



May 5, 2025

Daniel Cohen  
U.S. Department of Transportation  
Office of the General Counsel  
1200 New Jersey Ave. SE,  
Washington, DC 20590

**Re: Docket No. DOT-OST-2025-0026  
Department of Transportation, Ensuring Lawful Regulation,  
Reducing Regulation and Controlling Regulatory Costs  
90 Fed. Reg. 14593 (Apr. 3, 2025).**

Dear Mr. Cohen,

On behalf of the Competitive Enterprise Institute (CEI), I respectfully submit these comments responsive to the Department of Transportation's request for information identifying regulations that are unlawful, contrary to the national interest, or both.<sup>1</sup> CEI is a non-profit public interest organization dedicated to advancing the principles of limited government and economic liberty. We focus chiefly on regulatory issues.

**Top Priority: Rescind the Biden administration's SAFE 1 Repeal Rule and replace it with a new interpretative rule reasserting EPCA preemption of state laws and regulations "related to" fuel economy standards.**

Rescinding the Biden administration's December 2021 rule<sup>2</sup> that repealed Part 1 of Trump administration's Safer Affordable Fuel-Efficient Vehicles Rule (SAFE 1),<sup>3</sup> and prescribing a new interpretative rule that reasserts and strengthens SAFE 1's preemption analysis is the most

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<sup>1</sup> Department of Transportation (DOT), Ensuring Lawful Regulation; Reducing Regulation and Controlling Regulatory Costs, Request for Information, 90 FR 14593, April 3, 2025, <https://www.govinfo.gov/content/pkg/FR-2025-04-03/pdf/2025-05557.pdf>.

<sup>2</sup> National Highway Traffic Safety Administration (NHTSA), Corporate Average Fuel Economy (CAFE) Preemption, Final Rule, 86 FR 74236, December 29, 2021, <https://www.govinfo.gov/content/pkg/FR-2021-12-29/pdf/2021-28115.pdf>.

<sup>3</sup> NHTSA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310, September 27, 2019, <https://www.govinfo.gov/content/pkg/FR-2019-09-27/pdf/2019-20672.pdf>.

important action the Department of Transportation (DOT) can take to restore lawful regulation and safeguard the national interest.

SAFE 1 was a joint rulemaking of the Trump administration National Highway Traffic Safety Administration (NHTSA) and Environmental Protection Agency (EPA). NHTSA determined that Section 29319(a) of the Energy Policy and Conservation Act (EPCA) preempts California's tailpipe carbon dioxide (CO<sub>2</sub>) emission standards and zero emission vehicle (ZEV) mandates, rendering those regulations unenforceable.<sup>4</sup>

The EPA, partly in affirmation of NHTSA's preemption analysis,<sup>5</sup> but also because vehicular CO<sub>2</sub> emissions in California have no relevance to the state's air quality challenges, withdrew the Clean Air Act (CAA) preemption waiver the agency had granted in January 2013 for California's Advanced Clean Cars (ACC) program.<sup>6</sup> ACC featured stringent tailpipe CO<sub>2</sub> standards and ZEV mandates projected to boost electric vehicle (EV) sales to about 15 percent of California's new car market by 2025.<sup>7</sup>

Repealing SAFE 1 was a top priority for the Biden administration,<sup>8</sup> California Gov. Gavin Newsom, and other blue-state allies. If allowed to stand, SAFE 1 would topple the climate-centric industrial policy they planned to impose on the US auto sector.<sup>9</sup>

Although the SAFE 1 Repeal Rule did not itself regulate anything, it underpins the entire Biden-California regulatory agenda that now threatens to price millions of Americans out of the market for new motor vehicles, undermine US auto industry competitiveness, and suppress Americans' freedom to purchase the types of vehicles that best meet their needs.

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<sup>4</sup> 84 FR 51310, 51311-51328.

<sup>5</sup> 84 FR 51310, 51328, 51338.

<sup>6</sup> 84 FR 51310, 51328-51351.

<sup>7</sup> 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>.

<sup>8</sup> President Joseph R. Biden, Executive Order 13990 of January 20, 2021, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Sec. 2, ii (requiring "immediate review" of SAFE 1), <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01765.pdf>.

<sup>9</sup> President Joseph R. Biden, Executive Order 14307 of August 5, 2021, Strengthening American Leadership in Clean Cars and Trucks ("setting a goal that 50 percent of all new passenger cars and light trucks sold in 2030 be zero-emission vehicles, including battery electric, plug-in hybrid electric, or fuel cell electric vehicles"), <https://www.govinfo.gov/content/pkg/FR-2021-08-10/pdf/2021-17121.pdf>; 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-gasolinepowered-cars-drastically-reduce-demand-for-fossil-fuel-in-californias-fight-against-climate-change/>.

After NHTSA repealed SAFE 1’s codification of EPCA preemption in December 2021, the path was clear for the EPA to reinstate the 2013 ACC waiver, which it did in March 2022.<sup>10</sup> The day after NHTSA published the SAFE 1 Repeal Rule in the *Federal Register*, the EPA published ACC-aligned tailpipe CO<sub>2</sub> standards for model year (MY) 2023-2026 light-duty vehicles.<sup>11</sup>

The EPA acknowledged the standards “will *necessitate* greater implementation and pace of technology penetration through MY 2026 using existing GHG reduction technologies, including further deployment of BEV and PHEV technologies.”<sup>12</sup> Specifically, EPA estimated “the standards can be met with gradually increasing sales of plug-in electric vehicles in the U.S., from about 7 percent market share in MY 2023 (including both fully electric vehicles (EVs) and plug-in hybrid vehicles (PHEVs)) up to about 17 percent in MY 2026.”<sup>13</sup>

This was the first time the EPA issued regulatory standards automakers could not meet without producing and selling EVs. It was also the first time a federal agency presumed to decide the major question of whether automakers should be forced to shift production and sales from liquid-fueled cars to battery-powered cars.<sup>14</sup>

The EPA claimed the standards simply gave the market a helping hand, reporting that “Major automakers as well as many global jurisdictions and U.S. states have announced plans to shift the light-duty fleet toward zero-emissions technology.”<sup>15</sup> But an important motivating factor for that shift was the expectation that the EPA would empower California and other states to enforce ZEV mandates—a policy change teed up by NHTSA’s repeal of SAFE 1.

This pattern of federal bureaucrats justifying the adoption of more stringent regulations by invoking “market trends” they promoted by purporting to authorize EPCA-preempted vehicle emission standards occurred at least twice more during the Biden administration.

NHTSA’s May 2022 rule establishing Corporate Average Fuel Economy (CAFE) standards for MY 2024-2026 cars and light trucks increased the stringency of CAFE standards by 8 percent annually during 2024-2025 and by 10 percent in 2026.<sup>16</sup> That is a far more aggressive schedule

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<sup>10</sup> EPA, California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision, 87 FR 14332, March 14, 2022, <https://www.govinfo.gov/content/pkg/FR-2022-03-14/pdf/2022-05227.pdf>.

<sup>11</sup> EPA, Revised 2023 and Later Model Year Light Duty Vehicle Greenhouse Gas Emission Standards, 86 FR 74434, December 30, 2021, <https://www.govinfo.gov/content/pkg/FR-2021-12-30/pdf/2021-27854.pdf>.

<sup>12</sup> 86 FR 74434, 74493 (emphasis added). BEV means battery electric vehicle. PHEV means plug-in hybrid electric vehicle. Both are categorized as plug-in electric vehicles or PEVs.

<sup>13</sup> 86 FR 74434, 74438.

<sup>14</sup> Initial Brief for Private Petitioners, *State of Texas et al. v. Environmental Protection Agency*, November 3, 2022, p. 23, <https://cei.org/wp-content/uploads/2022/11/Texas-v-EPA-Draft-Brief.pdf>.

<sup>15</sup> 86 FR 74434, 74486.

<sup>16</sup> NHTSA, Corporate Average Fuel Economy Standards for Model Years 2024-2026 Passenger Cars and Light Trucks, 84 FR 25710, May 2, 2022, <https://www.govinfo.gov/content/pkg/FR-2022-05-02/pdf/2022-07200.pdf>.

than the 1.5 percent annual increase in stringency established by the Trump administration’s SAFE Rule.<sup>17</sup>

While acknowledging that 49 U.S.C. 32902(h)<sup>18</sup> prohibits NHTSA from considering EV market penetration when prescribing CAFE standards,<sup>19</sup> the Biden administration NHTSA nonetheless claimed it could not ignore the new “baseline”<sup>20</sup> formed by “California’s Zero Emission Vehicle (ZEV) program (and its adoption by a number of other states)” and settlement agreements between California and BMW, Ford, Honda, VWA, and Volvo to meet stricter-than-federal tailpipe CO<sub>2</sub> standards<sup>21</sup> (which implicitly regulate fuel economy).

“Further,” the May 2022 rule explained, “NHTSA is setting these CAFE standards in the context of a much larger conversation about the future of the U.S. light-duty vehicle fleet, the increasing and obvious need to move away from fossil fuels for reasons of national and energy security, and the evidence of a changing climate that is emerging on an almost daily basis.”<sup>22</sup>

That rationale is impossible to square with the shale revolution and America’s emergence as the world’s leading hydrocarbon energy producer,<sup>23</sup> the energy security risks arising from America’s increasing dependence on China as a supplier and processor of so-called energy transition minerals,<sup>24</sup> abundant evidence climate change is not a “crisis,”<sup>25</sup> and the miniscule and unverifiable impact of NHTSA’s standards on global temperature trends.

In any event, the “larger conversation” informing NHTSA’s rulemaking is the narrative of an inevitable transition to a “clean car future” predicated on the EPA’s forthcoming approval of California’s ACC II program, which prohibits sales of conventional gas- and diesel-powered cars in 2035 and beyond.

The EPA’s April 2024 rule establishing emission standards for light- and medium-duty vehicles<sup>26</sup> is a more consequential case of the Biden administration using “market trends” unleashed by its

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<sup>17</sup> NHTSA, Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 FR 24174, 24175, April 30, 2020, <https://www.govinfo.gov/content/pkg/FR-2020-04-30/pdf/2020-06967.pdf>.

<sup>18</sup> 49 USC § 32902(f)—Average fuel economy standards, <https://www.law.cornell.edu/uscode/text/49/32902>.

<sup>19</sup> 87 FR 25710, 25728.

<sup>20</sup> 87 FR 25710, 25222.

<sup>21</sup> CARB, Framework Agreements on Clean Cars, August 17, 2020, <https://ww2.arb.ca.gov/news/framework-agreements-clean-cars> (accessed 5-3-2025).

<sup>22</sup> 84 FR 25710, 25721.

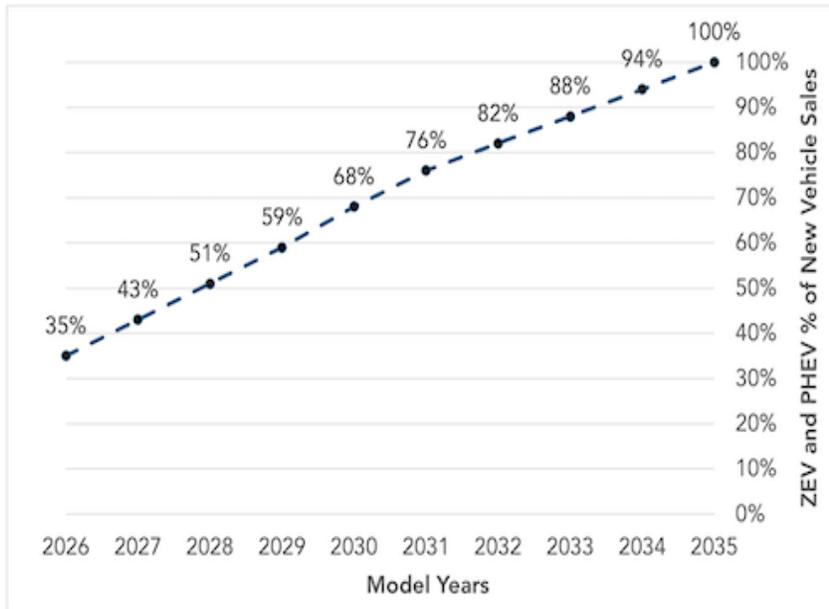
<sup>23</sup> Energy Information Administration, “The U.S. leads global petroleum production with record growth in 2018,” August 20, 2019, <https://www.eia.gov/todayinenergy/detail.php?id=40973>.

<sup>24</sup> International Energy Agency, The Role of Critical Minerals in Clean Energy Transitions, May 2021, <https://www.iea.org/reports/the-role-of-critical-minerals-in-clean-energy-transitions>.

<sup>25</sup> Marlo Lewis, A Citizen’s Guide to Climate Change, Competitive Enterprise Institute, On Point No. 255, June 11, 2019, [https://cei.org/sites/default/files/Marlo\\_Lewis\\_-\\_A\\_Citizen\\_s\\_Guide\\_to\\_Climate\\_Change.pdf](https://cei.org/sites/default/files/Marlo_Lewis_-_A_Citizen_s_Guide_to_Climate_Change.pdf).

<sup>26</sup> EPA, Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, Final Rule, 89 FR 27842, April 18, 2024, <https://www.govinfo.gov/content/pkg/FR-2024-04-18/pdf/2024-06214.pdf>.

collaboration with California to justify increasing the stringency of federal regulation. The EPA’s MY 2027 and later tailpipe CO<sub>2</sub> standards are de-facto EV mandates. The standards are projected to push plug-in electric vehicle sales to 69 percent of market share in 2032.<sup>27</sup> As a colleague astutely observed, “EPA’s program is California’s gas-car ban with a two-year delay and the outyears hidden.”



**Figure Source:** California Air Resources Board, Advanced Clean Cars II.<sup>28</sup>

Predictably, the EPA’s April 2024 rule cites the ACC II program finalized by CARB in August 2022<sup>29</sup> and twelve other states expected to adopt “all or most of the zero-emission vehicle phase-in requirements” as evidence of the practicality of the new standards.<sup>30</sup> Although the EPA had not yet approved ACC II waiver,<sup>31</sup> the agency solicited public comment on the waiver in December 2023,<sup>32</sup> and nobody expected the EPA to disappoint California, its state allies, and automakers

<sup>27</sup> 89 FR 27842, 27856.

<sup>28</sup> CARB, ACC II, <https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/advanced-clean-cars-ii> (accessed 5-3-2025).

<sup>29</sup> CARB, “California moves to accelerate to 100% new zero-emission vehicle sales by 2035,” August 25, 2022, <https://ww2.arb.ca.gov/news/california-moves-accelerate-100-new-zero-emission-vehicle-sales-2035> (accessed 5-3-2025).

<sup>30</sup> 89 FR 27842, 27988.

<sup>31</sup> 89 FR 27842, 27986.

<sup>32</sup> EPA, California State Motor Vehicle Pollution Control Standards; Advanced Clean Cars II Regulations; Request for Waiver of Preemption; Opportunity for Public Hearing and Public Comment, 88 FR 88908, December 26, 2023, <https://www.regulations.gov/document/EPA-HQ-OAR-2023-0292-0001>.

announcing commitments to electrify their fleets. The EPA approved ACC II in December 2024.<sup>33</sup>

**The Biden-California regulatory actions discussed above are unlawful, contrary to the national interest, or both.**

DOT requests information on “existing DOT regulations” that are “inconsistent with law or administration policy, including regulations . . . that are obsolete, unjustified, or simply make no sense.”<sup>34</sup> DOT seeks such information pursuant to President Trump’s Executive Order 14219,<sup>35</sup> which requires agencies to identify regulations that fall within one or more of seven categories.

Of the regulatory actions discussed above, only two—the SAFE 1 Repeal Rule and NHTSA’s May 2022 CAFE standards rule—are “existing” DOT regulations. The others are EPA and CARB regulations. However, all those regulations are part of the same vehicle electrification agenda, all fall within one or more of the seven categories, and the SAFE 1 Repeal Rule is foundational for the others.

Coercive vehicle electrification, whether expressly implemented by California, implicitly implemented by the EPA, or tacitly “power boosted” by NHTSA,<sup>36</sup> “raises serious constitutional difficulties” (category one). The Constitution aims to secure the “blessings of liberty to ourselves and our posterity.” Automobility is the principal mode by which Americans exercise and enjoy the liberty of directing their own movements and going about their lawful occasions.<sup>37</sup> Regulations that significantly reduce vehicle affordability and automotive choice impair American liberty.

In addition, the SAFE 1 Repeal Rule empowers California and allied states to defy EPCA 32919(a). Thus, the Rule implicitly defies Article VI, Clause 2 of the US Constitution, the source from which preemption statutes derive their authority.

As discussed below, the SAFE 1 Repeal Rule greenlights “unlawful delegations of legislative power” (category two), relies on interpretations “other than the best” (category three), and

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<sup>33</sup> EPA, California State Motor Vehicle Pollution Control Standards; Advanced Clean Cars II; Waiver of Preemption. Decision Document. December 17, 2024, <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P101DAS6.pdf>.

<sup>34</sup> 90 FR 14593, 14594.

<sup>35</sup> E.O. 14219, Ensuring Lawful Governance and Implementing the President’s Department of Government Efficiency Deregulatory Initiative, 90 FR 10583; February 25, 2025, <https://www.govinfo.gov/content/pkg/FR-2025-02-25/pdf/2025-03138.pdf>.

<sup>36</sup> Marlo Lewis, Comments on NHTSA’s Proposed CAFE Standards for Model Years 2027 and Later, October 16, 2023, <https://cei.org/wp-content/uploads/2023/10/Marlo-Lewis-CEI-NHTSA-2023-0022-October-16-2023-1.pdf>.

<sup>37</sup> Loren E. Lomasky, Autonomy and Automobility, *The Independent Review: A Journal of Political Economy*, Vol. 2, No. 1, Summer 1997, <https://www.independent.org/tir/1997-summer/autonomy-and-automobility/>.

spawns regulations implicating major questions without “clear statutory authority” (category four).

Coercive vehicle electrification “imposes significant costs on private parties not outweighed by public benefits” (category five). For example, the EPA’s April 2024 de-facto EV mandates will add an estimated \$760 billion to automakers’ compliance costs during 2027-2055 and \$2,000 to the average cost of a new car in 2032, making it the most expensive rule in the agency’s history.<sup>38</sup> Yet according to the EPA’s climate policy calculator, a model called MAGICC,<sup>39</sup> the rule would avert only 0.0068°C of warming by 2100, an effect too small to detect.<sup>40</sup> Similarly, NHTSA’s May 2022 CAFE Rule is projected to cost \$366.8 billion during calendar years 2021-2050<sup>41</sup> but avert only 0.002°C of warming by 2100 compared to the Trump administration policy baseline.<sup>42</sup>

Coercive vehicle electrification also “harms” the “national interest” in “economic development,” “energy production,” and “inflation reduction” (category six). Ford lost \$2.2 billion on EV sales in 2022, \$4.7 in 2023, and \$5.1 billion in 2024 (about \$53,113 for each EV sold), according to energy analyst Robert Bryce, who expects cumulative losses from Ford’s EV line to reach \$17 billion by year’s end.<sup>43</sup> Policies pushing major US companies to lose billions annually hinder economic development. Coercive electrification impedes energy production by outlawing sales of vehicles that run on liquid fuels. Mandates that increase the cost of vehicle ownership undercut inflation reduction.

Finally, coercive electrification imposes “undue burdens on small business” (category seven), forcing dealerships to fill their lots with vehicles consumers do not buy.<sup>44</sup>

The following sections of these comments do the following: (1) Restate SAFE 1’s preemption argument; (2) explain why the SAFE 1 Repeal Rule is arbitrary and capricious, rests on flawed

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<sup>38</sup> EPA, Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, Final Rule, 89 FR 27842, 27860, 27899, April 18, 2024, <https://www.govinfo.gov/content/pkg/FR-2024-04-18/pdf/2024-06214.pdf>.

<sup>39</sup> MAGICC, The Climate System in a Nutshell, <https://magicc.org/>.

<sup>40</sup> Benjamin Zycher, “Biden’s EPA can justify his new EV rules only by cooking the books,” *The Hill*, April 2, 2024, <https://thehill.com/opinion/energy-environment/4564253-bidens-epa-can-justify-his-new-ev-rules-only-by-cheating/>. Based on EPA’s speculative social cost of carbon metric, the agency claims the rule will deliver \$1.6 trillion in climate benefits (89 FR 27842, 27860). However, the purported benefits would be well below the threshold of human perception. Effects that are unverifiable and non-experiential are “benefits” in name only. Notional benefits should not be netted against multibillion dollar compliance costs that verifiably impose measurable burdens on identifiable firms and consumers.

<sup>41</sup> 84 FR 25710, 25728.

<sup>42</sup> NHTSA, Final Supplemental Environmental Impact Statement, Corporate Average Fuel Economy Standards Model Years 2024-2026, March 2022, Docket No. NHTSA-2021-0054, 5-45, [https://www.nhtsa.gov/sites/nhtsa.gov/files/2022-04/Final-SEIS-Complete\\_CAFE-MY-2024-2026.pdf](https://www.nhtsa.gov/sites/nhtsa.gov/files/2022-04/Final-SEIS-Complete_CAFE-MY-2024-2026.pdf).

<sup>43</sup> Robert Bryce, “Ford loses another \$5.1B on EVs,” Substack, <https://substack.com/home/post/p-156749627>.

<sup>44</sup> Voice of the Customer, <https://evvoiceofthecustomer.com/>.

statutory interpretations, and defies Congress and the Constitution; and (3) rebut the Biden administration’s legal rationales for repealing SAFE 1.

Importantly, the comments also provide evidence that the EPA is statutorily required to consider EPCA preemption when reviewing California vehicle emission standards under CAA Section 209(b), and that *MEMA I* and *Ford Motor v EPA*, the seminal 1979 cases interpreting 209(b), do not authorize CARB’s transformation from a “laboratory of innovation” into a national industrial policy czar for cars and climate.

### **SAFE 1’s EPCA Preemption Argument**

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.<sup>45</sup>

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 absolute and definitive.<sup>46</sup> EPCA 32919(a) is clear, broad, and categorical.<sup>47</sup>

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.

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<sup>45</sup> 49 U.S. Code § 32919(a). Preemption, <https://www.law.cornell.edu/uscode/text/49/32919>.

<sup>46</sup> Section 32919(b) allows states to adopt laws or regulations on disclosure of fuel economy information if such policies are identical to federal requirements. Section 32919(c) allows states to prescribe fuel economy requirements for vehicles purchased for their own use. Those provisions are clarifications rather than exceptions. 32919(b) increases the flow of federally approved information. 32919(c) acknowledge that states have the same liberty as private persons to shop for vehicles of their choice. For motor vehicles in general commerce, states have no role in setting or enforcing design, engineering, or sales requirements related to fuel economy standards.

<sup>47</sup> 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>.

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.”<sup>48</sup> 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.<sup>49</sup>

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.<sup>50</sup> Tailpipe CO<sub>2</sub> standards and CAFE standards are, thus, “two sides (or, arguably, the same side) of the same coin.”<sup>51</sup>

It was only because of that mathematical convertibility that the Obama administration EPA and NHTSA, when jointly establishing tailpipe CO<sub>2</sub> and CAFE standards for MY 2012-2016 light-duty vehicles, could claim they had instituted a “harmonized and consistent National Program.”<sup>52</sup> The agencies concisely explained the “very direct and close” relationship between their respective standards:

The National Program is both needed and possible because the relationship between improving fuel economy and reducing CO<sub>2</sub> tailpipe emissions is a very direct and close one. The amount of those CO<sub>2</sub> emissions is essentially constant per gallon combusted of a given type of fuel. Thus, the more fuel-efficient a vehicle is, the less fuel it burns to travel a given distance. The less fuel it burns, the less CO<sub>2</sub> it emits in traveling that distance. While there are emission control technologies that reduce the pollutants (e.g., carbon monoxide) produced by imperfect combustion of fuel by capturing or converting them to other compounds, there is no such technology for CO<sub>2</sub>. Further, while some of those pollutants can also be reduced by achieving a more complete combustion of fuel, doing so only increases the tailpipe emissions of CO<sub>2</sub>. Thus, there is a single pool of technologies for addressing these twin problems, i.e., those that reduce fuel consumption and thereby reduce CO<sub>2</sub> emissions as well.<sup>53</sup>

The two types of standards will remain mathematically convertible as long as affordable and practical onboard carbon capture technologies do not exist.<sup>54</sup> Since the start of the CAFE

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<sup>48</sup> *United States v. Maryland* (1981), <https://caselaw.findlaw.com/us-supreme-court/451/725.html>.

<sup>49</sup> United States Court of Appeals, Ninth Circuit, *Cabazon Band of Mission Ind. v. City of Indio* (1982), <https://law.justia.com/cases/federal/appellate-courts/F2/694/634/116955/>.

<sup>50</sup> 84 FR 51310, 51313.

<sup>51</sup> 83 FR 42986, 44327.

<sup>52</sup> 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>.

<sup>53</sup> 75 FR 25324, 25327.

<sup>54</sup> 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

program in 1975 and for the foreseeable future, all design and technology options for reducing tailpipe CO<sub>2</sub> emissions from combustion-engine vehicles, such as aerodynamic streamlining, low rolling resistance tires, and hybridization, are fuel-saving strategies by another name.

The Congress that enacted EPCA in 1975 understood the scientific relationship between CO<sub>2</sub> emissions and fuel economy. That is why it approved the EPA's procedure of testing automotive fuel economy by measuring tailpipe emissions of carbon-based compounds, chiefly CO<sub>2</sub>.<sup>55</sup>

ZEV mandates have a substantial impact on corporate average fuel economy.<sup>56</sup> As ZEV mandates tighten, fleet average fuel consumption per mile decreases, and fleet average fuel economy increases. Conversely, as the EPA's December 2021 and April 2024 vehicle emissions rules show, when fuel economy standards (or their CO<sub>2</sub>-tailpipe equivalents) reach a certain stringency, automakers cannot comply without selling more EVs and fewer gas- and diesel-powered cars. The 2024 EPA rule effectively restricts non-electric vehicle sales to less than one-third of the new car market by 2032.<sup>57</sup> Thus, because ZEV mandates are substantially related to fuel economy standards, EPCA also expressly preempts state ZEV standards.

Furthermore, EPCA impliedly preempts state policies regulating or prohibiting tailpipe CO<sub>2</sub> emissions because such policies interfere with the CAFE program in three main ways.

First, California's policies revise regulatory determinations Congress authorized NHTSA to make. EPCA expressly requires NHTSA to weigh and balance four factors when determining CAFE standards: technological feasibility, economic practicability, the effect of other federal emission standards on fuel economy, and the national need to conserve energy.<sup>58</sup> EPCA, as interpreted by DC Circuit case law, also directs NHTSA to consider the impact of fuel economy standards on occupant safety.<sup>59</sup> 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<sub>2</sub> standards, weigh and balance such factors the same way NHTSA does when prescribing fuel economy

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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."

<sup>55</sup> 83 FR 42985, 43234; EPCA, Section 503(d)(1), <https://www.govinfo.gov/content/pkg/STATUTE-89/pdf/STATUTE-89-Pg871.pdf>.

<sup>56</sup> 84 FR 51310, 51314.

<sup>57</sup> 89 FR 27842, 27856.

<sup>58</sup> 49 U.S. Code § 32902. Average fuel economy standards, <https://www.law.cornell.edu/uscode/text/49/32902>.

<sup>59</sup> 956 F. 2d 321 - *Competitive Enterprise Institute v. National Highway Traffic Safety Administration* (1992), <https://openjurist.org/956/f2d/321/competitive-enterprise-institute-v-national-highway-traffic-safetyadministration>.

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. When Congress directs an agency to weigh and balance specific decision criteria, state regulations that disturb that balance are impliedly preempted.<sup>60</sup>

The ZEV program's inherent potential to upset NHTSA's balancing of statutory factors has been visible from the get-go. As noted, the CAFE program requires NHTSA to balance technological feasibility and economic practicability. The ZEV program is not similarly constrained. In 1990, CARB required 10 percent of new car sales to be ZEVs by 2003<sup>61</sup>—despite it being obvious the mandate was neither feasible nor affordable. The market share of ZEV sales in California was still below 1 percent as of 2011.<sup>62</sup>

Second, California's ZEV mandates conflict with the structure of 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. As the Obama administration EPA explained, 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.”<sup>63</sup>

Third, as mentioned, EPCA as amended prohibits NHTSA from considering the fuel economy of alternative vehicles (including EVs)<sup>64</sup> when setting CAFE standards.<sup>65</sup> The amendment aims to ensure that CAFE standards never become so stringent automakers must sell EVs to comply.<sup>66</sup> Mandating EV sales is the very purpose of the ZEV program, which logically culminates in banning sales of new gas-powered cars.

The bottom line is this. California's tailpipe CO<sub>2</sub> standards and ZEV mandates are both expressly preempted by EPCA 32919(a) and impliedly preempted by their inherent conflicts with the statutory fuel economy program Congress established. Preemption statutes operate *ab initio*. EPCA voided California's tailpipe CO<sub>2</sub> standards and ZEV mandates years before the EPA

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<sup>60</sup> Marc Marie, Center for Environmental Accountability, *Ending Electric-Vehicle Mandates: A detailed playbook for ending electric-vehicle mandates under President Trump's term*, December 13, 2024, p. 52.

<sup>61</sup> CARB, Zero-Emission Vehicle Program, <https://ww2.arb.ca.gov/our-work/programs/zero-emission-vehicleprogram/about>.

<sup>62</sup> Office of Gov. Gavin Newsom, “California EV Sales Have Skyrocketed in the Last Decade,” February 22, 2024, <https://www.gov.ca.gov/2024/02/22/california-zev-sales-have-skyrocketed-more-than-1000-in-the-last-decade/>.

<sup>63</sup> 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>.

<sup>64</sup> 49 U.S. Code § 32901. Definitions, <https://www.law.cornell.edu/uscode/text/49/32901>.

<sup>65</sup> 49 U.S. Code § 32902. Average fuel economy standards, <https://www.law.cornell.edu/uscode/text/49/32902E>.

<sup>66</sup> 85 FR 24174, 25170.

agreed to review them. EPCA automatically turned those policies into legal phantoms—mere proposals without force or effect.

### **SAFE 1 Repeal Rule: arbitrary and capricious**

A federal agency may change its interpretation of a statute at any time, including when there is a change of administration following an election. However, “[w]hen an Agency adopts a materially changed interpretation of a statute, it must in addition provide a ‘reasoned analysis’ supporting its decision to revise its interpretation.”<sup>67</sup> That is not what NHTSA did in repealing SAFE 1.

The core of SAFE 1 is its EPCA preemption argument, which is easily summarized. State policies that regulate or prohibit tailpipe CO<sub>2</sub> emissions are directly or substantially related to fuel economy standards because vehicular CO<sub>2</sub> emissions are proportional to fuel consumption. Hence, such policies are preempted.

The proposed SAFE 1 Repeal Rule makes no attempt to rebut that argument and declines even to summarize it. NHTSA professed to have “significant doubts” about the “accuracy” and “validity” of SAFE 1’s preemption analysis,<sup>68</sup> but refuses to opinion whether such policies are related to fuel economy standards or not.

Moreover, NHTSA not only proposed to “repeal” SAFE 1’s regulatory text and “withdraw” SAFE 1’s “interpretative views” on EPCA preemption but also withdraw all similar preamble language in agency rules going back to 2003.<sup>69</sup> SAFE 1 was only elaborating an interpretation that the agency expounded at length in its 2006 rule prescribing MY 2008-2011 CAFE standards.<sup>70</sup>

The final SAFE 1 Repeal Rule similarly determines that “any positions announced in preambulatory statements of prior NHTSA rulemakings, including in the SAFE I Rule, which purported to define the scope of preemption under the Energy Policy and Conservation Act (EPCA), do not reflect the Agency’s reconsidered understanding of its proper role in matters of EPCA preemption.”<sup>71</sup> But what exactly are those positions, and why are they wrong? The final Repeal Rule does not say, although readers may infer their substance from public comments excerpted in the rule.

Adopting a “materially changed interpretation of a statute” without examining the substantive merits of the existing interpretation is not reasoned decision making. To put the point another

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<sup>67</sup> *Phoenix Hydro Corp. v. FERC*, 775 F.2d 1187, 1191 (D.C. Cir. 1985). See also *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (“Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.”)

<sup>68</sup> 84 FR 25980, 25982.

<sup>69</sup> 84 FR 25980, 25982.

<sup>70</sup> NHTSA, Average Fuel Economy Standards for Light Trucks Model Years 2008-2011, Final Rule, 71 FR 17654-17658, 17668-17670, 17674, April 6, 2006, <https://www.govinfo.gov/content/pkg/FR-2006-04-06/pdf/FR-2006-04-06.pdf>.

<sup>71</sup> 86 FR 74236.

way, there is no more important aspect of SAFE 1 than its EPCA preemption analysis. A rulemaking that “entirely fail[s] to consider an important aspect of the problem” is arbitrary and capricious.<sup>72</sup>

### **Frivolous criticisms of SAFE 1**

Several of NHTSA’s criticisms of SAFE 1 are frivolous.

SAFE 1 is “unprecedented,” NHTSA’s first-ever attempt to prescribe regulations enforcing EPCA preemption.<sup>73</sup> That is correct, but the Obama administration’s collusion with California to evade EPCA preemption was also unprecedented, as was the secretive “put nothing in writing, ever” negotiations conducted by Obama climate czar Carol Browner to overcome auto industry opposition to CARB’s tailpipe CO<sub>2</sub> standards.<sup>74</sup> Unprecedented usurpations require unprecedented corrections.

SAFE 1 is unnecessary because preemption statutes are “self-executing.”<sup>75</sup> NHTSA 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. However, a preemption statute has no practical effect unless someone interprets and implements it. Who better than the expert agency Congress authorized to administer the program that preempts state policymaking in the same field?

SAFE 1 is too “anticipatory” and “categorical,” labeling an entire segment of state regulation as preempted regardless of scientific or technological advances that may arise.<sup>76</sup> Not so. As indicated above, SAFE 1’s EPCA preemption analysis is based on a realistic assessment of past and reasonably foreseeable technologies. Development of practical onboard carbon capture or some other technological breakthrough could end the “very direct and close” relationship between vehicular CO<sub>2</sub> emission regulations and fuel economy standards. In the meantime, the relationship endures.

NHTSA’s criticism backfires because the ZEV program is also anticipatory and categorical. Over a period of decades, ACC II “forces manufacturers to expend scarce resources on specific technology regardless of consumer demand, and regardless of what the Secretary has determined in her judgment to be the appropriate expenditure of resources necessary to comply with fuel economy standards set in accordance with the balancing required by EPCA.”<sup>77</sup>

SAFE 1 is too “categorical” and does not “appropriately account for the importance of a more nuanced approach that considers state programs on a more particularized basis” and “how the

<sup>72</sup> *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins.* (State Farm), 463 U.S. 29, 43 (1983).

<sup>73</sup> 86 FR 25980, 25981; 86 FR 74236, 74259.

<sup>74</sup> 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-whitehouse-calif-fuel-e-12208.html> (quoting CARB Chair Mary Nichols: “We put nothing in writing, ever”).

<sup>75</sup> 86 FR 25980, 25986; 86 FR 74236, 74253.

<sup>76</sup> 86 FR 25980, 25989; 86 FR 74236, 74261.

<sup>77</sup> 84 FR 51310, 51314.

specifics of state programs may ‘relate to’ EPCA 32919(a).<sup>78</sup> Under CAA Section 177, states may adopt emission standards different from federal standards only if those standards “identical” to those for which California has received a CAA Section 209(b) waiver.<sup>79</sup> In other words, CAA 177 does not allow for “nuance” or “particularity” in the enforcement of vehicle emission standards. Consequently, EPCA preemption of a California emissions standard must apply uniformly across all states opting into the California program. There is no room for nuance or particularity.

### **SAFE 1 Repeal Rule’s Core Argument<sup>80</sup>**

NHTSA contends that neither EPCA 32919(a) nor any other provision “expressly authorizes” the agency “to adopt legislative rules implementing express preemption under EPCA.” Although the agency may set forth “advisory views” about EPCA preemption, “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.” That is NHTSA’s principal justification for repealing SAFE 1.<sup>81</sup>

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), NHTSA states that “the purpose of Congress is the ultimate touchstone of pre-emption analysis.”<sup>82</sup> However, NHTSA 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.’”<sup>83</sup>

Congress’s intent to preempt state policies “related to” fuel economy standards is explicitly stated in EPCA. 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 to act as if policies directly or substantially 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.”<sup>84</sup> California’s tailpipe CO<sub>2</sub> standards and ZEV mandates encroach on her CAFE-specific duties and powers. She therefore

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<sup>78</sup> 86 FR 25980, 25989, 25990; 86 FR 74236, 74260-74261.

<sup>79</sup> 42 USC § 7507.

<sup>80</sup> The following sections closely follow my comments on NHTSA’s proposed SAFE 1 Repeal Rule.

<sup>81</sup> 86 FR 25980, 25982; 86 FR 74236, 74238.

<sup>82</sup> 86 FR 25980, 25991; FR 74236, 74266.

<sup>83</sup> *Cipollone v. Liggett Grp.* (1992), <https://www.lexisnexis.com/community/casebrief/p/casebrief-cipollone-v-liggett-grp>.

<sup>84</sup> 49 U.S. Code § 322 - General powers, <https://www.law.cornell.edu/uscode/text/49/322>.

has “clear authority” to prescribe regulations needed “to effectuate a national automobile fuel economy program unimpeded by prohibited State and local requirements.”<sup>85</sup>

NHTSA 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.<sup>86</sup>

NHTSA misses the obvious. EPCA 32919 references the agency’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 connive with Beltway insiders to gut Congress’s express preemption. NHTSA’s reading of 49 U.S.C. 322 turns the phrase “duties and powers” into empty words. It is unreasonable to suppose Congress made NHTSA too weak to carry out its duties and powers.

### **Section 32919’s “Notable Silence”**

In the proposed SAFE 1 Repeal Rule, NHTSA asks why EPCA 32919 does not expressly authorize the agency “to issue regulations with the force of law that regulate and define the scope of preemption.” NHTSA purports to infer from the statute’s “notable silence” that Congress did not give the agency such power.<sup>87</sup> 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 CO<sub>2</sub> emissions and fuel consumption was the very basis for testing compliance with CAFE standards, the subterfuge of regulating fuel economy by regulating tailpipe CO<sub>2</sub> 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, the state’s greenhouse gas motor vehicle statute, and not until 2009 did the EPA team with CARB to neuter EPCA preemption. The provision’s “silence” regarding “supplemental regulations” may partly reflect Congress’s inability in 1975 to anticipate the brazenness of 21<sup>st</sup> 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

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<sup>85</sup> 84 FR 51310, 53120.

<sup>86</sup> 86 FR 25980, 26986 (emphasis added).

<sup>87</sup> 86 FR 25980, 25987.

explicit 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 potential 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.

### **Inapposite examples of express regulatory authority**

All of NHTSA'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 specific state policies requires subsequent adjudication by the agency. Express regulatory authority is provided so 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 25980, 25986-25987.

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 NHTSA'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 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).”<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup> 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

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<sup>88</sup> 42 U.S. Code § 6297 – Effect on other law, <https://www.law.cornell.edu/uscode/text/42/6297>.

<sup>89</sup> 49 U.S. Code § 5125 – Preemption, <https://www.law.cornell.edu/uscode/text/49/5125>.

<sup>90</sup> 49 U.S. Code § 31141. Review and preemption of State laws and regulations, <https://www.law.cornell.edu/uscode/text/49/31141>.

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 closed door (“put nothing in writing, ever”) negotiations.

NHTSA sets up a rigged test SAFE 1 cannot possibly meet. It demands that SAFE 1 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. That is ridiculous.

Section 521 of the Medical Device Amendments of 1976 (MDA).<sup>91</sup> 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

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<sup>91</sup> 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>.

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).<sup>92</sup> Quoting this Supreme Court decision, NHTSA 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.”<sup>93</sup>

That seeming gotcha evaporates when read in context. *City of New York* concerned the scope of preemption under the Cable Act of 1984.<sup>94</sup> 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 by NHTSA).

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.

The final SAFE 1 Repeal Rule’s response to the foregoing argument is telling. NHTSA claims “CEI’s comment demonstrates” that 32919(a) “leaves no room” for regulatory “implementation” by NHTSA or DOL.<sup>95</sup> NHTSA sweeps under the rug the difference between narrow, indeterminate, waivable preemptions that require routine regulatory adjudication and a broad, clear, categorical preemption that only needs regulatory implementation only when officials conspire to negate it.

## California Waiver Mythologies

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<sup>92</sup> *City of New York v. FCC* (1988), <https://caselaw.findlaw.com/us-supreme-court/486/57.html>.

<sup>93</sup> 86 FR 25980, 25986.

<sup>94</sup> S. 66, Cable Communications Policy Act of 1984, <https://www.congress.gov/bill/98th-congress/senate-bill/66/text>.

<sup>95</sup> 86 FR 74236, 74251.

Although not directly in DOT’s wheelhouse, the whole point of gutting EPCA preemption is to clear a path for EPA waivers purporting to authorize California’s usurpation of federal regulatory authority.

Two party-line interpretations of the CAA Section 209(b) waiver have been repeated so often that they have almost become canonical. In fact, they have feet of clay.

One is that EPCA 32919(a) cannot possibly mean what it says because that would preempt ACC II, and everybody knows Congress intended for California to have the “broadest possible discretion in selecting the best possible means to protect the health of its citizens and the public welfare.”<sup>96</sup> The same language is quoted in two seminal DC Circuit Court cases [Motor and Equipment Mfrs. Ass’n, v. EPA, 627 F.2d at 1110](#) (1979) (*MEMA I*) and [Ford Motor Co. v. EPA, 606 F.2d 1293](#) (1979). ACCII Waiver cites or mentions *MEMA I* 56 times and *Ford Motor* eight times.

Two points should be kept in mind. First, “broadest possible discretion” comes not from the statute but from committee report language. Committee report language can sometimes be instructive, but it can also be inserted to encourage courts to permit agency action beyond the scope of the statutory text.<sup>97</sup>

Second, and more importantly, upon reading those cases, one discovers a shocking disproportion between the discretion approved by the Court and the regulatory ambitions of ACCII. In *MEMA I*, the Court upheld CARB’s discretion to revise manufacturer warranties to incentivize (not mandate) the development of more durable emission control devices. In *Ford Motor*, the Court upheld CARB’s discretion to adopt weaker-than-federal carbon monoxide (CO) emission standards so that automakers could meet stronger-than-federal nitrogen oxide (NO<sub>x</sub>) emission standards.

In short, the supposed foundational cases for California’s “broadest possible discretion” do not come close to authorizing a program to ban sales of gasoline-powered cars. Those cases upheld California’s authority to be a laboratory of innovation, not an industrial policy Czar for Climate and Cars.

The other party-line interpretation holds that when reviewing a CAA 209(b) waiver request, the EPA may not—or at least need not—consider anything except the three decision criteria contained in the provision. The EPA’s sole job is to grant the waiver unless it determines that (A) California’s protectiveness determination is arbitrary and capricious, (B) the state does not need such standard to “meet compelling and extraordinary conditions,” or (C) such standards are not consistent with CAA Section 202(a). The EPA may not, or need not, consider constitutional

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<sup>96</sup> The phrase is quoted 11 times by EPA in its December 2024 Decision Document approving the ACC II waiver.

<sup>97</sup> Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, p. 34 (Princeton and Oxford: Princeton University Press 1997)

issues or potential conflicts between California vehicle emission standards and other statutes. That is incorrect.

Statutory construction is a holistic endeavor. As the Congressional Research Service explains:

A cardinal rule of construction is that a statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes.<sup>98</sup>

A proper reading of CAA 209(b) must consider other parts of the CAA that potentially affect it or are affected by it.

Opponents of SAFE 1 directed their fire at its supposed damage to “federalism interests,” particularly the authority of states to incorporate ZEV mandates into their CAA State Implementation Plans (SIPs).<sup>99</sup>

And there’s the rub. CAA Section 110(a)(2)(E) requires the Administrator to provide assurance that a SIP “is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof.”<sup>100</sup> Therefore, when the Administrator reviews a California waiver request, he may not turn a blind eye to other federal statutes that may prohibit a “portion” (a state policy) from being included in a SIP. He may not ignore EPCA preemption.

## **Conclusion**

The House of Representatives last week voted to overturn the ACC II waiver. The Senate has not yet voted on the resolution of disapproval. Whatever the outcome, DOT should not leave the SAFE 1 Repeal Rule on the books and should prescribe an interpretative rule clarifying the scope of EPCA preemption.

Sincerely,

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<sup>98</sup> Yule Kim, *Statutory Interpretations and Recent Trends*, CRS Report for Congress, August 31, 2008, p. 2, [https://digital.library.unt.edu/ark:/67531/metadc26119/m1/1/high\\_res\\_d/97-589\\_2008Aug31.pdf](https://digital.library.unt.edu/ark:/67531/metadc26119/m1/1/high_res_d/97-589_2008Aug31.pdf).

<sup>99</sup> EPA, *Decision Document for ACC II*, pp. 10-11, 75, 176.

<sup>100</sup> Cited by Marc Marie, *Ending Electric Vehicle Mandates*, p. 60.