administer their obligations and yet avoid inconsistency."[44] Once NHTSA proposed to finalize a determination that EPCA preempts California's GHG motor vehicle standards, it would be unreasonable for the EPA to refuse to take NHTSA's action into account.

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[42] 78 FR 2415.
[43] 84 FR 51338.
[44] *Massachusetts v. EPA* (2009), slip. op., p. 29, https://www.supremecourt.gov/opinions/06pdf/05-1120.pdf.

In SAFE 1, the EPA explains why it must consider NHTSA's action:

> In the context of a joint action in which our sister agency is determining, and codifying regulatory text to reflect, that a statute Congress has entrusted it to administer preempts certain State law, EPA will not disregard that conclusion, which would place the United States Government in the untenable position of arguing that one federal agency can resurrect a State provision that, as another federal agency has concluded and codified, Congress has expressly preempted and therefore rendered void *ab initio*.[45]

The EPA asks for comment on whether, in SAFE 1, the agency properly interpreted and applied the CAA 209(b) preemption waiver provision:

> EPA seeks public comment, in the context of SAFE 1 and now the Agency's reconsideration, on whether the Agency properly exercised its authority in reconsidering the ACC program waiver and whether the second waiver prong at section 209(b)(1)(B) was properly interpreted and applied. 86 FR 22428
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> Was it permissible for EPA to construe section 209(b)(1)(B) as calling for a consideration of California's need for a separate motor vehicle program where criteria pollutants are at issue and a consideration of California's specific standards where GHG standards are at issue? 86 FR 22429

Some quick background is appropriate here. CAA 209(a) prohibits states from adopting or enforcing motor vehicle emission standards. CAA 209(b) makes a big fat exception for California. It directs the EPA to waive preemption for California if the State determines that its standards, "in the aggregate," are at least as protective as the applicable federal standards. However, no such waiver shall be granted if the Administrator finds that:

> (A) California's protectiveness determination is arbitrary and capricious;
>
> (B) California does not need "such State standards" to meet compelling and extraordinary conditions; or

[45] 86 FR 51338.

> (C) "Such State standards" and accompanying enforcement procedures are not consistent with CAA Section 202(a), which requires the EPA to consider compliance costs and the time needed to develop emission control technology.

During the decades when California's emission standards solely addressed criteria pollutants—pollutants regulated by the national ambient air quality standards (NAAQS) program—the EPA's waiver review was mostly a simple box checking exercise. The EPA interpreted the second of the three "prongs"—waiver denial criterion (B)—to ask whether California still needs its own vehicle emissions program to meet "compelling and extraordinary conditions." The EPA assumed the phrase "such State standards" referred to the standards "in the aggregate" required to be at least as protective as federal standards.

That would mean the only relevant test for the EPA in determining whether to grant or deny a waiver is whether California needs its own motor vehicle emissions program.[46] However, that never made much sense, and when California began to regulate CO_2 emissions, it made no sense.

The interpretation that "such State standards" in 209(b) refer exclusively to California's separate motor vehicle program, not to the specific standards for the State is seeking a waiver, is flawed for two reasons.

First, the same phrase "such State standards" occurs in prong (C), which clearly requires a review of the specific standard or standards for which a waiver is pending. Under prong (C), the EPA must determine, on a case-by-case basis, whether the requisite technology will be available and whether compliance costs will be reasonable.

Second, as a practical matter, the EPA considers waiver requests "as it receives them, individually, not in the aggregate with all standards for which it has previously granted waivers" going back to 1967.[47] As the EPA acknowledges, "in response to commenters that have argued that EPA is required to examine the specific standards at issue in the waiver request, EPA's practice has been to retain the traditional approach [reaffirming California's need for a separate program] but

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[46] 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, 32759, July 8, 2009, https://www.gpo.gov/fdsys/pkg/FR-2009-07-08/pdf/E9-15943.pdf.

[47] 83 FR 43246.

to nevertheless review the specific standards to determine whether California needs such standards."[48]

If Congress had intended to bar EPA from denying a waiver request for any particular standard or set of standards, it could easily have said so. As the U.S. Chamber of Commerce argued in its reply brief submitted to the D.C. Circuit Court of Appeals in October 2010:

> But if Congress intended to give California free rein to add to its program any standard it chooses, subject only to a general assessment of the state's continuing need for that "program," the statute would look radically different. Rather than requiring Section 209(b)(1)(B) review each time California adopts a new "standard," the statute would limit EPA's role to periodic reviews of California's "need" for a "program" "as a whole," with EPA issuing a categorical preemption waiver at the completion of each review. Likewise, if it were Congress's intent to permit California-specific standards that have nothing to do with California-specific "conditions," Congress would have omitted the requirement for "compelling and extraordinary conditions"—a term that plainly requires a comparison to conditions in other states or to the nation as a whole.[49]

As it happened, there was no pressing need to clarify this matter during the first three decades of the CAFE program, because California's standards addressed local and regional air pollution arising from its "compelling and extraordinary conditions"—the State's large number of vehicles, a climate with frequent thermal inversions, and a topography with pollution concentrating basins.[50]

Prong (B) became problematic when CARB began regulating CO_2 emissions. That is so for two reasons. First, California's "compelling and extraordinary conditions" have no particular nexus to either the causes or effects of global climate change. GHG concentrations are essentially uniform throughout the globe, and are not affected by California's topography and meteorology. California's vehicles emit GHGs, but so do mobile and stationary sources throughout the world. The resulting

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[48] 86 FR 22427.

[49] Chamber of Commerce of the United States of America, et al., Petitioners v. U.S. Environmental Protection Agency, et al., Respondents, On Petition of Review of an Order of the U.S. Environmental Protection Agency, No. 09-1237, October 15, 2010, https://www.chamberlitigation.com/sites/default/files/cases/files/2009/Chamber%20of%20Commerce%2C%20et%20al.%20v.%20EPA%20%28California%20Waiver%29%20%28Reply%20Brief%29.pdf

[50] 84 FR 51345-51346.

"global pool" of GHG emissions is not any more concentrated in California than anywhere else.[51]

SAFE 1 provides ample evidence from legislative and regulatory history that California's "compelling and extraordinary conditions" refer to the factors driving California's air pollution, not the pollution itself.[52] But even if one assumes "compelling and extraordinary conditions" can refer to climate change impacts, such as heat waves, drought, and coastal flooding, California's vulnerability is not "sufficiently different" from the rest of the nation to merit waiving federal preemption of state emission standards.[53] Thus, California is not "extraordinary" in regard to either the "causes" of the "effects" of global climate change.[54] Or, as we at CEI are wont to say, "They call it global warming, not California warming."

Second, unlike California's emission standards for criteria pollutants, California's GHG standards would not ameliorate any environmental problem in the state. Compared to the GHG standards in the final SAFE Rule, California's standards would decrease carbon dioxide concentrations by 0.65 parts per million and global average surface temperature by 0.003°C in 2100.[55] Three one-thousands of a degree Celsius is 27 times smaller than the 0.08°C margin of error for measuring annual changes in global average temperature.[56] The impact of the California standards on global warming would be undetectable under current scientific methods.

More importantly, an unverifiable decrease of 0.003°C in global average temperature 79 years from now would have no discernible impacts on weather patterns, coastal flooding, smog levels, or any other environmental condition people actually care about. The climate benefits in the policy-relevant future—the next 10-30 years—would be even more miniscule.

Whatever one's views on climate change, California does not "need" separate motor vehicle standards useful only for virtue-signaling or bureaucratic empire building. As the proposed SAFE Rule more gently put it, "a problem does not

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[51] 83 FR 43246; 86 FR 51347.
[52] 86 51343-51344.
[53] 83 FR 43247-43249; 86 FR 51348.
[54] 83 FR 43245.
[55] NHTSA, Final Environmental Impact Assessment, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Year 2021-2026 Passenger Cars and Light Trucks, Docket No. NHTSA-2017-0069, March 2020, p. 8-27, https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/safe_vehicles_rule_feis.pdf (hereafter FEIS).
[56] NOAA, National Centers for Environmental Information, Global Temperature Uncertainty, https://www.ncdc.noaa.gov/monitoring-references/faq/global-precision.php

cause you to 'need' something that would not meaningfully address the problem."[57]

In brief, SAFE 1 reasonably concludes that California needs its own mobile source program to deal with local and regional air pollution, which results from the state's "extraordinary" conditions, but does not need its own tailpipe CO_2 regulations or mandates, which have no particular nexus to the "extraordinary" conditions the waiver program was established to address.

SAFE 1's critics contend that even if California's motor vehicle GHG regulations do not discernibly mitigate climate change, California and other states need those policies to combat air pollution. SAFE 1 pointed out that in CARB's support document for the ACC waiver program, CARB stated "that there were no criteria emission benefits [from the ZEV mandates] in terms of vehicle (tank-to-wheel) emissions because its LEV [Low Emission Vehicle] III criteria pollutant fleet standard was responsible for those emission reductions."[58] The reconsideration invites comment on (i.e. criticism of) that statement:

> EPA requests comment on these specific conclusions [based on 2013 waiver request assessment that ZEV provided no TTW criteria pollutant benefit] and readings as well as within the context of environmental conditions in California . . . 86 FR 22429

Does anyone seriously argue that SAFE 1 should be rescinded because it relied on an Obama EPA-approved CARB analysis of California's motor vehicle program?

What presumably irks the EPA is that even if ZEV mandates and more stringent tailpipe CO_2 standards have no tank-to-wheel criteria pollutant benefits, those policies can reduce upstream emissions associated with petroleum production, refining, transport, and storage.[59]

Although NHTSA and EPA are required to consider all relevant factors when determining CAFE and tailpipe CO_2 standards, it is inappropriate to elevate *stationary source* criteria pollutant emissions into a make-or-break factor in waivers for a *mobile source* program. The Clean Air Act already provides the EPA with ample authorities to regulate stationary sources, including the NAAQS program, New Source Performance Standards program, Prevention of Significant Deterioration of Air Quality program, Acid Rain program, and Regional Haze

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[57] 83 FR 43248.

[58] 86 FR 22425, citing EPA, Approval and Promulgation of Implementation Plans; California; California Mobile Source Regulations; Final Rule, 81 39424, 39427-39428, June 16, 2016, https://www.govinfo.gov/content/pkg/FR-2016-06-16/pdf/2016-13941.pdf.

[59] NHTSA, FEIS, pp. 4-34, 39.

program. If Congress wanted NHTSA's CAFE program and EPA's mobile source program to prioritize reductions of indirect stationary source emissions, it could easily have said so. The indirect effects on stationary source emissions are not even mentioned.

Finally, we come to the reconsideration's objection to SAFE 1's determination that other states may not opt into California's GHG motor vehicle standards under CAA Section 177:

> Additionally, EPA seeks comment on whether EPA had the authority in the SAFE 1 context to interpret section 177 of the CAA and whether the interpretation was appropriate, as well as whether EPA properly considered EPCA preemption and its effect on California's waiver. 86 FR 22428-22429

CAA section 177 authorizes other states to opt into California's motor vehicle emissions program. Today, 13 states and the District of Columbia have adopted the California standards, including nine that also participate in the mandate to increase sales of zero-emission vehicles.[60] Collectively, the "California" states represent 40 percent of the automobile market, which gives politicians and bureaucrats in Sacramento substantial leverage over the auto industry.[61]

In SAFE 1, the EPA determined that CAA section 177 does not apply to CARB's GHG standards.[62] Section 177 is titled ''New motor vehicle emission standards in nonattainment areas'' and applies solely to states with "approved" plans (SIPs) to bring non-attainment areas into attainment with national ambient air quality standards (NAAQS). The provision's clear purpose is to facilitate nonattainment states' efforts to clean the air by adopting California's stricter emission standards for NAAQS-regulated ("criteria") air pollutants.

As the SAFE proposal argued, it would be "illogical to require approved nonattainment SIP provisions as a predicate for allowing States to adopt California's standards if states could use this authority to adopt California standards that addressed environmental problems other than nonattainment of criteria pollutant standards."[63] More simply stated, there are no NAAQS for carbon dioxide and other greenhouse gases, hence no NAAQS non-attainment areas for

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[60] Stephen Edlestein, "Which states follow California's emission and zero-emission vehicle rules?" *Green Car Reports*, May 7, 2017, https://www.greencarreports.com/news/1109217_which-states-follow-californias-emission-and-zero-emission-vehicle-rules

[61] Ingrid Lobet, "EPA pick shows little support for California pollution authority," January 19, 2017, https://inewsource.org/2017/01/19/pruitt-epa-california-waiver/

[62] 83 FR 43253

[63] 83 FR 43253

GHGs. Consequently, the 177 option has no rational application to California's motor vehicle GHG standards.

As the SAFE proposal also pointed out, Congress placed Section 177 in title I part D, which deals with plan requirements for nonattainment areas, rather than title II, which contains the California waiver provision. Thus, it "would make no sense if [Section 177] functioned as a waiver applicable to all subjects, as does the California-focused provision under section 209(b), rather than as a provision specifically targeting criteria pollutants and nonattainment areas, as does the rest of title I part D." In short, "the text, context, and purpose of Section 177 suggest" that the provision is limited to motor vehicle standards "designed to control criteria pollutants to address NAAQS nonattainment."[64]

The final SAFE 1 Rule also provides substantial legislative history showing that Congress's purpose in creating the Section 177 program was to address non-attainment with NAAQS for criteria pollutants, not to address any global atmospheric phenomenon.[65]

Conclusion

NHTSA and the EPA clearly want to rescind SAFE 1. However, neither agency engages SAFE 1's core preemption argument on the merits. The EPA raises several issues and concerns regarding the agency's decision to withdraw California's 2013 waiver and determination that CAA Section 177 does not apply to state emission standards for non-criteria pollutants. All of those concerns and objections were raised during the SAFE 1 proceeding, and the EPA dealt with them forthrightly and adequately in the final SAFE 1 Rule. If courts review the issues on the merits, we expect SAFE 1 to be upheld.

Respectfully Submitted,

Marlo Lewis
Senior Fellow in Energy and Environmental Policy
Competitive Enterprise Institute
1310 L Street, NW
Washington, D.C. 20005
marlo.lewis@cei.org

[64] 83 FR 43253.
[65] 86 FR 51351.