



**Comments of Marlo Lewis, Jr., Competitive Enterprise Institute**  
**Docket: NHTSA–2023–0022**

**October 16, 2023**

Thank you for the opportunity to comment on the National Highway Traffic Safety Administration’s (NHTSA’s) proposed corporate average fuel economy (CAFE) standards for passenger cars and light trucks for model years (MY) 2027–2032.<sup>1</sup>

These comments provide a contextual analysis of NHTSA’s proposal. Specifically, NHTSA’s proposal is examined in relation to the Environmental Protection Agency’s (EPA’s) May 5, 2023 proposed motor vehicle greenhouse gas (GHG) emission standards, prior joint rulemakings by the two agencies, *West Virginia v. EPA* (2022), *Massachusetts v. EPA* (2007), and various provisions of the Energy Policy and Conservation Act (EPCA) as amended.

The analysis reveals that the EPA and NHTSA propose to destroy what the Obama administration once proudly hailed as the harmonized, consistent, coordinated, national fuel economy and greenhouse gas vehicle program. More importantly, it reveals that the both agencies are engaged in a regulatory campaign of vehicle electrification that is unlawful on both major-questions and statutory grounds.

## **I. Summary**

### Inconsistencies

The agencies’ standards are inconsistent in two ways. First, the EPA’s tailpipe GHG standards start out 8.5 percent more stringent than NHTSA’s CAFE standards, and end up 44.8 percent more stringent.

However, all of the fuel economy gains from EPA’s standards come from rising electric vehicle (EV) sales, not from improved fuel economy in the shrinking internal combustion engine (ICE) vehicle segments of automakers’ fleets.

For ICE vehicles, NHTSA’s CAFE standards are significantly more stringent than the EPA’s. That is the second inconsistency.

The standards are coordinated but after the fashion of a squeeze play or one-two punch. Because NHTSA’s standards are more stringent for ICE vehicles, manufacturers do not automatically meet those standards by complying with the EPA’s more-stringent fleetwide GHG standards.

Thus, NHTSA’s standards ensure that manufacturers have two compliance headaches as long as they continue to produce ICE vehicles. Some companies may withdraw from the ICE vehicle market, or accelerate plans to do so, in order to simplify and reduce overall compliance burdens. Functionally, NHTSA is a power booster or auxiliary enforcer for the electrification agenda.

### Unlawful on major-questions grounds

Although less stringent than the EPA’s GHG standards, NHTSA’s CAFE standards are stringent enough to backstop the administration’s electrification agenda if EPA and California lose in court.

Forced vehicle electrification is a policy decision of vast economic and political significance for which no clear congressional authorization exists. The agencies' agenda is thus unlawful under the Supreme Court's major-questions doctrine as articulated in *West Virginia v. EPA*.

#### Unlawful on statutory grounds

EPCA as amended prohibits NHTSA from setting fuel economy standards to force sales of alternative fueled vehicles such as EVs. NHTSA's role as a power booster for vehicle electrification conflicts with EPCA's statutory prohibition.

#### Undermining the Supreme Court's rationales in *Massachusetts v. EPA*

In *Massachusetts*, the Supreme Court opined "there is no reason to think the two agencies cannot ... avoid inconsistency" if the EPA prescribes CAFE-like GHG standards, and that such power would not lead to "extreme measures," such as banning an entire class of products. Yet the agencies' proposed standards are increasingly inconsistent and aim to phase out (progressively ban) sales of ICE vehicles. The agencies undermine key premises on which the Court based its decision.

#### The agencies have unlawfully empowered California to ban ICE vehicles

The agencies depict their role as supporting rather than driving vehicle electrification, assigning primary responsibility to California's zero-emission vehicles (ZEV) program. However, the ZEV program would not exist had the EPA not waived Clean Air Act preemption of California's GHG emission standards in 2009 and Advanced Clean Car (ACC) program in 2013, and 2022, and had NHTSA in 2022 not repealed the SAFE 1 Rule enforcing EPCA preemption of state policies "related to" fuel economy standards.

#### NHTSA ignores or downplays important aspects of economic practicability

Millions of middle-income households are already priced out of the market for new motor vehicles. NHTSA's standards will increase new-car prices. Americans' choices under the agencies' proposals will be increasingly limited to purchasing EVs many cannot afford or do not want, or giving up on personal automobility altogether. Households forced to rely on transit will experience significant losses of personal liberty, time, convenience, economic opportunity, health, safety, and, yes, fun.

#### Climate change is not a crisis, and the proposed CAFE standards are not a solution

Contrary to Biden administration assertions, climate change is not a crisis, and the global warming mitigation achieved by the proposed CAFE standards would orders of magnitude smaller than scientists can detect or verify.

#### Bottom line

The agencies' proposed motor vehicle standards are unlawful and unreasonable, and should be withdrawn.

## **II. Inconsistent fleetwide standards**

The misalignment between NHTSA's CAFE standards and the EPA's tailpipe GHG standards is a fundamental departure from the agencies' practice in both the Obama and Trump administrations. The agencies' joint rulemakings in 2010, 2012, 2016, and 2020 promulgated CAFE and GHG standards of approximately equal stringency. That was considered the only rational approach. As the 2010 rule explained, CO<sub>2</sub> emissions constitute about 94 percent of motor vehicle GHG emissions, and a vehicle's CO<sub>2</sub> emissions per mile are directly proportional to its fuel consumption per mile.<sup>2</sup>

Although labeled differently, tailpipe CO<sub>2</sub> emissions and fuel economy are “two sides of the same coin.”<sup>3</sup> NHTSA’s CAFE standards (expressed in miles per gallon) implicitly regulate fleet average CO<sub>2</sub> emissions per mile, and the EPA’s GHG standards (expressed in grams CO<sub>2</sub>/mile) implicitly regulate fleet average fuel economy. It is neither efficient nor reasonable to subject automakers to conflicting fuel economy requirements.

Accordingly, in the 2010 and 2012 joint rulemakings, the agencies boasted of implementing a single “national,” “harmonized,” “coordinated,” and “consistent” CAFE and GHG program. Not once, or twice, but scores of times. In the 2010 rule establishing CAFE and GHG standards for MY 2012-2016 motor vehicles, the term “national program” occurs 91 times; “harmonized,” 26 times; “coordinated,” 21 times; and “consistent,” 148 times. In the 2012 rule establishing CAFE and GHG standards for MY 2017-2025 motor vehicles,<sup>4</sup> the term “national program” occurs 111 times; “harmonized,” 28 times; “coordinated,” 33 times; and “consistent,” 253 times.

In May 2023, the EPA proposed GHG standards for MY 2027-2032 light duty vehicles.<sup>5</sup> The EPA’s proposed standards are substantially more stringent than NHTSA’s. In NHTSA’s preferred alternative, abbreviated PC2LT4, required fleet average fuel economy increases by two percent annually for passenger cars and four percent annually for light trucks.<sup>6</sup>

**Table I-4: Estimated Required Average and Estimated Achieved Average of CAFE Levels (mpg) for Passenger Cars and Light Trucks, Preferred Alternative PC2LT4**

Fleet	MY 2027	MY 2028	MY 2029	MY 2030	MY 2031	MY 2032
<b>Passenger Cars</b>						
Estimated Required	60.0	61.2	62.5	63.7	65.1	66.4
Estimated Achieved	63.5	65.3	67.5	69.3	71.3	72.8
<b>Light Trucks</b>						
Estimated Required	44.4	46.2	48.2	50.2	52.2	54.4
Estimated Achieved	44.2	45.7	47.5	49.0	50.9	52.4
<b>Combined</b>						
Estimated Required <sup>16</sup>	48.4	50.1	51.9	53.8	55.7	57.8
Estimated Achieved	49.0	50.5	52.3	54.0	56.0	57.6

In contrast, the EPA’s combined light-duty vehicle standards increase in stringency by 12.8 percent annually.<sup>7</sup> Table 29 below shows the EPA’s proposed CO<sub>2</sub> standards for MY 2027-2032 passenger cars and light trucks.<sup>8</sup>

**TABLE 29—ESTIMATED FLEET-WIDE CO<sub>2</sub> TARGETS CORRESPONDING TO THE PROPOSED STANDARDS**<sup>408 409</sup>

Model year	Cars CO <sub>2</sub> (g/mile)	Trucks CO <sub>2</sub> (g/mile)	Fleet CO <sub>2</sub> (g/mile)
2026 adjusted .....	152	207	186
2027 .....	134	163	152
2028 .....	116	142	131
2029 .....	99	120	111
2030 .....	91	110	102
2031 .....	82	100	93
2032 and later .....	73	89	82

The agencies do not make it easy to compare their respective standards. Although the term “fuel economy” occurs 126 times in the EPA’s proposed rule and 71 times in the Draft Regulatory Impact Analysis,<sup>9</sup> there is no information about the mileage equivalents of the estimated fleetwide CO<sub>2</sub> targets.

Similarly, although the term “CO<sub>2</sub>” occurs 129 times in NHTSA’s proposed rule, 131 times in the Draft Technical Support Document,<sup>10</sup> and a whopping 441 times in the Draft Environmental Impact Statement,<sup>11</sup> there is no information about the CO<sub>2</sub> targets implied in the mileage standards. NHTSA surely knows how to present such information in an easy-to-read format, because it did so in its May 2022 final rule establishing CAFE standards for MY 2024-2026 motor vehicles.<sup>12</sup>

**Table II-6 – Estimated CO<sub>2</sub> Levels Equivalent to Average of CAFE Levels Required Under Final Rule (Gram per Mile CO<sub>2</sub> Levels)**

Fleet	2024	2025	2026	2027	2028	2029
Passenger Cars	181	166	150	150	150	150
Light Trucks	253	233	210	210	210	210
Overall Fleet	219	201	181	181	181	180

NHTSA should have provided this information in the current rulemaking. Not doing so is unreasonable, as it makes the proposal harder for the public to understand.

Fortunately, [UnitJuggler.Com](https://www.unitjuggler.com) has an online calculator for converting miles per gallon into grams CO<sub>2</sub>/km. One mile equals 1.609344 kilometers, so by multiplying grams CO<sub>2</sub>/km by 1.609344, we can compute the grams CO<sub>2</sub>/mile equivalents of NHTSA’s proposed mileage standards.

NHTSA’s proposed CAFE standards for passenger cars increase from 60.0 mpg in MY 2027 to 66.4 mpg in MY 2032 (Table I-4, above). The corresponding equivalent CO<sub>2</sub> standards decrease from 146.4 grams CO<sub>2</sub>/mile in MY 2027 to 132.2 grams CO<sub>2</sub>/mile in MY 2032. The EPA’s tailpipe GHG standards start at 134 grams CO<sub>2</sub>/mile in MY 2027 and decrease to 73 grams CO<sub>2</sub>/mile in MY 2032 (Table 29, above). In the first year of the compliance period, the EPA’s standard is 8.5 percent more stringent than NHTSA’s. By the last year of the compliance period, the EPA’s standard is 44.8 percent more stringent.

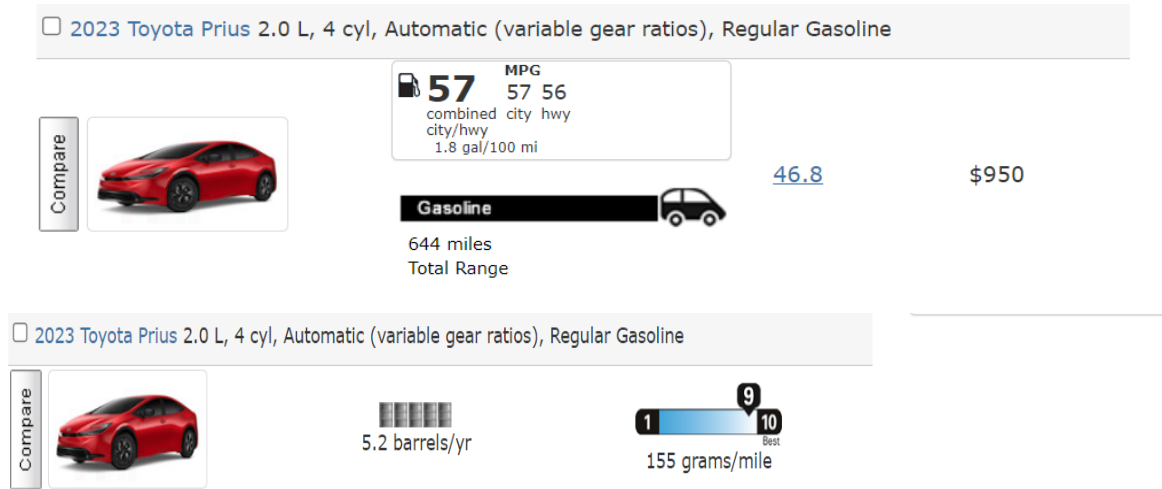
Comparing the standards from the CAFE side of the coin, for passenger cars, explicit fleet average fuel economy increases from 60 mpg to 66.4 mpg in NHTSA’s proposal, whereas implicit fuel economy increases from 66.7 mpg to 121.3 mpg in the EPA’s proposal.

NHTSA’s press release claims the “proposed fuel economy standards complement and align with the Environmental Protection Agency’s recently proposed emissions standards for similar vehicle fleets.”<sup>13</sup> That is backwards. The EPA’s standards increasingly clash and misalign with NHTSA’s.

### **III. EPA’s de-facto electric vehicle mandate**

The big picture neither agency acknowledges is that the EPA’s standards are de-facto EV mandates. The standards are so stringent that manufacturers can comply only by averaging in the “fuel economy” of cars that don’t run on gasoline or diesel fuel. As the standards tighten, automakers must increase the percentage of EVs they sell and decrease sales of gasoline- and diesel-powered cars, including fuel-efficient hybrids.

For example, according to [FuelEconomy.Gov](https://www.fueleconomy.gov), a joint Website of the EPA and Department of Energy, Toyota’s most fuel-efficient MY 2023 Prius hybrid gets 57 mpg and emits 155 grams CO<sub>2</sub>/mile.



Toyota also manufactures hybrids and non-hybrids with lower mpg ratings, such as the RAV-4 Hybrid Woodland Edition, rated at 37 mpg, and the Corolla Hatchback XSE, rated at 33 mpg. However, even if all Toyota vehicles were to achieve the mpg and CO<sub>2</sub> targets of the Prius hybrid shown above, the fleet average would not come even half way to meeting the EPA’s proposed standard for MY 2032 vehicles—73 grams CO<sub>2</sub>/mile.

Although NHTSA does not quantify the growing misalignment, it offers an explanation that acknowledges it. According to NHTSA, the “the biggest difference between the two proposals is due to EPCA/EISA’s statutory prohibition against NHTSA considering the fuel economy of dedicated alternative fueled vehicles, including BEVs [battery electric vehicles], and including the full fuel economy of dual-fueled alternative fueled vehicles in determining the maximum feasible fuel economy level that manufacturers can achieve for passenger cars and light trucks, even though manufacturers may use BEVs and dual-fueled alternative fuel vehicles (AFV) to comply with CAFE standards.”<sup>14</sup>

EPCA as amended does indeed prohibit NHTSA from setting standards to compel fleetwide electrification.<sup>15</sup> However, the implicit claim that the EPA may do so because CAA section 202 does not expressly prohibit the EPA from forcing EV sales is false. Congress did not prohibit the EPA from considering the fuel economy of alternative vehicles because it never authorized the EPA to regulate fuel economy in the first place. The notion that an agency may do anything not expressly prohibited turns the basic premise of administrative law upside down.<sup>16</sup> Absence of prohibition is not authorization.

Moreover, as explained in the next section, NHTSA’s proposal puts additional pressure on automakers to phase out ICE vehicle sales.

#### **IV. The proposal makes NHTSA a power booster or auxiliary enforcer for vehicle electrification**

Surprisingly, although the EPA’s fleet-average standards are more stringent than NHTSA’s, NHTSA’s standards for ICE vehicles are more stringent than the EPA’s. That, too, is not easy to see from the agencies’ proposals. However, because the EPA treats EVs as having zero grams CO<sub>2</sub> per mile (i.e., upstream emissions from electric generation are ignored),<sup>17</sup> it is possible to isolate the grams CO<sub>2</sub>/mile for ICE vehicles by taking the fleetwide target grams per mile and dividing by 1 minus the percentage market share of EVs.

Year	BEV Penetration (EPA) <sup>18</sup>	Fleet CAFE (MPG) <sup>19</sup>	Fleet EPA (g/mile) <sup>20</sup>	EPA standards with BEVs excluded (g/mile)	Fleet CAFE Converted to (g/mile)
2027	36%	48.4	152	237.5	165.6
2028	45%	50.1	131	238.2	159.4
2029	55%	51.9	111	246.7	153.2
2030	60%	53.8	102	255.0	147.2
2031	63%	55.7	93	251.4	141.6
2032	67%	57.8	82	248.5	135.8

NHTSA’s fleetwide standards are less stringent than EPA’s when the market penetration of EVs is considered (compare “Fleet EPA” to “Fleet CAFE converted”). However, NHTSA’s standards are *more stringent* than EPA’s for ICE vehicles (compare “EPA standards with BEVs excluded” to “Fleet CAFE Converted”). Indeed, looking just at ICE vehicles, NHTSA’s standards become 17.9 percent more stringent during 2027-2032, whereas the EPA’s standards become 4.6 percent *less stringent*.

This means manufacturers will not automatically comply with NHTSA’s standards just by producing lots of EVs to meet the EPA’s standards. They will also have to increase the fuel economy of ICE vehicles to comply with NHTSA’s standards. In NHTSA’s gingerly formulation: “Even though NHTSA is statutorily prohibited from considering the possibility that manufacturers would produce additional BEVs to comply with CAFE standards, and even though manufacturers have stated their intention to rely more and more heavily on those BEVs for compliance, CAFE standards still have an important role to play in meeting the country’s ongoing need to conserve energy.”<sup>21</sup>

This double whammy did not exist in the 2010, 2012, 2016, and 2020 joint rulemakings. As long as automakers continue to produce any ICE vehicles, they must cope with two regulatory headaches rather than one. Some automakers may decide to reduce and simplify their compliance burdens by withdrawing from the ICE vehicle market, or phasing out ICE vehicles sooner than planned. The proposed CAFE standards function as a power booster or auxiliary enforcer for vehicle electrification.

### V. Unlawful under *West Virginia v. EPA*

In *West Virginia v. EPA*,<sup>22</sup> the Supreme Court vacated the EPA’s so-called Clean Power Plan (CPP).<sup>23</sup> The Court based its ruling on the “major-questions doctrine”—a jurisprudence grounded in the constitutional principle that elected officials should decide major questions of public policy, because they alone are accountable to the people at the ballot box.

The Court found that the EPA attempted to restructure a fundamental sector of the economy—electric power generation—without a “clear statement” of congressional authorization in the rule’s putative statutory basis, CAA section 111(d). Despite the agency’s 6-3 defeat in *West Virginia*, the EPA is again attempting to restructure a fundamental sector without a clear congressional authorization. The proposal’s alleged statutory basis, CAA section 202, says not a word about vehicle electrification.

In *West Virginia*, the Court said that the EPA could not set emission performance standards based on its judgment “that it would be ‘best’ if coal [and other fossil fuels] made up a much smaller share of national electricity generation.”<sup>24</sup> The EPA now proposes to establish tailpipe GHG standards based on the similar judgment that it would be best if ICE vehicles made up a much smaller share of national vehicle production.

Moreover, the EPA is using the same regulatory tactic the Court ruled out of bounds in *West Virginia*. In the CPP, the EPA promulgated CO<sub>2</sub> emission standards fossil-fuel powerplants could not meet to force a shift from coal and gas generation to wind and solar generation. The EPA now proposes to set tailpipe CO<sub>2</sub> standards beyond the reach of even the most fuel-efficient hybrid to force a shift from vehicles powered by internal combustion engines and liquid fuels to vehicles powered by electric motors and batteries.<sup>25</sup>

As a power booster or auxiliary enforcer of EPA's vehicle electrification program, NHTSA's CAFE standards are part of a coordinated strategy to resolve a major public policy question without clear congressional authorization. Thus, the proposed standards are unlawful under the major-questions doctrine.

## **VI. Unlawful on statutory grounds**

Although less stringent than EPA's GHG standards, NHTSA's CAFE standards may be stringent enough to force EV sales in the event that courts overturn the EPA's rulemaking and California's ZEV mandates. NHTSA suggests as much when explaining why CAFE standards are still important in an era of vehicle electrification: "CAFE standards can also ensure continued improvements in energy conservation by requiring ongoing fuel economy improvements even if demand for more fuel economy flags unexpectedly, or if other regulatory pushes change in unexpected ways."<sup>26</sup>

To reiterate, NHTSA's standard for light-duty ICE vehicles in 2032 is 135.8 grams CO<sub>2</sub>/mile, and today's best performing Toyota Prius emits 155 grams CO<sub>2</sub>/mile. Absent significant improvements in hybrid technologies, it is hard to see how an automaker's *fleetwide* passenger car + light truck *average fuel economy* could be as low as 135.8 grams CO<sub>2</sub>/mile without shifting production and sales from ICE vehicles to EVs.

In any event, CAFE standards that amplify the pressure on automakers to electrify their fleets (discussed in Section IV above) is at a minimum contrary to the purpose of EPCA section 32902(h). NHTSA's proposal is thus unlawful on statutory grounds.

## **VII. EPA and NHTSA's proposals undermine the Supreme Court's rationales in *Massachusetts v. EPA***

*Massachusetts v. EPA* (2007) is the fountainhead of all federal regulation of GHG emissions for climate change mitigation purposes. The EPA and NHTSA undermine two key rationales on which the Court based its decision, namely: (1) "there is no reason to think the two agencies cannot both administer their obligations [i.e., regulate tailpipe CO<sub>2</sub> emissions] and yet avoid inconsistency,"<sup>27</sup> and (2) granting the EPA jurisdiction over such emissions would not lead to "extreme measures," such as banning an entire product line.<sup>28</sup>

We now know better. The EPA's standards significantly and increasingly diverge from NHTSA's, and those standards aim to ban ICE vehicle sales—not all at once, of course, but substantially and within just nine years.

Would the Court have decided the case as it did if petitioners had avowed a goal of authorizing the EPA to impose CAFE-like requirements increasingly more stringent than NHTSA's, and for the purpose of progressively eliminating the market for ICE vehicles? Of course, no one can say for sure, but it seems doubtful.

### VIII. Upending EPCA

Politically, *Massachusetts* set the stage for the Obama EPA in July 2009 to waive Clean Air Act preemption of California’s tailpipe GHG standards.<sup>29</sup> That, in turn, set the precedent for the EPA’s January 2013 waiver for the State’s Advanced Clean Car (ACC) Program, which included stronger GHG standards and ZEV mandates.<sup>30</sup>

The EPA and NHTSA now cite California’s ACC Program to claim that their standards support rather than drive market trends.<sup>31</sup> However, it was the EPA and NHTSA that resurrected the ACC program by repealing the September 2019 SAFE 1 Rule.<sup>32</sup> SAFE 1 clarified and enforced EPCA’s broad, categorical, and non-waivable preemption of state laws or regulations “related to” fuel economy standards.<sup>33</sup> By repealing SAFE 1, the EPA and NHTSA empowered California and its State allies to adopt and enforce policies preempted by EPCA, upending the CAFE program Congress created.

SAFE 1’s clear logic is so powerful that NHTSA did not dare summarize it, much less try to rebut it, when proposing and finalizing repeal.<sup>34</sup> Here is the concise argument for SAFE 1 that NHTSA has yet to address:

1. EPCA 32919(a) prohibits states from adopting or enforcing laws or regulations “related to” fuel economy standards. California’s tailpipe CO<sub>2</sub> standards are physically and mathematically “related to” fuel economy standards. An automobile’s CO<sub>2</sub> emissions per mile are directly proportional to its fuel consumption per mile. If an agency regulates tailpipe CO<sub>2</sub> emissions, it also regulates fuel economy, and vice versa.
2. California’s ZEV mandates are substantially “related to” fuel economy standards. As ZEV mandates tighten, and EV market share increases, fleet average fuel economy increases. Conversely, as the EPA’s recent proposed rule shows, if fuel economy requirements tighten beyond a certain point, manufacturers must sell more EVs and fewer ICE vehicles to comply.
3. Because state policies regulating or prohibiting tailpipe CO<sub>2</sub> emissions are directly or substantially “related to” fuel economy standards, they are preempted.
4. Preemption statutes derive their authority from the Constitution’s Supremacy Clause. Preemption occurs *ab initio*—at the moment a conflicting state policy is enacted or adopted, not when a court later declares it so.<sup>35</sup>
5. Thus, the EPA cannot legalize California’s tailpipe GHG and ZEV standards by granting a waiver of Clean Air Act preemption. EPCA preemption is non-waivable, and it turned the California policies into legal nullities years before the EPA agreed to review them.

Viewed in context, NHTSA’s proposal is the latest action in a broader agenda of deliberate disregard of the limits Congress has placed on federal and state regulatory agencies. The EV sales projections informing the EPA’s and NHTSA’s regulatory proposals are based in significant part on California’s EPCA-preempted, ZEV program.

### IX. NHTSA ignores or downplays important aspects of economic practicability

NHTSA must consider “economic practicability” when determining CAFE standards.<sup>36</sup> NHTSA emphasizes that economic practicability is complex, including impacts on industry sales and employment, consumer choice, and vehicle purchase price.<sup>37</sup> However, NHTSA’s practicability analysis ignores the proposed standards’ auxiliary role in promoting vehicle electrification and the associated costs.



Millions of middle-income households are already priced out of the market for new motor vehicles.<sup>38</sup> Americans' choices under the administration's motor vehicle program will be increasingly limited to purchasing EVs many households cannot afford or do not want, or giving up on personal automobility. Those forced to rely on transit for their daily transportation needs will suffer severe losses of personal liberty,<sup>39</sup> time, convenience, economic opportunity,<sup>40</sup> health,<sup>41</sup> and, yes, fun.

EVs have several well-known drawbacks that the agencies' regulatory mandates do not remove but rather intensify by restricting the supply of ICE vehicles available for purchase. Such disadvantages include high purchase price,<sup>42</sup> price volatility due to supply-chain bottlenecks,<sup>43</sup> range anxiety<sup>44</sup> (especially in towing mode),<sup>45</sup> long recharging times,<sup>46</sup> reduced cold-weather performance,<sup>47</sup> and less reliability during blackouts from hurricanes and other disasters.<sup>48</sup>

The Inflation Reduction Act provides a \$7,500 tax credit for the purchase of EVs.<sup>49</sup> That should be an additional reason to let consumer preferences determine rates of EV market penetration. Instead, the EPA treats the subsidy as a factor justifying additional regulatory compulsion.<sup>50</sup>

Government's restructuring of the auto industry via regulations and preferential subsidies poses an insidious threat to consumer welfare. The IRA and the EPA's mandates increase automakers' dependence on political subventions while preventing both industry incumbents and new entrants from competing on price, range, and ease-of-fueling by selling gasoline-powered cars.

Energy analyst Robert Bryce reports that during second quarter 2023, Ford lost \$72,762 for every EV it sold, and that in July, Ford projected \$4.5 billion in EV-related losses by year's end—more than double the company's \$2.1 billion EV business losses in 2022.<sup>51</sup> It is hard to imagine such losses persisting without automakers raising the price of conventional vehicles to cross-subsidize EV production. The cost to ICE vehicle owners may seem "practicable" when EVs account for only 7 percent of new-car sales.<sup>52</sup> However, the cross-subsidy could increase dramatically as a declining number of ICE vehicle sales are used to prop up an increasing number of EV sales.<sup>53</sup>

In sum, NHTSA's consideration of "economic practicability" ignores several potentially significant costs.

## **X. Climate change is not a crisis and the proposed rule is not a climate solution**

President Biden views climate change as a "crisis"<sup>54</sup> and "existential threat,"<sup>55</sup> and NHTSA touts its proposal as a way to "mitigate global climate-related economic damages caused by accumulation of GHGs in the atmosphere."<sup>56</sup> However, climate change is not a crisis.

- Global warming is not accelerating; rather, it has held steady over the past 44 years at 0.14°C per decade.<sup>57</sup>
- The average annual number of global climate-related deaths per decade has declined by 96 percent over the past century.<sup>58</sup>
- Factoring in the fourfold increase in global population since the 1920s, the average person's risk of dying from extreme weather has decreased by 99.4 percent.<sup>59</sup>
- Climate-related economic losses as a percentage of wealth exposed to extreme weather, floods, and droughts have declined almost fivefold globally since the 1980s.<sup>60</sup>
- The administration's climate crisis narrative implicitly relies on overheated climate models<sup>61</sup> run with inflated emission scenarios.<sup>62</sup> Absent those biases, climate change assessments would project less warming, smaller climate impacts, and lower tipping-point risks.

Nor is NHTSA’s proposal a climate “solution.” According to the agency’s Draft Environmental Impact Statement, the proposed CAFE standards’ mitigation of global warming by 2100 is 0.000°C.<sup>63</sup> That is orders of magnitude smaller than any temperature effect scientists can detect or verify.<sup>64</sup>

**Table 5.4.1-6. Carbon Dioxide Concentrations, Global Mean Surface Temperature Increase, Sea-Level Rise, and Ocean pH by CAFE Standards Alternative <sup>a</sup>**

	CO <sub>2</sub> Concentration (ppm)			Global Mean Surface Temperature Increase (°C) <sup>b, c</sup>			Sea-Level Rise (cm) <sup>b, d</sup>			Ocean pH <sup>e</sup>		
	2040	2060	2100	2040	2060	2100	2040	2060	2100	2040	2060	2100
<b>Totals by Alternative</b>												
No-Action	490.19	587.76	838.31	2.008	2.788	4.340	20.10	36.39	83.24	8.4013	8.3328	8.1933
PC1LT3	490.18	587.74	838.29	2.008	2.788	4.339	20.10	36.38	83.24	8.4014	8.3328	8.1933
PC2LT4	490.17	587.71	838.21	2.008	2.788	4.339	20.10	36.38	83.23	8.4014	8.3329	8.1933
PC3LT5	490.15	587.64	838.04	2.008	2.788	4.338	20.10	36.38	83.22	8.4014	8.3329	8.1934
PC6LT8	490.10	587.42	837.48	2.007	2.786	4.336	20.09	36.37	83.16	8.4014	8.3330	8.1937
<b>Reductions Under CAFE Standard Action Alternatives</b>												
PC1LT3	0.01	0.02	0.03	0.000	0.000	0.000	0.00	0.00	0.00	0.0000	0.0000	0.0000
PC2LT4	0.02	0.05	0.10	0.000	0.000	0.000	0.00	0.00	0.01	0.0000	0.0000	0.0000
PC3LT5	0.04	0.11	0.27	0.000	0.001	0.001	0.00	0.01	0.03	0.0000	-0.0001	-0.0001
PC6LT8	0.09	0.34	0.83	0.001	0.002	0.004	0.00	0.02	0.08	-0.0001	-0.0002	-0.0004

## XI. Conclusion

The EPA and NHTSA propose standards that are significantly and increasingly inconsistent but coordinated as a strategy to progressively ban ICE vehicle sales. That strategy is unlawful under the Supreme Court’s major-questions doctrine as articulated in *West Virginia*.

For NHTSA, the strategy is also unlawful on statutory grounds, as it conflicts with the purpose of EPCA section 32902(h), which is to prevent CAFE standards from being used to suppress the ICE vehicle market.

The agencies’ greenlighting of California’s ZEV program conflicts with EPCA section 32919, compounding the unlawfulness of the agencies’ vehicle electrification strategy.

The agencies also undermine the Supreme Court’s rationales in *Massachusetts* by failing to “avoid inconsistency” and by implementing the “extreme measure” of a progressive ICE vehicle ban.

NHTSA ignores important aspects of “economic practicability,” such as the potential health effects of low-income household’s loss of affordable automobility.

The “climate crisis” rationale underpinning both agencies’ rulemakings is unscientific. As climate policy, NHTSA’s rulemaking is all pain for no gain.

The rulemaking is unlawful and unreasonable. It should be withdrawn.

Sincerely,

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<sup>13</sup> NHTSA, “USDOT Proposes Updated Fuel Economy Standards to Strengthen Energy Security, Save Americans Hundreds of Dollars at the Gas Pump,” July 28, 2023, <https://www.nhtsa.gov/press-releases/usdot-proposal-updated-cafe-hdpuv-standards>.

<sup>14</sup> 88 FR 56128, 56139.

<sup>15</sup> 49 U.S.C. § 32902(h)(1); 49 U.S.C. § 32901(a)(1)(J).

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