COMMENTS

submitted on behalf of

URBAN AIR INITIATIVE

and

CONSUMERS' RESEARCH

Concerning the

National Highway Traffic Safety Administration Corporate Average Fuel Economy (CAFE) Preemption

NHTSA-2021-0030

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INTRODUCTION AND EXECUTIVE SUMMARY

Under the Energy Policy and Conservation Act of 1975, "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."[1] Because state automobile fleet-average carbon dioxide standards are "related to" fuel economy standards, they are thus expressly preempted by the corporate average fuel economy (CAFE) law. Similarly, state mandates to sell an increasing number of electric vehicles are "related to" fuel economy standards and are expressly preempted by CAFE. That is the law. And, because the National Highway Traffic and Safety Administration (NHTSA) is part of the executive branch, it is constitutionally obligated to "take care" that the law be "faithfully executed."[2]

The need for faithful execution of CAFE preemption is pressing. For over a decade, California and like-minded states have violated its strictures, seeking to dictate federal fuel economy policy by menacing automobile manufacturers with balkanized fleet-average fuel economy standards artfully labeled as "carbon dioxide" standards. In 2018, California brazenly threatened this balkanization-by-regulation unless the federal government adopted its preferred fuel-efficiency policies. It did this by proposing to no longer deem carmaker's compliance with federal fuel-efficiency standards as exempting them from California's own, more-stringent carbon dioxide standards. California then carried out that threat, displacing the single national fuel economy standard with its own preferred fleet-average fuel-efficiency rules, which have been adopted in about a dozen other states, unlawfully increasing costs to car buyers nationwide for little discernible benefit.

In response, NHTSA acted. To preserve Congress's single national fuel economy standard, NHTSA promulgated the "One National Program Rule" reasserting the obvious: the statute means what it says. This was an appropriate first step to ensure that California would not be allowed to create a "monster" of the sort that

[1] 49 U.S.C. § 32919(a).

[2] U.S. Const. art. II, sec. 3.

James Madison warned against, "in which the head was under the direction of the members."[3]

But rather than persisting in its defense against California's assault on federal supremacy—as it is duty bound to do—NHTSA now proposes to quit the field entirely by repealing the One National Program Rule and "revoking" all interpretive statements it has made over the span of at least two decades about how regulations of the sort used by California are "related to" its national fuel economy requirements. NHTSA dismisses the need for regulations on this question because it thinks that CAFE's preemption provision is "self executing." This is true in the sense that the preemption of state laws "related to" NHTSA's fuel economy standards does not depend on whether the Agency has addressed the issue in a rule. But it is false in the sense that laws are mere paper barriers if they are never enforced. And that is what NHTSA appears poised to do—to simply ignore CAFE's preemption of California's rules out of existence, beginning with the repeal of the One National Program Rule.

Despite the potentially profound consequences of this abdication, NHTSA's proposal completely ignores the Madisonian monster in the room. It says nothing—not a word—about the real-world problems that motivated the rules in the first place: California's takeover of fuel economy policy in a third of the market for new automobiles, at the expense of manufacturers and car buyers in every state. Instead, NHTSA grounds the repeal proposal on legalistic "doubts" about doctrines of administrative law that have no bearing on the validity or propriety of its interpretation of CAFE preemption. Specifically, NHTSA states that the prior rules may have improperly attempted to regulate fuel economy preemption with the "force and effect of law," an action it believes may be outside of its congressionally delegated authority because the preemption provision does not explicitly give NHTSA any special role in defining the preemption provision's application either in general or as applied to particular state policies.

The Supreme Court swept aside such concerns in *City of Arlington v. FCC*, 569 U.S. 290 (2013), holding that an agency's interpretation of statutory ambiguity about

[3] The Federalist No. 44 (James Madison).

the scope of its authority or "jurisdiction" is part of its congressionally delegated mission and therefore entitled to *Chevron* deference. As the Court explained, the scope of an agency's delegated authority does not depend on "labels" like "force of law"; rather, it turns on whether the Agency administers the statutory scheme and "whether the statutory text forecloses the agency's" interpretation of the statute, "or not."[4] Here there is no question that NHTSA administers the CAFE scheme, and the preemption provision is entirely silent on how preemption may be enforced.

NHTSA's contrary view would resurrect the "mental acrobatics" and empty "*ultra vires*" labels that *City of Arlington* buried.[5] It would require agencies to uselessly fret about whether a properly promulgated preemption rule is "legislative" or "interpretive," an inquiry that courts have said is "enshrouded in considerable smog."[6] NHTSA would then require agencies to search "provision-by-provision to determine" whether the agency has specific authority "*to directly regulate preemption itself*," or merely authority to interpret preemption in an advisory manner. Agencies would have to engage in an ill-defined "close examination of the precise power delegated by Congress." Under this approach, the words "*ultra vires*" would again crowd the pages of Federal Reporters and law reviews, festooned with distinctions between "legislative" and "interpretive" rules, but with no apparent bearing on the ultimate correctness of an Agency's statutory interpretation. None of this is remotely consistent with *City of Arlington*, which condemned these inquiries as "empty distraction[s]."[7]

The oddness of NHTSA's misplaced formalism is amplified by the Agency's concession that it *has* congressionally delegated authority both to administer CAFE and to interpret its preemption provision—indeed, it says it may do so in the future. But its interpretation in the One National Program Rule is consistent with, and indeed compelled by, the statute, so it is lawful under *Chevron* or any other standard of review. NHTSA's legal argument for repeal is simply incorrect, and therefore cannot support its proposed course of action.

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[4] 569 U.S. at 301.

[5] *Id.*

[6] *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1108–09 (D.C. Cir. 1993).

[7] *City of Arlington*, 569 U.S. at 300.

But even if NHTSA's "tentative" view had any basis in law, and it does not, NHTSA should still renounce it. If adopted, NHTSA's cramped view of federal agencies' authority would do long-term damage to the interests of the United States in ensuring the supremacy of federal law. Federal agencies must be able to provide publicly available interpretations of federal preemption provisions in statutes they administer without being impeded by "doubts" about an "*ultra vires*" doctrine that applies only to an ill-defined category of legislative rules interpreting express preemption provisions.

NHTSA's "tentative" view to the contrary can only lead to enforcement *ad hoc*ery, curtailing the ability of the United States to let its views on preemption be known to the public. The Department of Justice should recoil in horror at the prospect of defending NHTSA's legal position, which would injure the interests of federal agencies and federal supremacy across the entire government. These are, after all, the pages of the *Federal* Register and the Code of *Federal* Regulations, and NHTSA is a *National* agency, not a state attorney general's office.[8] If NHTSA persists in this course of action, it will invite universal disregard of federal preemption laws by states of all political persuasions, not just those favored by the administration that happens to be in power. This will do lasting damage to our system of government, which works precisely because of its ingenious federal structure that limits the scope of national power while simultaneously ensuring that, where that power is vested and exercised, the national government can speak with one voice, "any thing in the Constitution or Laws of any State to the Contrary notwithstanding."[9]

NHTSA had authority to promulgate its interpretation of CAFE's preemption provision in the Code of Federal Regulations, whether or not the current political leadership likes the outcome of that promulgation. Rescinding that interpretation should therefore require substantive legal analysis on the merits of that interpretation, a topic about which the already "tentative" proposal is uncommonly shy, limited

[8] As the record reflects, the Agency is taking the approach demanded by CARB. NHTSA-2021-0030-0006; *see also* Detailed Comments of California et al., at 110, NHTSA-2018-0067 (Oct. 26, 2018) (making argument NHTSA is now parroting), https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0283-5481.

[9] U.S. Const. art. VI.

to a footnote that cites a pair of articles written by a long-time Democratic Party congressional staffer and law professor.

This lack of engagement is perhaps unsurprising. It is far easier to turn a blind eye to lawlessness one tacitly approves of than to confront the law. No amount of law review articles can change the fact that NHTSA's interpretation in the One National Program Rule is correct both in general and as applied to California. Indeed, NHTSA's current interpretation is compelled by statute. State regulations regulating each automobile manufacturer's fleet-average automobile carbon dioxide emissions are of course "related to" average fuel economy standards, since they control the rate of fuel consumption and are established based on careful consideration of four statutory factors: technological feasibility; economic practicability; the effect of other motor vehicle standards of the Government on fuel economy; and the Nation's need to conserve energy. For the same reasons, quotas dictating the production of automobiles with specific fuel-efficiency technologies—electric or hydrogen powertrains—are also "related to" fuel economy standards. This has been NHTSA's consistent position for nearly two decades, ever since these problems first arose. And it is not just *a* reasonable interpretation, but the *only* legally and scientifically defensible one.

"Revoking" NHTSA's longstanding and consistent interpretation in this way would also be arbitrary and capricious. The proposal's fretting over the unsubstantiated "uncertainty" arising from whether the One National Program Rule has "the force and effect of law" pales in comparison to the actual uncertainties the One National Program Rule addressed in the first place, which go entirely unmentioned and which will return with even greater force if the One National Program Rule is repealed. NHTSA's proposal gives *zero* weight to the enormous uncertainty faced by automobile manufacturers, who have an interest in knowing whether NHTSA believes they have one or potentially fifty-one fuel economy sovereigns with California as their master puppeteer. Repealing the One National Program Rule without addressing these issues would be a classic arbitrary and capricious failure to weigh all of the Rule's advantages and disadvantages. NHTSA says it may, or may not, state "nuanced" views on preemption later. But we know what that means: NHTSA will fiddle while Rome burns. Indeed, NHTSA's proposal encourages state and local governments to disregard the law without pausing to consider the negative consequences.

NHTSA also fails to explain why it no longer believes that a balkanized fuel economy regime threatens the economic practicability of its "maximum feasible" performance standards. As NHTSA said in the One National Program Rule, apart from threatening the automobile industry with regulatory uncertainty, this fuel economy regime would "lead to increased compliance costs and highly uncertain, if any, benefits." NHTSA was right. State fleet-average efficiency standards or electric car quotas sprinkled on top of a national fleet-average standard make no sense, as manufacturers will just sell their less fuel-efficient vehicles in other states while complying with the same national average standard, at best a useless hidden regulatory tax that burdens interstate commercial activity to subsidize California's preferred industries. It is even worse than NHTSA believed. As explained in the attached Affidavit of Professor John D. Graham, California's separate standards likely *decrease* national fleet-average fuel efficiency while increasing vehicle costs, frustrating *all* the purposes and objectives of CAFE. NHTSA's repeal says not a word about its prior conclusions on this important aspect of the problem.

NHTSA's attempt to condemn by association numerous unspecified positions and interpretations in preambles on CAFE preemption also lacks any legal or policy justification. Indeed, the repeal of these statements does not even accomplish NHTSA's pretextual goals. It would add to uncertainty, would not allow a clean slate, and would not allow the Agency to speak with any greater specificity.

NHTSA's new leadership may be "willing to stand on the dock and wave goodbye as" California continues its "multiyear voyage of discovery," but the courts will not.[10] Under the Administrative Procedure Act, NHTSA cannot ignore the balkanization and serious policy interference it had attempted to resolve in the One National Program Rule, not without first explaining why it has now changed its views on those important legal and policy issues.

NHTSA's failure to wrestle with any of the real-world policy problems that motivated the rule in the first place or to acknowledge any of the disadvantages of going dark at this critical juncture is arbitrary, capricious, and irresponsible. The Agency should therefore abandon this flawed repeal proposal.

[10] *UARG v. EPA*, 573 U.S. 302, 328 (2014).

BACKGROUND

I. THE CORPORATE AVERAGE FUEL ECONOMY PROGRAM (CAFE)

A. CAFE establishes "maximum feasible" average fuel economy standards for automobile manufacturers.

In 1975, Congress required the Secretary of Transportation to establish ambitious corporate average fuel economy or "CAFE" standards applicable to manufacturers of new automobiles.[11] Congress increased the stringency of CAFE standards in 2007, requiring a fuel economy standard of "at least 35 miles per gallon" by 2020 and the "maximum feasible average fuel economy standard for each fleet" by 2030 or earlier.[12]

When setting "maximum feasible" CAFE standards for new automobiles, the Secretary of Transportation must consider several factors, including "technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy."[13] CAFE standards thus involve a complicated balancing that considers the interests of the entire country. Under the "economic practicability" factor, for example, the Secretary considers any "adverse economic consequences, such as a significant loss of jobs or the unreasonable elimination of consumer choice."[14]

The Secretary of Transportation has delegated the promulgation and enforcement of CAFE standards to an expert agency, the National Highway Traffic Safety

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[11] Energy Policy and Conservation Act of 1975, Pub. L. 94-163 § 502(a)(1), 89 Stat. 871, 902 (1975); *Ctr. for Auto Safety v. NHTSA*, 793 F.2d 1322, 1324 (D.C. Cir. 1986). The term "automobile" in CAFE overlaps almost entirely with the light- and medium-duty vehicles regulated under California's regulations. *See* 49 U.S.C. § 32901(a)(3); 49 C.F.R. §§ 523.3(a), 523.4, 523.5 (defining the terms automobile, passenger automobile, and light-truck); 13 Cal. Code Reg. § 1900(b)(11), (12), (13), (17) (defining the terms light-duty truck, medium-duty passenger vehicle, medium-duty vehicle, and passenger car). For simplicity, these comments will generally use the broader term automobile.

[12] 49 U.S.C. § 32902(b)(2), Energy Independence and Security Act of 2007, Pub. L. 110-140 § 102(b)(2) (2007).

[13] 49 U.S.C. § 32902(f).

[14] 67 Fed Reg. 77,015, 77,021 (Dec. 16, 2002).

Administration (NHTSA). NHTSA has set automobile fuel economy standards up to model year 2026.[15]

B. CAFE broadly prohibits any state policies related to automobile fuel economy standards.

Congress sought to establish a "single standard" for fuel economy.[16] It recognized that CAFE's effectiveness would be frustrated if states adopted needlessly duplicative or overlapping automobile policies. To prevent states from second-guessing federal "maximum feasible" fuel economy standards, or NHTSA's enforcement of those standards, CAFE provides:

> 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 [chapter 329 of title 49 of the U.S. Code].[17]

The statute provides one limited exception to its exclusively national approach—automobiles purchased for the sole use of state or local governments are not subject to preemption.[18]

Congress's use of the broad term "related to" prevents any artful evasions of the prohibition. Labels are not controlling. As Congress recognized, "State or local fuel economy standards would be preempted, regardless of whether they were in terms of miles per gallon or some other parameter such as horsepower or weight."[19] Consistent with that anti-circumvention purpose, CAFE's express preemption provision is sweeping. As the Supreme Court has explained in an analogous preemption context, the "ordinary meaning" of "related to" "is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with

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[15] 49 C.F.R. §§ 531.5(c) (passenger automobiles), 533.5 (light-trucks). NHTSA cannot set CAFE standards for more than five model years in a row. 49 U.S.C. § 32902(b)(3)(B).

[16] S. Rep. No. 93-526, at 59 (1973).

[17] 49 U.S.C. § 32919(a).

[18] *Id.* § 32919(c).

[19] S. Rep. No. 93-526 at 66.

or connection with,' . . . —and the words thus express a broad pre-emptive purpose."[20] The U.S. Court of Appeals for the Second Circuit, for example, has held that "related to fuel economy standards or average fuel economy standards" must be construed broadly, applying the statute to prohibit local taxi-fleet rules encouraging the adoption of hybrid taxis.[21]

II. CALIFORNIA'S "ADVANCED CLEAN CARS" PROGRAM

In general, § 209(a) of the Clean Air Act prohibits states from regulating new motor vehicle emissions.[22] Like the preemption provision in CAFE, the Clean Air Act's federal preemption avoids "an anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for [vehicle] manufacturers."[23]

But unlike CAFE, the Clean Air Act authorizes EPA to grant a limited waiver of this Clean Air Act prohibition to California.[24] Under the statute, California may apply for a waiver of preemption of the Section 209(a) prohibition if California's standards satisfy certain conditions.[25] Congress justified this waiver exception based on California's "unique" smog (ground-level ozone) problems, caused by California-specific conditions such as the "numerous thermal inversions that occur within that state because of its geography and prevailing wind patterns."[26]

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[20] *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting Black's Law Dictionary 1158 (5th ed. 1979)).

[21] *See Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 157–58 (2nd Cir. 2010); *see also Ophir v. City of Bos.,* 647 F. Supp. 2d 86, 94 (D. Mass. 2009) (same).

[22] 42 U.S.C. § 7543(a).

[23] *Motor Equip. Mfrs. Assn., Inc. v. EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979); *see also Motor Vehicle Mfrs. Ass'n v. N.Y. Dep't Envtl. Conservation*, 17 F.3d 521, 526 (2nd Cir. 1994) ("The cornerstone of Title II is Congress' continued express preemption of state regulation of automobile emissions.").

[24] 42 U.S.C. § 7543(b)(1); *see also* Air Quality Act of 1967, Pub. L. No. 90-148, § 208(b), 81 Stat. 485, 501 (1967). "California is the only state . . . eligible for a waiver . . . under this provision." *Chamber of Commerce v. EPA*, 642 F.3d 192, 196 (D.C. Cir. 2011); *see also* 42 U.S.C. § 7507 (allowing other states to adopt "California standards" in certain circumstances).

[25] 42 U.S.C. § 7521(a)(2).

[26] *California State Motor Vehicle Pollution Control Standards: Waiver of Federal Preemption Notice of Decision*, 49 Fed. Reg. 18887, 18890 (May 3, 1984) (citing 113 Cong. Reg. 30,948, (Nov. 2, 1967)).

Once a waiver has been granted, states that have failed to attain the Clean Air Act's minimum air pollution standards can then copy California's standards. Specifically, under the Clean Air Amendments of 1977, "[n]otwithstanding section 209(a) of" the Clean Air Act, any state which has an EPA-approved non-attainment or maintenance plan for one or more federal air quality standards may adopt standards identical to California's exempted standards.[27]

In 2013, EPA granted California a consolidated waiver for a suite of standards, known broadly as California's "Advanced Clean Cars" program.[28] This program includes three sets of standards:

First, the California low-emissions vehicle air pollution standards, which address California's unique ozone and particulate pollution problems by requiring reductions in automobile organic nitrogen oxide and particulate matter emissions.[29]

Second, the greenhouse gas standards for model year 2017 and later automobiles, which seek to address global climate change primarily by controlling the rate of carbon dioxide emissions.[30] However, under a compromise with automobile manufacturers, California would deem automobile manufacturers to comply as long as they complied with federal standards.

Third, California's zero-emissions vehicle standards for model year 2018 and later vehicles, which require manufacturers to generate or acquire an increasing percentage of regulatory "credits" representing new electric or fuel-cell automobiles produced and delivered for sale as a fraction of a manufacturer's total automobiles produced and delivered for sale in California or like-minded states.[31] By 2025, the zero-emissions vehicle credit percentage requirement will rise to 22% of all automobiles

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[27] 42 U.S.C. § 7507; *see also Am. Auto. Mfrs. Ass'n v. Cahill*, 152 F.3d 196, 201 (2d Cir. 1998) ("[T]he Section 177 exception is available to the 49 other states only when a standard identical to an existing California standard is adopted.").

[28] 78 Fed. Reg. 2112, 2114 (Jan. 9, 2013) (hereinafter 2013 Waiver).

[29] *Id.*

[30] *Id.* (codified at 13 Cal. Code Reg. § 1961.3).

[31] 13 Cal. Code Reg. § 1962.2(b).

produced and delivered for sale in the state.[32] This electric-vehicle quota is not primarily designed to reduce automobile emissions—it is rather an ambitious regulatory cross-subsidy program to force the commercialization of electric automobiles and discourage the sale of internal combustion engines.[33]

Several states have copied California's greenhouse gas and zero-emissions vehicle standards. Collectively, these states account for one-third of all new vehicle sales.[34]

III. THE ONE NATIONAL PROGRAM RULE

In 2018, as NHTSA and EPA reconsidered the stringency of federal fuel economy and greenhouse gas standards under a mid-term evaluation, California amended its rules (without requesting another required waiver) to eliminate its "deemed to comply" provision, threatening the automobile industry with balkanization and enormous compliance costs unless federal agencies adopted California's preferred policy determinations.[35]

In 2019, in a joint rulemaking, EPA revoked the Clean Air Act preemption waiver for California's greenhouse gas standards and zero-emissions vehicle standards, and NHTSA concluded that California's standards were preempted by CAFE.[36] NHTSA highlighted the importance of "[u]niform national fuel economy standards" for accomplishing the objectives of the CAFE program and pointed to the broad language of the statutory provision prohibiting state laws or regulations "related to fuel

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[32] *Id.* CARB estimates that from 2018 to 2025, the mandate will require the sale of roughly 2 million new electric cars in section 177 states. *See* CARB, California's Advanced Clean Cars Midterm Review A-24 (Jan. 2017).

[33] 2013 Waiver, 78 Fed. Reg. at 2130 ("As CARB notes . . . the goal of . . . the ZEV regulation was to . . . move advanced low GHG vehicles from demonstration phase to commercialization.").

[34] California, New York, Massachusetts, Vermont, Maine, Pennsylvania, Connecticut, Rhode Island, Washington, Oregon, New Jersey, Maryland, Delaware, and Colorado have adopted the greenhouse gas rules, and most of these states have also adopted the zero-emissions vehicle mandate. CARB, § 177 States, https://ww2.arb.ca.gov/sites/default/files/2019-10/ca_177_states.pdf.

[35] California's "deemed to comply" provision was amended in September 2018 to provide that it "shall not be available" for model years 2021 and later if the final rules promulgated by the Obama Administration were "altered." 13 Cal. Code Reg. § 1961.3(c); Statement by CARB Chair on Action to Preserve California Vehicle Standards (Sept. 28, 2018), https://ww2.arb.ca.gov/news/statement-carb-chair-action-preserve-california-vehicle-standards.

[36] 84 Fed. Reg. 51,310 (Sept. 27, 2019) ("One National Program Rule").

economy standards for automobiles" as clear evidence of Congress's preemptive intent.[37] Documenting the well-established scientific relationship between carbon dioxide emissions and fuel economy standards and the direct relationship between zero-emissions vehicle mandates and fuel economy standards, NHTSA concluded that state automobile carbon dioxide emissions standards and zero-emissions vehicle mandates "relate to fuel economy standards by directly or substantially affecting corporate average fuel economy levels" and so are expressly preempted by CAFE.[38]

NHTSA promulgated several new rules in the Code of Federal Regulations. New rule 49 C.F.R. § 531.7 repeats the statutory prohibition. New Appendix B to Part 531 of title 49 states which state regulations are "related to" automobile fuel economy standards and thus preempted by the CAFE statutory prohibition. Appendix B also explains that a state law or regulation that "regulates or prohibits tailpipe carbon dioxide emissions from automobiles . . . relates to average fuel economy standards" and is expressly preempted by the statutory prohibition.[39] Appendix B further explains that a state law or regulation that "ha[s] the direct or substantial effect of regulating or prohibiting tailpipe carbon dioxide emissions . . . relates to fuel economy standards" and so is preempted.[40] NHTSA concluded that any law

> regulating tailpipe carbon dioxide emissions from automobiles, particularly a law or regulation that is not attribute-based and does not separately regulate passenger cars and light trucks, conflicts with:
>
> (A) The fuel economy standards in this part;
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> (B) The judgments made by the agency in establishing those standards; and
>
> (C) The achievement of the objectives of the statute (49 U.S.C. Chapter 329) under which those standards were established, in-

[37] *Id*. at 51,312.

[38] *Id*. at 51,313, 51,320.

[39] 49 C.F.R. App'x B to Part 531 §§ (a), (b).

[40] *Id*. §§ (a)(3), (b)(3).

> cluding objectives relating to reducing fuel consumption in a manner and to the extent consistent with manufacturer flexibility, consumer choice, and automobile safety.[41]

NHTSA issued similar regulations for light truck fuel economy standards.[42] In finalizing its preemption rules, NHTSA underscored that the regulations were "necessary to maintain the integrity of the corporate average fuel economy program and compliance regime" the Agency is charged with administering and "consistent with Congress' statement of express preemption."[43] NHTSA observed that its regulations are consistent with the statute and provide certainty to regulated parties concerning future preemption and regarding the legality of California's balkanizing regulations.[44]

IV. NHTSA'S PROPOSED REPEAL OF THE ONE NATIONAL PROGRAM RULE

On Inauguration Day, President Biden signed Executive Order 13,990, which directed NHTSA and EPA to consider "suspending, revising, or rescinding" various regulatory actions taken by the previous administration, including the One National Program Rule.[45] In response, NHTSA now proposes to repeal the codified preemption regulations and appendices, as well as "any associated interpretations or views on [CAFE] preemption" contained in the One National Program Rule's preamble and an unknown number of prior preambles.[46]

NHTSA's proposal contains three parts.

First, with respect to the rules promulgated in the Code of Federal Regulations, including Appendix B, NHTSA now says it has "substantial doubts" that the agency had "the authority necessary" to promulgate the rules.[47] NHTSA tentatively argues

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[41] *Id.* § (b)(1).

[42] *See* 49 C.F.R. § 533.7; *id.* App'x B to Part 533.

[43] One National Program Rule, 84 Fed. Reg. at 51,311.

[44] *Id.* at 51,316–17.

[45] Exec. Order No. 13,990, 86 Fed. Reg. 7,037, 7,037-38 (Jan. 20, 2021).

[46] 86 Fed. Reg. 25,980, 25,982 (May 12, 2021) ("Notice of Proposed Repeal").

[47] *Id.* at 25,985.

that the rules are "*ultra vires*" because they are "legislative" or "binding" rules purporting to regulate conduct "with the force and effect of law."[48] To attribute this "force and effect of law" quality to the rule, NHTSA relies on the "intent" it finds in the use of words like "implement" instead of "interpret" in the rule's preamble, as well as the "categorical" nature of NHTSA's legal conclusions in the Appendix regarding preemption, which "appeared to confer upon them legally binding connotations."[49] It also notes that there are portions of the One National Program Rule that do not contain temporizing language about how NHTSA's interpretation is its "view," but instead state that view directly.[50]

NHTSA has come to the "tentative" view that such rules with the "force of law" must be expressly authorized by Congress. According to NHTSA's novel view, to issue "legislative" rules on preemption, "the agency must have the authority to *directly regulate preemption itself*, rather than merely to establish the substantive law that leads to preemption."[51] That precondition is (perhaps) not satisfied here, NHTSA says, because the CAFE's preemption provision, 49 U.S.C. § 32919, is "self-executing": "The statute does not require any supplemental agency regulations to implement this standard, nor does the text and structure of the statute appear to provide NHTSA any special legislative role in dictating the scope of Section 32919's preemption."[52] Congress's "unambiguous silence" on NHTSA's jurisdiction, the Agency argues, shows that NHTSA cannot issue "binding" or "legislative" rules with "the force and effect of law" on preemption.[53]

Second, in light of these "doubts," NHTSA "proposes to repeal any interpretative positions regarding [CAFE] preemption" in the preambles "regardless of whether they are linked to the codified text."[54] It also proposes to withdraw numerous

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[48] *Id*. at 25,985–88

[49] *Id.* at 25,985.

[50] *Id.* at 25,989.

[51] *Id.* at 25,986 (emphasis in original).

[52] *Id.* at 25,985.

[53] *Id*. at 25,988. *But see Chevron*, 467 U.S. at 843 (holding that "if the statute is *silent* or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute" (emphasis added)).

[54] Notice of Proposed Repeal, 86 Fed. Reg. at 25,988.

longstanding or unspecified statements in "other NHTSA Preambles, which preceded the [One National Program] Rule" and which "espoused views directly defining [CAFE] preemption under [the statute] or the Agency's role in such preemption."[55] NHTSA identifies two candidate statements for withdrawal in a footnote, but states it "is proposing to withdraw all of such statements that may appear in prior preambles, regardless of whether they are expressly cited" in the notice.[56] It asks the public to review NHTSA's own documents to let NHTSA know whether there are other preambles espousing this view.[57]

NHTSA concedes it has authority to promulgate interpretative rules advising the public about its interpretation of CAFE's preemption provisions.[58] But it nevertheless argues that withdrawing *all* prior interpretative statements on CAFE preemption will contribute to "clarity" about "the positions announced in the" One National Program Rule and will "restore a clean slate for the Agency's position on [CAFE] preemption, which the Agency views as a necessary step to ensure that such prior statements do not overstate NHTSA's authority with respect to [CAFE] preemption issues."[59] A "clean slate," NHTSA argues, "would more appropriately enable a particularized consideration of how the specifics of state programs may 'relate to' fuel economy."[60]

Third, NHTSA argues that repeal of all codified rules and interpretative positions on preemption is good policy in any event because it will enable the Agency to adopt an unspecified "more nuanced approach" in the future that "could better balance federalism interests by avoiding a sweeping and premature prohibition of all state and local programs and instead evaluating such programs more specifically."[61]

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[55] *Id.* at 25,982.

[56] *Id.* at 25,982 n.9.

[57] *Id.*

[58] *Id.* at 25,988 ("While NHTSA still retains interpretative authority to set forth its advisory views on whether a state regulation impermissibly conflicts with Federal law, such authority does not support the power to codify binding legislative rules on the matter."); *id.* at 25,982 ("NHTSA's administration of EPCA enables the Agency to provide its interpretation of EPCA's preemption provisions.").

[59] *Id.* at 25,982.

[60] *Id.* at 25,989.

[61] *Id.* at 25,990.

It also claims that revoking prior interpretations will allow additional innovation at the state and local levels.

In concert with NHTSA's proposed repeal of the rule, EPA is reconsidering its prior withdrawal of California's Clean Air Act waiver.[62]

ARGUMENT

I. NHTSA'S ONE NATIONAL PROGRAM RULE IS NOT *ULTRA VIRES*.

NHTSA's main argument for repeal focuses on "doubts" about its authority. The proposal repeatedly describes the One National Program Rule as being "legislative," "binding," and as having the "force and effect of law," before concluding that NHTSA probably lacks the authority to issue such "legislative" rules on the question of preemption, though it may do so in an "interpretive rule."

These "doubts" are misplaced, so misplaced that we fear that they may be manufactured as part of a ploy to give aid and comfort to this administration's political allies in California and other, like-minded states, while avoiding any engagement with the merits of the One National Program Rule's preemption analysis. NHTSA's "doubts" are what *City of Arlington* aptly described as "empty distraction[s]," an improper "sifting the entrails of [a] vast statutory scheme[] to divine whether a particular agency interpretation" exceeds its authority. NHTSA's sudden interest in this irrelevant exercise is insufficient to permit repeal. NTSA must address all the pros and cons of ceasing to oppose California's impending balkanization. Anything less would be arbitrary, capricious, and a dereliction of the Agency's statutory duty to set *national* fuel economy standards.

A. Nothing turns on whether the proposal is a "legislative rule" with the "force of law."

Imagine the One National Program Rule were edited slightly to address the proposal's concerns. The word "implement" would be replaced with "interpret" in the Rule's preamble, the Rule's "categorical" conclusions would be modified with some temporizing phrases, its statements about the meaning of CAFE preemption would be prefaced with the phrase "it is NHTSA's view that . . .," and the Rule could even

[62] 86 Fed. Reg. 22,421 (Apr. 28, 2021).

include a statement that it was promulgated under the Agency's authority to interpret CAFE's preemption provision and was not a "legislative rule" but simply an effort to advise the public. If the Agency had done this, what would change in the real world compared to what the Agency actually did? In a word, nothing.

NHTSA's unsupported suggestion to the contrary proceeds from a confusion about the basics of administrative law. "The force of law concept plays a significant role in at least two major areas of administrative law doctrine."[63] "The first is in distinguishing between legislative rules that must comply with APA notice-and-comment rulemaking procedures and nonlegislative rules that are exempt from those requirements." "The second involves the *Mead* standard articulated by the Supreme Court for determining which agency rules are eligible for *Chevron* deference."[64] "Some agency rules are obviously both legislative and reviewable under *Chevron*; other agency rules are clearly neither." Another "subset of agency rules falls somewhere in the middle," and are non-legislative but "*Chevron* eligible."[65] Sometimes, *Chevron*-eligibility is described as emanating from an agency's implicit delegation to speak with the force of law when there is ambiguity.

APA "force of law" does not matter here. The One National Program Rule concededly satisfies the APA's minimum procedural requirements for promulgating legislative rules. And whether NHTSA's rule is eligible for *Chevron* deference in court is also irrelevant, since the standard of judicial review that applies to questions of law in court has no bearing on a rule's validity on the statutory merits. NHTSA points to no case holding an agency's interpretation is "*ultra vires*" merely because it was intended to be "legislative" instead of "interpretive."[66] None exists. An agency's interpretation of a statute that it administers is valid if it is right. And as explained below,

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[63] Kristin E. Hickman, *Unpacking the Force of Law*, 66 Vand. L. Rev. 465, 472 (2013).

[64] *Id.*

[65] *Id.* at 473; *see, e.g.*, *Barnhart v. Walton*, 535 U.S. 212, 221 (2002) ("[T]he fact that the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking, [] does not automatically deprive that interpretation of the judicial deference otherwise its due.").

[66] It is thus totally unsurprising that One National Program Rule does not describe itself as "legislative" or as "having the force and effect of law." NHTSA manufactures this non-issue by grasping at stray words and phrases, like the One National Program Rule's use of the word "implement" instead of "interpret."

NHTSA's current interpretation is right, so right in fact that any other reading of the law would violate the statute.

Because NHTSA's proposal conflates basic doctrines and the concept of the "force of law," it is necessary to first unpack the meaning of rules with the "force of law" under the APA and *Chevron*, and then to explain why these doctrines do not help NHTSA.

APA Notice-and-Comment "Force of Law." Under the APA, agencies must give "[g]eneral notice of proposed rulemaking" in the Federal Register and a public "opportunity to participate," but this requirement "does not apply" "to interpretative rules."[67] Agencies must also publish final rules at least "30 days before its effective date," but "interpretative rules" are again exempt from this requirement. "The term 'interpretative rule,' or 'interpretive rule,' is not further defined by the APA, and its precise meaning is the source of much scholarly and judicial debate."[68] As with NHTSA's preamble, courts often distinguish between "legislative," "binding" or "substantive" rules, which are said to carry the force of law, and interpretative rules, which "do not have the force and effect of law and are not accorded that weight in the adjudicatory process."[69] But just like California's separate standards, these circular descriptions do little to lift the smog.

Under the contemporaneous understanding of the APA at the time of its enactment, legislative rules are those agency rules implementing statutory provisions that only "become fully operative only after [the] exercise of an agency's rule-making function."[70] A statute prohibiting violations of rules promulgated by an agency and attaching sanctions to the violation of those rules is one common example.[71] That

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[67] 5 U.S.C. § 553(b), (c).

[68] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015).

[69] *Id.* at 97 (quotation marks omitted).

[70] Dep't of Justice, *Final Report of the Attorney General's Committee on Administrative Procedure* 27 (1941).

[71] *See, e.g.*, *Am. Min. Cong.*, 995 F.2d at 1109 (citing 15 U.S.C. 78n(b)); *United States v. Grimaud*, 220 U.S. 506, 515 (1911) (citing Act of June 4, 1987, 30 Stat. 11, 35).

kind of statute is not self-executing, as "one cannot violate the provisions of the statute unless they are implemented by administrative regulations or orders."[72] The statute's sanctions become enforceable only through the agency's rulemaking power, and in that sense, the agency's rules have the force and effect of law as "subordinate legislation."[73] Other examples of legislative rules include rules that dispense with otherwise applicable statutory prohibitions, and in that sense also carry the force of law.[74]

Interpretive rules, by contrast, are rules "of an advisory character, indicating merely the agency's present belief concerning the meaning of the applicable statutory language."[75] Although an agency's interpretation may be "accepted as determinative by the public at large," such guidance is not "binding upon those affected, for, if there is disagreement with the agency's view, the question may be presented for determination by a court," and "courts will be influenced though not concluded by the administrative opinion."[76]

The test to distinguish "legislative" and "interpretive rules" that best reflects the APA's legal history is set forth in *American Mining Congress*, an opinion that "has been widely hailed as a particularly incisive judicial pronouncement on the interpretive rules exemption and is often cited as authoritative."[77] That test is "whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of

[72] *Bowles v. Willingham*, 321 U.S. 503, 530 (1944) (Roberts, J., dissenting).

[73] *See* Dep't of Justice, *supra* note 70, at 27.

[74] *Id.* at 27; *see, e.g.*, *Field v. Clark*, 143 U.S. 649, 695 (1892); *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 133–34 (1939) (discussing examples).

[75] *See* Dep't of Justice, *supra* 70, at 27.

[76] *Id.*

[77] Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 Admin. L. Rev. 263, 334 (2018).

duties."[78] "If the answer . . . is affirmative, we have a legislative, not an interpretive rule."[79] This test is often called the "intransitivity" test.[80]

The One National Program rules do not satisfy the intransitivity test for legislative rules. The statutory provision those rules enforce is "self-executing": Private parties may enforce the prohibition in court, with or without NHTSA's rulemaking blessing. NHTSA thinks this *helps* NHTSA's repeal justification. But that the statute is self-executive only *undercuts* NHTSA's premise that the One National Program rules are "legislative" in the first place.

The intransitivity test is not the only test applied by lower courts. Most courts also give weight to an agency's intent to act with the force of law derived from uncertain signals like publication in the Code of Federal Regulations or references to the Agency's general rulemaking power. But since agencies often publish non-binding materials in the Code of Federal Regulations, courts have never "taken publication in the Code of Federal Regulations, or its absence, as anything more than a snippet of evidence of agency intent."[81]

These "legislative rule" tests based on agency intent, which NHTSA purports to apply, also undermine NHTSA's tentative position. They show that agency rules can be "legislative" under the APA even when the intransitivity test is not satisfied. In other words, they show that rules may be "legislative" under the APA and perfectly lawful even when they interpret self-executing provisions. Otherwise, why would any of these intent-based tests be necessary? NHTSA's position relies on this line of authority to justify its belief that the One National Program rule is "legislative," but it then turns around and ignores the fact that these cases hold that such "legislative" rules interpreting "self-executing" provisions are permissible if they comply with APA

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[78] *Am. Min. Cong.*, 995 F.2d at 1112.

[79] *American Mining Congress* set forth three other legal tests: "(2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule." *Am. Min. Cong.*, 995 F.2d at 1112. For a critical assessment, *see* Levin, *supra* note 77, at 335–39.

[80] Levin, *supra* note 77, at 335.

[81] *Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994); *see also* Levin, *supra* note 77, at 338 (criticizing test as overbroad).

notice-and-comment and publication requirements, which the One National Program did.

This gets us to the nub of the issue: APA distinctions between legislative and interpretive rules are irrelevant here. Whether or not the rules are "interpretive" within the meaning of the APA, they went through notice-and-comment rulemaking, and the rules became effective more than 30 days after publication in the Federal Register.[82] Since NHTSA complied with the APA's procedures, and none of this caselaw speaks to whether an agency's rule is *ultra vires*, this jurisprudence does nothing to help, but does much to confuse, NHTSA's analysis.

***Chevron*'s "Force of Law."** Under *Chevron*'s familiar two-step framework, "[w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[83]

Not all agency interpretations are eligible for *Chevron* deference. *United States v. Mead* "requires that, for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted."[84] *Mead* speaks loosely about an agency's express or implied congressional delegation of authority to act with "the force of law."[85] But as *City of Arlington* explained, *Mead* denied "*Chevron* deference to action . . . that was not rulemaking."[86] And the Court in *City of Arlington* was quite clear that a "general conferral of rulemaking or adjudicative authority" suffices "to support *Chevron* deference for

[82] One National Program Rule, 84 Fed. Reg. at 51,310.

[83] *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984).

[84] *City of Arlington*, 569 U.S. at 307 (citing *United States v. Mead Corp.*, 533 U.S. 218 (2001)).

[85] *Mead*, 533 U.S. at 229.

[86] *City of Arlington*, 569 U.S. at 306.

an exercise of that authority within the agency's substantive field."[87] Thus, in a rulemaking, *Chevron* applies as long as the agency is interpreting a statute it administers under a general conferral of rulemaking authority. That is all *Mead* means by "force of law."

Chevron-eligible rules are sometimes also described as "binding" in a more practical sense. In one sense, "rules that command deference do have the force of law."[88] After all, "[i]f a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation."[89] Narrowing the scope of review by courts, even when cabined by *Chevron*'s two steps, would seem to give a rule "weight" in the judicial process.

But as *Kisor*'s plurality took pains to explain, "[e]ven though a court might defer to an agency's interpretation . . ., the agency's interpretation itself never forms the basis for an enforcement action" and therefore does not carry the force of law in a formal APA sense.[90] Deference-eligibility hence does not necessarily make a rule "legislative" under the APA.

If *Chevron*-eligibility is what NHTSA has in mind by "force of law," that is no legal basis to conclude the One National Program's codified rules were *ultra vires*. Whether a court ought to review NHTSA's rule under *Chevron* or a less deferential standard of review for questions of law has no bearing on whether NHTSA's interpretation exceeds its authority under the statute. And in any event, as explained next, the One National Program Rule was a valid exercise of interpretive authority under *Chevron*.

Given that none of the recognized technical uses of "force of law" are relevant or useful to NHTSA's analysis, the term "force of law" in NHTSA's story is like the

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[87] *Id.* at 306.

[88] *Mortgage Bankers Ass'n*, 135 S. Ct. at 1212 (Scalia, J., concurring in judgment).

[89] *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

[90] *Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019) (plurality opinion).

Maltese Falcon in the classic movie of the same name, a necessary plot device without substantive content or significance used to justify a desired outcome.

B. The One National Program Rule is a valid exercise of interpretive authority under *Chevron*.

Congress has broadly authorized the Secretary of Transportation to "prescribe regulations to carry out the duties and powers" of his office.[91] Those duties include the obligation to administer the CAFE program.[92] The Secretary has subdelegated the authority to NHTSA.[93] And, as NHTSA's proposal concedes, NHTSA has authority to interpret the preemption provision.

In administering the CAFE program, NHTSA is obligated to "prescribe by regulation average fuel economy standards" that are "the maximum feasible average fuel economy level that [NHTSA believes] the manufacturers can achieve in that model year."[94] Congress made clear that these standards are broadly preemptive by expressly prohibiting any state from "adopt[ing] or enforc[ing] a law or regulation related to fuel economy standards" for vehicles already covered by a maximum feasible federal fuel economy standard.[95]

Regulations interpreting CAFE's preemption provision are a straightforward exercise of NHTSA's delegated authority to "prescribe regulations to carry out [its] duties and powers."[96] "Words are to be understood in their ordinary, everyday meanings."[97] To "prescribe" means "To establish rules, laws, or directions."[98] "'To carry out' means 'to put into execution' [,] 'to bring to successful issue'" or "to carry into practice

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[91] 49 U.S.C. § 322(a).

[92] *Id*. §§ 32901–03.

[93] 49 C.F.R. § 1.95(a), (j).

[94] 49 U.S.C. § 32902(a).

[95] *Id*. § 32919(a).

[96] *Id*. § 322(a).

[97] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpreting of Legal Texts* 69 (2012).

[98] *The American Heritage Dictionary of the English Language* 1035 (1969).

or to logical consequences or inferences."[99] NHTSA's One National Program establishes rules to put into execution and carry into practice the single national system of uniform national fuel economy standards it is charged with administering under CAFE.[100]

NHTSA's suggestion that an agency can only prescribe preemption regulations if a preemption provision is non-self-executing or expressly gives an agency a special implementation role is refuted by *City of Arlington*. In *City of Arlington*, the FCC relied on its general rulemaking grant in the Communications Act to interpret a concededly self-executing preemptive provision that prohibits states from unreasonably delaying siting decisions for towers and antennas. The Court held that *Chevron*-eligibility "does not turn on whether Congress's delegation of authority was general or specific."[101] The Court rejected precisely the same argument NHTSA is making, which was made by the dissent. "What [NHTSA] needs, and fails to produce, is a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field. There is no such case, and what [NHTSA] proposes is a massive revision of [the Court's] *Chevron* jurisprudence."[102]

The *City of Arlington* majority is consistent with a longstanding body of administrative law. "In the absence of an unmistakable directive" to the contrary, courts have long construed as empowering the administering agency to act through rulemakings so as to "render the statutory design effective in terms of the policies behind its enactment."[103] Under *Chevron*, § 32919 contains no "unmistakable directive" prohibiting NHTSA from interpreting the preemption provisions in CAFE in the Code of

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[99] *Shirk v. United States,* 773 F.3d 999, 1005 (9th Cir. 2014) (consulting *Merriam-Webster's Collegiate Dictionary* (10th ed. 1993) and *The Oxford English Dictionary* (2d ed. 1989)); *see also The American Heritage Dictionary of the English Language* (1969) (defining "carry out" as "[t]o put into practice or effect" and "[t]o bring to a conclusion; accomplish").

[100] 49 U.S.C. §§ 32901 et seq.

[101] *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 57 (2011) (citing examples).

[102] *City of Arlington*, 569 U.S. at 306.

[103] *National Petroleum Refiners Assoc. v. FTC*, 482 F.2d 672, 689 (D.C. Cir. 1973) (quoting *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968)); *see also Am. Frozen Food Inst. v. Mathews*, 413 F. Supp. 548, 552 (D.D.C. 1976) ("[T]o construe the governing statute as not permitting implementation of a

Federal Regulations. The "unambiguous silence" that NHTSA cites in CAFE's preemption provision thus means precisely the opposite of what it says.

NHTSA does not try to distinguish *City of Arlington*. Rather, it seeks support from older opinions speaking loosely about the "nature and scope" of the Agency's delegation of authority to displace state law.[104] But as explained above, *City of Arlington* is clear that a "general conferral of rulemaking or adjudicative authority" suffices "to support *Chevron* deference for an exercise of that authority within the agency's substantive field."[105] Nothing turns on "whether Congress's delegation of authority was general or specific."[106]

Nor does anything turn on the preemptive context. In *City of Arlington*, the Supreme Court held that deference is owed even "to [an agency's] assertion that its broad regulatory authority extends to preempting conflicting state rules."[107] The Court

> recognized that many of the responsibilities conferred on federal agencies involve a broad grant of authority to reconcile conflicting policies. Where this is true, the Court has cautioned that even in the area of preemption, if the agency's choice to pre-empt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.[108]

NHTSA preemption regulations fit comfortably within this Supreme Court-approved framework. NHTSA has a broad grant of authority to issue regulations necessary "to carry out [its] duties and powers," including its obligation to administer the

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substantive section by rulemaking would constitute the 'crabbed, inhospitable construction of a broad rulemaking authority' condemned in *National Petroleum*.") (quoting *National Petroleum Refiners*, 482 F.2d at 681).

[104] 86 Fed. Reg. at 25,986.

[105] *City of Arlington*, 569 U.S. at 306.

[106] *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 57 (2011) (citing examples).

[107] *City of Arlington*, 569 U.S. at 302 (citing *City of New York v. FCC*, 486 U.S. 57, 64 (1988)).

[108] *New York v. FCC*, 486 U.S. 57, 64 (1988).

CAFE program.[109] Its administration of the program necessarily requires accommodating conflicting policies: establishing national "maximum feasible average fuel economy" standards while "consider[ing] technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy."[110] NHTSA's proposal says nothing to refute its prior judgment that its "maximum feasible" national fuel economy standards and delicate balancing of these various factors would be seriously compromised by allowing states to second-guess NHTSA's technical judgments and expert balancing.

Preemption is even less salient here, because "the choice to preempt" was expressly made by Congress. *City of Arlington* again belies NHTSA's concerns about a federalism "balance" in this context. In deferring to the FCC's interpretation that it had authority to clarify the meaning of a statutory preemption provision through a declaratory rulemaking, the Supreme Court observed that that case

> has nothing to do with federalism. [The statute at issue] explicitly supplants state authority . . . 'This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the [agency] or the federal courts that draw the lines to which they must hew.' These lines will be drawn, either by unelected federal bureaucrats, or by unelected (and even less politically accountable) federal judges. '[I]t is hard to spark a passionate 'States' rights' debate over that detail.'[111]

As in *City of Arlington*, NHTSA's authority to issue preemption regulations "has nothing to do with federalism": the CAFE preemption provision, 49 U.S.C. § 32919, "explicitly supplants state authority." As the agency with "technical automobile expertise" charged with administering the CAFE program, NHTSA's attempt to "draw the lines" accomplishes no greater federal intrusion than an analogous interpretation by a federal judge.[112]

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[109] 49 U.S.C. § 322(a); *id.* §§ 32901–03; 49 C.F.R. §§ 1.95(a), (j).

[110] 49 U.S.C. § 32902(f).

[111] 569 U.S. at 305.

[112] *Id.*

The Supreme Court has upheld reasonable similar rules interpreting preemptive statutes in the past.[113] In *Smiley v. Citibank*, for example, the Court also applied *Chevron* deference to an agency rule interpreting the term "interest" in expressly preemptive statutory language.[114] The Court explained that a contrary argument "confuses the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive."[115] "As *Smiley* showed, a federal agency's construction of an ambiguous statutory term may clarify the pre-emptive scope of enacted federal law."[116] That is what NHTSA's rule did. NHTSA was clarifying the meaning of "related to fuel economy standards" in the express preemption provision.[117]

That NHTSA has never before published preemption regulations in the Code of Federal Regulations poses no impediment. As the Supreme Court said in *Smiley*, even a "100-year delay makes no difference. To be sure, agency interpretations that are long standing come before us with a certain credential of reasonableness, since it is rare that error would long persist. But neither antiquity nor contemporaneity with the statute is a condition of validity."[118]

California's quest to become the *de facto* fuel economy regulator for a third of the Nation's car market (at the expense of 100 percent of the Nation's car market) is of recent vintage. Before then, states had largely stayed in their lane and complied with CAFE's statutory prohibition. California first received a Clean Air Act waiver to regulate fleet-average carbon dioxide emissions in 2009, but shortly afterward, the state yielded to the federal government's standards as part of a legal settlement with

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[113] *See, e.g., id.* at 599 U.S. at 307 (upholding FCC's authority to regulate preemption via declaratory rulings where delegation of authority to the agency to interpret the statutory preemption provision was ambiguous); *New York v. FCC*, 486 U.S. at 66–67 (upholding FCC's authority to issue preemption regulations under the agency's general statutory authority to "make such rules and regulations . . . as may be necessary to carry out" the regulatory scheme).

[114] 517 U.S. 735, 744 (1996).

[115] *Id.*

[116] *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 555–556 (2009) (Thomas, J., concurring in part and dissenting in part).

[117] *Chevron*, 467 U.S. at 843–44 (1984) (Where "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.").

[118] *Smiley*, 517 U.S. at 740.

automobile manufacturers. Only after 2018, when California insisted on having its preferred policy determinations codified as part of federal law, did it become necessary for NHTSA to assert preemption. State conflict with federal CAFE fuel economy standards was made a near certainty when California recklessly eliminated its "deemed to comply" provision in 2018 in a last-ditch attempt to threaten the automotive industry and force the national government's hand.

In fact, NHTSA's regulations are consistent with the Agency's unwavering stance over the last two decades.[119] NHTSA stated plainly in 2008 that any state "law or regulation that has essentially all of the effects of a fuel economy standard, but is not labeled as one (i.e., a State tailpipe CO_2 standard)" is "preempted under [the CAFE program]," a position the agency has consistently taken since at least 2002.[120] The only novelty is the proposal's cramped view of NHTSA's interpretive authority over preemption.

Apart from flouting *City of Arlington* and tampering with the structure of administrative law, NHTSA's view of federal agencies' authority would also do long-term damage to the interests of the United States in ensuring federal supremacy. Federal agencies must be able to provide publicly available interpretations of federal preemption provisions in statutes they administer without worrying about an ethereal "*ultra vires*" doctrine that applies only to an ill-defined category of legislative rules interpreting express preemption provisions. NHTSA's "tentative" view to the contrary can only lead to enforcement *ad hoc*ery, gravely injuring the interests of the United States in letting its views on preemption be known to the public.

II. THE SUBSTANCE OF NHTSA'S ONE NATIONAL PROGRAM RULE IS COMPELLED BY STATUTE.

NHTSA says it "now has significant doubts about the validity of its preemption analysis as applied to the specific state programs discussed."[121] NHTSA cites the

[119] NHTSA describes the history of the agency's statements related to CAFE preemption at length in its One National Program rulemaking. SAFE Vehicles Rule NPRM, 83 Fed. Reg. at 43,232–33.

[120] *Average Fuel Economy Standards, Passenger Cars and Light Trucks; Model Years 2011–2015; Proposed Rule*, 73 Fed. Reg. 24,352, 24,454, 24,478 (May 2, 2008).

[121] 86 Fed. Reg. at 25,990.

"thorough" arguments made by California and other states opposing preemption in the One National Program Rule litigation.[122]

NHTSA has nothing to worry about. California's carbon dioxide emissions standards and its zero-emission standards fall comfortably within the scope of CAFE's expansive preemption provision. California's arguments to the contrary lack merit.

A. Automobile carbon dioxide standards are "related to" fuel economy standards.

CAFE expressly forbids any state from adopting or enforcing "a law or regulation related to fuel economy standards or average fuel economy standards for automobiles." As the Supreme Court has recognized, where a federal "statute 'contains an express pre-emption clause,' we do not invoke any presumption against pre-emption but instead 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.' "[123]

The Supreme Court has interpreted the meaning of the term "related to" in preemption statutes on many occasions.[124] The "ordinary meaning" of "related to" "is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with,' . . . —and the words thus express a broad pre-emptive purpose."[125]

An impermissible "connection" to "fuel economy standards" may be found in a broad variety of circumstances. For example, under ERISA's analogous preemption provision, the Supreme Court has held that a state law has an impermissible connection with ERISA plans if the indirect economic effects of the state law "force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice

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[122] *Id.*

[123] *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (quoting *Chamber of Commerce v. Whiting*, 563 U.S. 582, 594 (2011)).

[124] *Morales v. Trans World Airlines*, 504 U.S. 374, 383–84 (1992) (citing cases).

[125] *Id.* at 383 (quoting Black's Law Dictionary 1158 (5th ed. 1979)).

of insurers."[126] A state law also has an impermissible connection to ERISA if intrudes upon "a central matter of plan administration" or "interferes with nationally uniform plan administration."[127] This broad interpretation of "related to" is equally applicable to CAFE.[128]

State average carbon dioxide standards for light-duty vehicles are *de facto* automobile fuel economy standards, so they are preempted under any sensible reading of CAFE. As NHTSA concluded in the One National Program Rule after notice-and-comment proceedings: "as a practical matter, regulating fuel economy controls the amount of tailpipe emissions of carbon dioxide, and regulating the tailpipe emissions of carbon dioxide controls fuel economy."[129] Or as NHTSA said in a 2006 preamble: "tailpipe CO_2 emissions are always and directly linked to fuel consumption because CO_2 is the ultimate end product of burning gasoline. The more fuel a vehicle consumes, the more CO_2 it emits."

NHTSA was right, and nothing is gained by the proposal's attempt to further delay California's judgment day.

1. There is a direct functional relationship between automobile fuel economy and carbon dioxide emission rates.

There is an undeniable direct functional relationship between regulating carbon dioxide and fuel economy standards. Carbon dioxide is the natural byproduct of combusting the carbon-based liquid or gaseous fuels that power internal combustion engines.[130] Automobile manufacturers improve automobile carbon dioxide emissions per mile by improving new automobile fuel consumption rates, i.e., fuel economy.[131]

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[126] *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U. S. 645, 668 (1995).

[127] *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 945 (2016).

[128] *See Metro. Taxicab Bd. of Trade*, 615 F.3d at 157–58 (applying ERISA caselaw to CAFE preemption).

[129] 49 C.F.R. Part 531, App'x B(a)(1)(E).

[130] *See* 49 C.F.R. Part 531, App'x B(a)(1)(B) ("Carbon dioxide is the natural by-product of automobile fuel consumption").

[131] *See id.* Part 531, App'x B(a)(1)(D) ("Almost all technologically feasible reduction of tailpipe emissions of carbon dioxide is achievable through improving fuel economy, thereby reducing both the consumption of fuel and the creation and emission of carbon dioxide.").

California's and similar copycat automobile carbon dioxide standards are thus not just "related to" automobile fuel economy; they are functionally *identical* to adopting automobile fuel economy standards, as NHTSA concluded in the final rule.[132]

Automobile carbon dioxide emissions and fuel economy are so closely related that automobile manufacturers measure fuel economy by measuring carbon emissions as a proxy. Under the CAFE test procedures, automobile manufacturers measure automobile fuel economy using a "carbon-balance" method: by measuring carbon per gallon in the test fuel and dividing it by the rate at which carbon is emitted from the tailpipe, manufacturers reliably estimate how fast an automobile is consuming fuel based on how rapidly it is consuming the fuel's carbon.[133] This relationship works because combusting liquid or gaseous hydrocarbon or alcohol fuels (like gasoline, diesel, methanol, natural gas, ethanol, or liquified petroleum gas) in the presence of oxygen naturally and inevitably yields carbon dioxide emissions (and water vapor) as a byproduct.[134]

For less exacting purposes, automobile carbon dioxide emissions and fuel economy rates can be mathematically converted if the carbon content of the fuel is known, assuming constant fuel energy density. EPA, for example, estimates a typical gallon of gasoline contains 2,421 grams of carbon, which would equal 8,887 grams of carbon dioxide.[135] Plugging this value into a simple equation: a gasoline-powered automobile

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[132] *See id.* Part 531, App'x B.

[133] *See* 40 C.F.R. § 600.113-12(h) (gasoline), (i) (diesel), (j) (methanol), (k) (natural gas), (l) (ethanol), (m) (liquified petroleum gas); *see also* 40 C.F.R. Part 600, App'x II (sample calculations from prior gasoline formula). While other carbon-related emissions (like hydrocarbons or carbon monoxide) are included in the carbon-balance equations, these emissions are trivial and dependent on factors other than efficiency. Carbon dioxide emissions account for 99% of all measured mass-based emissions per mile and depend on efficiency. *See* EPA, Greenhouse Gas Emissions from a Typical Passenger Vehicle 1 (May 2014) ("The amount of CO_2 created from burning one gallon of fuel depends on the amount of carbon in the fuel. Typically, more than 99% of the carbon in a fuel is emitted as CO_2 when the fuel is burned. Very small amounts are emitted as hydrocarbons and carbon monoxide, which are converted to CO_2 relatively quickly in the atmosphere."); *see* 71 Fed. Reg. at 17,661 ("[C]ompliance with federal fuel economy standards is based primarily on CO_2 emission rates of covered vehicles.").

[134] For empirical data, *see e.g.*, EPA, Tier 3 Certification Fuel Impacts Test Program, EPA-420-R-18-004 (Jan. 2018).

[135] This conversion is based simply on the ratio of the molecular weight of carbon and carbon dioxide, 44/12. *See* EPA, Average Carbon Dioxide Emissions Resulting from Gasoline and Diesel Fuel 2–3 (Feb. 2005).

that emits 404 grams of carbon dioxide per mile has a fuel economy of 22 miles per gallon, and vice versa.[136] The same formulas can be used for other hydrocarbon or alcohol fuels.[137]

NHTSA is not alone. The close functional relationship between carbon dioxide and fuel economy is no secret. It is not only the automobile manufacturer industry standard, it has been recognized by federal courts, federal agencies, and experts. Here are just a few examples:

- The Court of Appeals for the D.C. Circuit recognized in an opinion that "any rule that limits tailpipe CO_2 emissions is effectively identical to a rule that limits fuel consumption."[138]

- A district court found after expert testimony that "there is a mathematical relationship between fuel consumption and carbon dioxide emissions."[139]

- EPA in a 2009 waiver for California acknowledged that California's greenhouse gas standards "overlap significantly [with CAFE standards], in that the technology used to increase fuel efficiency will also lead to reductions in emissions of . . . CO_2."[140]

- Jody Freeman, the "architect" of the first joint national fuel economy and greenhouse gas standards, recognized that reducing automobile carbon dioxide "essentially requires improving fuel economy."[141]

- California and its supporters' opening brief challenging NHTSA's One National Program rule admits that "[m]ost technologies automakers currently use to comply with greenhouse gas emission standards improve fuel economy and reduce tailpipe carbon-dioxide emissions."[142]

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[136] EPA, Greenhouse Gas Emissions from a Typical Passenger Vehicle 2 (May 2014) (8,887 / 404 = 22).

[137] *See id.* (diesel).

[138] *Delta Const. Co. v. EPA.*, 783 F.3d 1291, 1294 (D.C. Cir. 2015) (quoting 76 Fed. Reg. 57,124–25).

[139] *Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 342 n.49 (D. Vt. 2007).

[140] 2009 Waiver, 74 Fed. Reg. at 32,751.

[141] Jody Freeman, *The Obama Administration's National Auto Policy: Lessons from the "Car Deal,"* 35 Harv. Envtl. L. Rev. 343, 350 (2011).

[142] Opening Br. State and Local and Public Interest Petitioners 100, *Union of Concerned Scientists v. NHTSA*, No. 19-1230, Doc. #1849316. The brief claims that there are "exceptions," *id.*, but the exceptions only prove the rule.

These statements are correct. The relationship between fuel economy and greenhouse gas standards explains why NHTSA and EPA promulgate joint national standards. And it explains why California predicts large fuel savings will result from its rules (at the expense of car buyers in other states).

2. State carbon dioxide standards are *de facto* fuel economy standards.

Given the functional relationship between carbon dioxide and fuel economy, carbon dioxide standards are not just "related to fuel economy standards": they are *de facto* average fuel economy standards.

Like CAFE, California's carbon dioxide regulations set fleet-average model year standards for new automobiles. These standards are derived from "gram per mile CO_2 target value[s]" for each automobile type (e.g., passenger car, light truck) produced based on size, as measured by its "footprint."[143] These targets are strikingly similar to NHTSA's own footprint-based fuel economy targets.[144]

California, for example, assigns a passenger car "with a footprint of less than or equal to 41 square feet" a "gram per mile CO_2 target value" of 131 in model year 2025.[145] For a gasoline-powered automobile, that is a fuel economy target of approximately 67.8 miles per gallon.[146] That is an extraordinarily burdensome standard that could only be met by internal combustion engines through economically impractical hybridization.

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[143] The vehicle "footprint" is the area defined by the points where the tires contact the ground. Or defined more technically, it is "the product of average track width . . . and wheelbase ... divided by 144 and then rounded to the nearest tenth of a square foot." 40 C.F.R. § 86.1803-01.

[144] *Compare* 13 Cal. Code Reg. § 1961.3(a) (California footprint-based carbon dioxide targets), *with* 49 C.F.R. § 531.5(c) (NHTSA footprint-based fuel economy targets); *see also* 49 C.F.R. Part 531, App'x (example of calculating compliance under § 531.5(c)).

[145] 13 Cal. Code Reg. § 1961.3(a)(1)(A).

[146] 8,887 grams of CO_2 per gallon of gasoline / 131 grams of CO_2 per mile = 67.8 miles per gallon.

It does not matter that California has chosen to label its standards as carbon dioxide standards.[147] Congress did not want preemption to turn on "whether the legislature has a stupid staff."[148] Under CAFE, "[s]tate or local fuel economy standards would be preempted, regardless of whether they were in terms of miles per gallon or some other parameter such as horsepower or weight."[149] The choice of carbon dioxide as a label does not matter given the close functional relationship between carbon dioxide and average fuel economy standards. "That which we call a rose by any other name would smell as sweet."[150]

Despite this relationship, California and its allies argue that state carbon dioxide standards are not "related" to fuel economy because there is no direct "mathematical" relationship between efficiency and carbon emissions for hydrogen or electric powertrains.[151] Hydrogen automobiles emit only water, and electric automobiles do not have tailpipe emissions, since their greenhouse gas and other emissions are shifted upstream to the manufacturing and utility sectors.

The relationship between carbon emissions and efficiency for these automobiles is more complex, but this does not change the key point: California's regulations apply to all automobiles, including all liquid- and gaseous-fueled automobiles for which there is a direct functional relationship between fuel economy and carbon dioxide emissions. "Preemption cannot be avoided by intertwining preempted requirements with non-preempted requirements."[152] California's argument that its carbon dioxide regulations are not always precisely *identical* to fuel economy standards for every technology available in the marketplace is therefore entirely beside the point. Carbon dioxide and fuel economy standards need only be "related" for preemption to

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[147] *But see* Ann Carlson, *The New EPA Plan To Roll Back Auto Emissions Standards and "Supersede" the California Waiver is Legally Indefensible*, Legal Planet (Apr. 27, 2018) (arguing that the label somehow helps California's case).

[148] *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992).

[149] S. Rep. No. 93-526, at 66.

[150] One National Program Rule, 84 Fed. Reg. at 51,316 (quoting W. Shakespeare, Romeo & Juliet, II, ii (47–48) (1597)).

[151] Opening Br. State and Local and Public Interest Petitioners 87–93, *Union of Concerned Scientists v. NHTSA*, No. 19-1230, Doc. #1849316.

[152] *Cent. Valley Chrysler-Plymouth v. CARB*, 2002 WL 34499459, at *4 (E.D. Cal. June 11, 2002).

apply, not identical in all cases now and forever. The relationship is undeniable, as California's weak defense amply illustrates.

3. Because of their relation to fuel economy standards, state carbon dioxide standards have no fuel-efficiency or environmental policy justification.

There is a good reason for preempting state carbon dioxide standards. State carbon dioxide standards make no sense when sprinkled atop a national fleet-*average* fuel economy standard. Since compliance with federal fuel economy (or carbon dioxide) standards is determined by averaging an automobile manufacturer's fleet nationwide, "the increased fuel economy of [California] vehicles would likely be offset by less efficient vehicles produced for sale in the rest of the U.S., leading to little to no change in either fuel use or [greenhouse-gas] emissions at a national level."[153]

The net effect of these ambitious standards on national fuel consumption and related carbon pollution may be zero. For each compliant car sold in California states, a manufacturer will be able to sell automobiles (that are greater in demand based on their value and utility to the consumer) and that consume more fuel and therefore emit *more* grams of carbon per mile elsewhere in the United States but still meet the same national fleet-average standard. Because reducing fuel consumption and related carbon dioxide emissions is costly, automobile manufacturers have strong economic incentives to offset the effect of state standards in other states. As one would expect, peer-reviewed studies show that carbon leakage offsets fuel savings and related carbon-reduction benefits from state automobile carbon dioxide standards, imposing additional compliance costs on automobile manufacturers for little or no incremental benefit.[154]

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[153] One National Program Rule, 84 Fed. Reg. at 51,354.

[154] *See* Alan Jenn et al., *Cost Implications for Automaker Compliance of Zero Emissions Vehicle Requirements*, 53 Environ. Sci. Technol. 564, 586 (2019); Alan Jenn, et al., *Alternative Fuel Vehicle Adoption Increases Fleet Gasoline Consumption and Greenhouse Gas Emissions Under United States Corporate Average Fuel Economy Policy and Greenhouse Gas Emissions Standards*, 50 Environ. Sci. Technol. 2165 (2016); L. H. Goulder et al., *Unintended Consequences from Nested State and Federal Regulations: The Case of the Pavley Greenhouse-Gas-Per-Mile Limits*, 63 J. of Environ. Econ. & Mgmt. 187 (2012) (concluding that state carbon dioxide rules "would lead to 'emissions leakage' of 100 percent at the margin: the reductions within [California and other] states would be *completely* offset by emissions increases outside of those states") (emphasis added). The Congressional Budget

Carbon leakage is particularly important when it comes to addressing this Administration's concerns about alleged climate change. Carbon dioxide globally mixes in the upper atmosphere, leaving the same concentration over a given state as over the rest of the country, and indeed, the whole world. Consequently, one state's carbon emissions are "not more relevant . . . than are the [carbon dioxide] emissions from cars being driven in New York, London, Johannesburg, or Tokyo."[155] Policies that simply drive carbon emissions elsewhere do nothing. For a more detailed explanation of this leakage phenomenon as applied to California's policies, see the attached Affidavit of Professor John D. Graham. NHTSA's failure to consider this aspect of the problem is arbitrary and capricious.

B. California's electric automobile quotas are "related to" average fuel economy standards.

1. State electric automobile quotas restrict manufacturer compliance choices and undermine CAFE's flexible fleet-average standards.

The zero-emissions vehicle standard is related to fleet-average fuel economy standards because it in effect requires the production of a certain percentage of electric automobiles per conventional vehicle sold, or the production of an equivalent number of credits. The zero-emissions vehicle standard works by increasing the cost of producing gasoline or diesel automobiles (as each car comes with a zero-emissions vehicle percentage obligation), and cross-subsidizing alternative fuel powertrains—electric automobiles. The effect of this program is to force automobile manufacturers to meet fleet-average fuel economy standards with a costlier fuel-efficiency technology, restricting manufacturer compliance choices and undermining CAFE's flexible

Office has also predicted the same effect for federal tax credits. CBO, Effects of Federal Tax Credits for the Purchase of Electric Vehicles 14 (2012) ("With CAFE standards in place, therefore, putting more electric (or other high-fuel-economy) vehicles on the road will produce little or no net reduction in total gasoline consumption and greenhouse gas emissions.").

[155] One National Program Rule, 84 Fed. Reg. at 51,354.

performance standards.[156] The Second Circuit has held that analogous rules encouraging the adoption of hybrid and plug-in taxis are preempted as "related to" fuel economy.[157] The same logic applies here.

California's zero-emissions vehicle standard is functionally related to average fuel economy standards in yet another way.[158] The number of "ZEV" credits manufacturers get for producing electric automobiles depends on driving range, with greater driving ranges getting more credits (up to 4 credits total per electric automobile).[159] That central feature of the program is related to average fuel economy standards. For a given battery's capacity (kilowatt-hours of chemical potential energy stored in the battery), electric automobile range can be increased only by increasing their equivalent fuel economy (the number of miles per kilowatt-hour of chemical potential energy stored in the battery). Any regulation meant to encourage greater electric-automobile battery range therefore invariably encourages greater electric-automobile fuel efficiency and is "related to" average fuel economy standards.

2. Because of their relation to fuel economy standards, state electric automobile quotas have no environmental, legal, or policy justification.

Layering electric automobile standards on top of CAFE standards has perverse effects. Modeling studies predict that adding a state electric-vehicle automobile for 30% of the market on top of CAFE will increase average new automobile costs by $400 in 2025, undermining the economic practicability of the standards, not only for *new* car buyers, but also *used* car buyers.[160] "The reason for this cost increase is because, on the marginal cost curve of fuel-saving technologies, electrification of vehicles is relatively expensive per unit of fuel saved. Electrification is certainly a less cost-effective method . . . than refinements to the internal combustion engine."[161] And while

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[156] *Cf. New York State Conference of Blue Cross & Blue Shield Plans*, 514 U. S. at 668.

[157] *See Metro. Taxicab Bd. of Trade*, 615 F.3d at 158–59.

[158] *Id.*

[159] 13 Cal. Code. Reg. § 1962.2(d)(5)(A) ("ZEV Credit = (0.01) * (UDDS range) + 0.50").

[160] Alan Jenn et al., *Cost Implications for Automaker Compliance of Zero Emissions Vehicle Requirements*, 53 Environ. Sci. Technol. 564, 568–69 (2019).

[161] *Id.* at 569.

electric-vehicle quotas increase costs, they also *reduce* fleet-average fuel economy and increase carbon emissions, undermining CAFE's main goal of increasing efficiency.[162]

For a more detailed explanation of how the quotas interfere with CAFE's purposes, please see the attached Affidavit of John D. Graham, attached as an exhibit to these comments. NHTSA's failure to consider these things—an "aspect of the problem" that its proposed repeal must confront—is arbitrary and capricious.

3. Attempts to carve out state electric automobile quotas from preemption fail.

Supporters of electric quotas argue that zero-emissions vehicle standards are not "related to" fuel economy standards or average fuel economy standards for several reasons.[163] All of these reasons fail.

Supporters of California's program first argue that CAFE excludes the fuel economy of alternative fuels like electricity from preemption. As they point out, the term "fuel" is defined to mean "gasoline," "diesel oil" or any "other liquid or gaseous fuel" that NHTSA says is fuel.[164] Electricity and hydrogen, by contrast, are classified as "alternative fuel."[165] Fuel economy is in turn defined as "the average number of miles traveled by an automobile for each gallon of gasoline (or equivalent amount of other fuel) used, as determined by the Administrator under section 32904(c) of this title."[166] Because electricity and hydrogen are "alternative fuel," and not "other fuel," California asserts that electric automobiles do not have a "fuel economy" and hence cannot be related to fuel economy standards.

This argument ignores half of the statutory prohibition. California's standards are preempted if they are "related to" fuel economy standards *or* average fuel economy

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[162] *Id.* at 586 ("[W]hile policies that promote the market development of [electric automobiles] are effective at increasing production and adoption of the vehicles, the combination of state and national policies results in an emissions penalty−more emissions on a national basis than would occur if federal programs did not give compliance credit for the state-required vehicles. The more effective ZEV is at driving the market for electric vehicles, the greater the emissions penalty will be.").

[163] *See* Opening Br. State and Local and Public Interest Petitioners 87–93, *Union of Concerned Scientists v. NHTSA*, No. 19-1230, Doc. #1849316.

[164] 49 U.S.C. § 32901(a)(10).

[165] *Id.* § 32901(a)(1)(G), (J).

[166] *Id.* § 32901(a)(11).

standards. Average fuel economy is defined as the "average fuel economy determined under section 32904 of this title."[167] A manufacturer's average fuel economy under section 32904, essentially the fleet-performance compliance calculation, includes the fuel economy equivalent value of "an electric vehicle," or any other alternative fuel automobile.[168] Because electric automobiles are considered for compliance with average fuel economy standards under section 32904, they are "related to" average fuel economy standards.

California's supporters further argue that the prohibition on NHTSA considering the efficiency of alternative-fueled automobiles—including electric automobiles—when setting fuel economy standards means that electric automobile quotas cannot be related to average fuel economy standards.[169] But a statute that dictates what technologies manufacturers must use to comply with the average fuel economy standard is necessarily connected to average fuel economy standards under the broad meaning of "related."[170] California's contrary argument would turn CAFE's express limitation on setting standards upside down. Congress prohibited NHTSA's consideration of electric automobile efficiency when setting fuel economy standards precisely because they are related to average fuel economy standards. It did this so that the fuel economy standards could be met using only conventional fuel-efficiency technologies, instead of more expensive alternative fuel automobiles.[171] Congress chose to incentivize, not mandate, alternative fuel technologies.[172] State electric-automobile quotas undo this flexible and limited design, forcing the production of a particular

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[167] *Id.* § 32901(a)(5). The term "average fuel economy standards" is also defined by statute. It "means a performance standard specifying a minimum level of average fuel economy applicable to a manufacturer in a model year." *Id.* § 32901(a)(6).

[168] *Id.* § 32904(a)(2)(B).

[169] The term "average fuel economy standards" is defined by statute. It "means a performance standard specifying a minimum level of average fuel economy applicable to a manufacturer in a model year." *Id.* § 32901(a)(6).

[170] *Cf. Gobeille*, 136 S. Ct. at 943 ("A state law also might have an impermissible connection with ERISA plans if acute, albeit indirect, economic effects of the state law force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers.") (quotation marks omitted).

[171] 49 U.S.C. § 32902(h).

[172] *Id.* § 32905.

kind of technology that Congress decided *against* mandating through average fuel economy standards.

California also argues that CAFE should not be read to preempt California's zero-emissions vehicle standards because that would make text in the Clean Air Act Amendments of 1990 surplusage. That too is wrong.

California's surplusage argument relies on language in the "clean fuel vehicles" program established in the 1990 Clean Air Act Amendments.[173] Under this program, EPA must establish emission standards for "clean-fuel vehicles."[174] States in "covered areas"—metropolitan areas with bad smog or carbon monoxide pollution—must modify their state implementation plans to require that "covered fleets"—largely government fleets—purchase new automobiles that meet the clean-fuel vehicle standards.[175] Beginning in 1998, covered fleet operators had to buy an increasing percentage of new vehicles certified as clean-fuel vehicles under EPA's regulations, and they had to use alternative fuels when operating these vehicles in the covered area.[176] But "[t]he choice of clean-fuel vehicles and clean alternative fuels" had to "be made by the covered fleet operator."[177]

The clean-fuel-vehicles program included a state compliance "credit" provision to reward fleet operators that exceeded expectations by purchasing more clean-fuel vehicles than required, or by purchasing vehicles "which meet more stringent standards established by" EPA.[178] The even "more stringent" EPA standards had to "con-

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[173] 42 U.S.C. Ch. 85, Subch. II, Part C.

[174] 42 U.S.C. § 7582(a). That includes automobile "exhaust emission" standards for smog-forming emissions, carbon monoxide, nitrogen oxides, particulate matter, and formaldehyde. *Id.* § 7583(a), (b), (c). EPA must also establish standards for flexible-fuel vehicles that can operate on "clean-alternative fuel." *Id.* § 7583(a), (b), (c). Clean-alternative fuel includes any "alternative fuel" under CAFE. *Id.* § 7581. EPA established the regulations in 1994. 59 Fed Reg. 50,042 (Sept. 30, 1994), *codified at* 40 C.F.R. Part 88.

[175] Covered fleets" are those owned by a single entity with "10 or more motor vehicles," excepting any vehicles "held for lease or rental" to the general public, non-road vehicles, and law-enforcement or other emergency vehicles. 42 U.S.C. § 7581(5); *see also* 40 C.F.R. § 88.302-94 (defining terms).

[176] 42 U.S.C. § 7586(b).

[177] *Id.* § 7586(d).

[178] *Id.* § 7586(f)(1).

form as closely as possible to standards which are established by the State of California" for certifying vehicles as "Ultra-Low Emissions Vehicles" and "Zero Emissions Vehicles."[179]

California also relies on the reference to California's zero-emissions vehicle certification requirements to argue that Congress embraced electric-automobile production mandates and argue that the reference would be surplusage if CAFE preempted California's electric-automobile quotas. Not so.

The credit provision requires EPA to "certify vehicles," not entire manufacturer fleets, as complying with "more stringent standards" for zero-emissions vehicles. In context, this refers to California's numerical emission limits for certification of a particular vehicle as a zero-emissions vehicle, and not California's separate production quotas for electric cars. EPA's sole task under this credit provision is to closely conform its certification requirements to California's own requirements for what cars count as zero-emissions vehicles. This use of "standard" in the credit provision "to denote requirements such as numerical emission levels with which vehicles or engines must comply" "is consistent with the use of 'standard' throughout Title II of the Clean Air Act."[180]

Consistent with the plain text, EPA has *always* interpreted the reference to "standards" as referring to California's standards for *defining* zero-emissions vehicles, and not California's electric-vehicle production quotas.[181] EPA's "Zero-Emissions Vehicle" standard for the clean-fuel-vehicle program simply requires that the vehicle have no exhaust, evaporative, or auxiliary system emissions of specific pollutants.[182] As long as a particular vehicle conforms to those California criteria, it is certified as a "more stringent standards" clean-fuel vehicle. Because this statute has nothing to do with electric car quotas, EPA could continue conforming to California's definition

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[179] *Id.* § 7586(f)(4).

[180] *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253 (2004) (holding certain local fleet standards preempted by the Clean Air Act).

[181] 59 Fed. Reg. at 50,050 ("Consistent with the CARB, EPA is establishing ZEV standards which require zero emissions of the following pollutants: NMOG, NOx, CO, particulates, and HCHO.").

[182] 40 C.F.R. § 88.104-94(g).

of zero-emissions vehicle under the One National Program Rule. There is no surplusage at all.

California's argument that the reference to zero-emissions vehicles somehow refers to California's production quotas makes no sense. The clean-fuels vehicle program has its own phase-in schedule for mandating the purchase of clean-fuel vehicles, and "the choice of clean-fuel vehicles and clean alternative fuels" has to "be made by the covered fleet operator," not by decree of EPA or the states.[183]

Indeed, the only provision that references production quotas like California's expressly *prohibits* them. EPA rules or state plans may provide additional incentives for clean-fuel vehicles through a separate voluntary program, but the rules or plans "shall not include any production or sales mandate for clean-fuel vehicles" or subject automobile manufacturers to "penalties or sanctions for failing to produce or sell clean-fuel vehicles or clean alternative fuels."[184] Thus, the only section of the program that addresses electric-automobile production quotas prohibits them. That would be quite a strange way for Congress to embrace California's electric-automobile quotas.

The argument that the Clean Air Act Amendments of 1990 somehow embraced California's mandate, or that CAFE preemption would make any provision of the Clean Air Act surplusage, does not stand up to scrutiny. The only court to ever address CAFE preemption for California's first zero-emissions vehicle mandate held that the mandate was preempted by CAFE.[185] California never raised this surplusage argument in that litigation because it is meritless. Nor did that ruling render the credit provision's reference to zero-emissions vehicles surplusage. The same is true now.

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[183] 42 U.S.C. § 7586(b), (d).

[184] *Id.* § 7589(f)(4).

[185] *Cent. Valley Chrysler-Plymouth*, 2002 WL 34499459, at *7.

4. Electric automobile quotas also impliedly conflict with the statute.

The zero-emissions vehicle standards are also impliedly preempted by CAFE because they stand as an obstacle to the statute's objectives.[186] CAFE gives automobile manufacturers flexible choices. Automobile manufacturers may meet the standards using conventional fuel-efficiency technologies or using a variety of alternative fuel technologies.[187] CAFE pursues an all-of-the-above strategy for alternative fuels, where all liquid and gaseous alternative fuels have the same fuel economy credit multiplier (1/0.15) (as does electricity under the Department of Energy's regulations).[188] This allows automobile manufacturers a choice between improving conventional automobile fuel economy or being rewarded with artificially high fuel economy for producing a variety of alternative fuel technologies, including automobiles capable of operating on alternative liquid and natural gas fuels, not just electricity or hydrogen.

California's electric automobile quotas take away that statutory choice by mandating the production of electric automobiles, when Congress has decided to encourage a range of options. Thus, as in *Geier v. American Honda Motor,* California's zero-emissions vehicle regulation is "an obstacle to the variety and mix of devices that the federal regulation sought."[189] Moreover, since zero-emissions vehicle standards *increase* both fleet-average fuel consumption and compliance costs, they are a serious obstacle to the explicit objectives of CAFE.

C. Attempts to impliedly exempt California's standards from CAFE preemption fail.

California disputes CAFE preemption. California principally argues that Congress impliedly exempted California state standards that receive a Clean Air Act

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[186] *See Geier*, 529 U.S. at 881.

[187] 49 U.S.C. §. §§ 32902(h), 32905.

[188] *Id.*; 65 Fed. Reg. 36,986, 36,987 (June 12, 2000); 10 C.F.R. § 474.3.

[189] 529 U.S. at 881 (holding that any rule of state tort law imposing a duty to install airbags was preempted by the National Traffic and Motor Vehicle Safety Act of 1966 and NHTSA's implementing regulations, because the tort law would present "an obstacle to the variety and mix of devices that the federal regulation sought").

waiver from preemption under CAFE.[190] This contention cannot be squared with the text.

The Clean Air Act's text is straightforward. A waiver under section 209(b) "waive[s] [the] application of this section"—section 209 of the Clean Air Act *only*.[191] A Clean Air Act 209(b) waiver does *not* waive application of CAFE or any other federal preemption statutes. The same is true for section 177, which is limited to a waiver from section 209(a) of the Clean Air Act.[192]

CAFE's text is also clear. "[A] State may not adopt or enforce a law or regulation related to fuel economy standards for automobiles."[193] Congress made only a single exception from this prohibition—"a state may prescribe requirements for fuel economy for automobiles obtained for its own use."[194] California is a "State," not a foreign sovereign, so it is subject to the ordinary operation of the Supremacy Clause and CAFE's plain text. As the Clean Air Act's limited California exception demonstrates, Congress knows how to carve out states from general preemption laws, and it chose not to do so in CAFE.[195] It chose instead to make preemption fully applicable to any State, maintaining federal uniformity.[196]

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[190] Opening Br. State and Local and Public Interest Petitioners 87–93, *Union of Concerned Scientists v. NHTSA*, No. 19-1230, Doc. #1849316.

[191] 42 U.S.C. § 7543.

[192] *Id.* § 7507.

[193] 49 U.S.C. § 32919(a).

[194] *Id.* § 32919(c).

[195] *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (citation omitted)).

[196] It is telling that, while California has broader discretion to regulate "automobiles obtained for its own use," 49 U.S.C. § 32919(c), California has not adopted an electric vehicle mandate for state government vehicles, and absorbed the associated cost premium and lower vehicle utility. "In 2017, the vast majority of new vehicles (96%) purchased by government entities in California remained traditional gas-powered vehicles." https://www.autosinnovate.org/initiatives/energy-and-environment/electric-drive.

Through an esoteric reading of the statute, California and its allies argue that a California exemption must be inferred from other CAFE provisions that do not deal with preemption at all.

Explaining California's convoluted argument requires a historical detour. The original CAFE statute, the "Motor Vehicle and Cost Savings Act," as amended in 1975, required automobile manufacturers to meet stringent "passenger car" fuel economy standards increasing from 18 miles per gallon in 1978 to 27.5 miles per gallon in 1985.[197] But CAFE allowed any individual manufacturer to request a variance from the passenger car standards for initial model years 1978, 1979, and 1980.[198] To get a variance for any of these years, a manufacturer had to show "a Federal standards fuel economy reduction is likely to exist for such manufacturer for the model year to which the application relates."[199] And, for purposes of "this subsection" only—the subsection dealing with variances for these three initial model years—the term "Federal standards" included "emissions standards applicable by reason of section 209(b)" of the Clean Air Act.[200] This limited consideration was adopted because California's existing emission standards for smog-forming pollutants could have made it slightly more difficult for automobile manufacturers to increase fuel economy standards to reach the levels established by Congress.[201] Given that this transitional variance provision had no effect after 1980, Congress omitted this provision when it recodified the CAFE statute in 1994.[202]

The CAFE statute today requires NHTSA to consider several factors when setting fuel economy standards, including "the effect of other motor vehicle standards of

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[197] Motor Vehicle Information and Cost Savings Act § 502(a)(1), 89 Stat. 871, 902. Only standards for 1978, 1979, 1980, and 1985 are numerically specified. From 1981 to 1984, CAFE required NHTSA to set maximum feasible standards that adequately made progress toward the 1985 goal. *Id.* § 502(a)(3), 89 Stat. 903.

[198] *Id.* § 502(d)(1), 89 Stat. 904.

[199] *Id.* § 502(d)(2)(A)(i), 89 Stat. 904.

[200] *Id.* § 502(d)(2)(A)(i), 89 Stat. 904.

[201] H.R. Rep. 94-340, at 1849 ("The 1975 California standards ... appear to result in a 5.7 percent fuel penalty relative to automobiles subject to the 49 state standards"); Cal. Admin. Code § 1955.1 (1975).

[202] 3 Fed. Reg. at 43,210/2-3 (citing H.R. Rep. No. 103-180, at 583–584, tbl. 2A). The recodification made no substantive changes to the statute. Pub. L. No. 103-272, 108 Stat. 745 (1994) (preamble).

the Government on fuel economy."[203] The term "standards of the Government" is an undefined term, but, based on the definition of "Federal standards" in the now-defunct variance provision, California argues that "standards of the Government" does not bear its ordinary singular meaning, but means instead both federal standards *and* California standards waived under § 209(b) of the Clean Air Act. California further argues that this also means that California's standards must not only be considered by NHTSA when setting standards, but also that they are entirely outside the scope of CAFE's preemption provision. The conclusion is wrong.

Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[204] California relies on the tiniest mousehole—a definition applicable only to a time-limited variance—to fit a mastodon—a total rewrite of the CAFE preemption provision that guts the national fuel economy program, supplementing NHTSA's national standards with a patchwork of *de facto* fuel economy standards dictated from Sacramento and designed to impart a hidden tax on every car buyer in the nation.

Consider what would need to be true for California's reading to be right.

First, in 1975, although Congress appeared to preempt all state regulations related to fuel economy, Congress furtively intended the *sui generis* definition of "Federal standards"—which expressly applied only to a temporary variance provision—to license a separate California fuel economy program on top of Congress' carefully designed national fuel economy program. This "monster, in which the head was under the direction of the members," finds no support in the text, structure, or purpose of the statute.[205] If Congress intended to grant California such an extraordinary exemption from CAFE preemption, Congress would have said so more clearly, as it did under the Clean Air Act.

Second, when Congress enacted the 1977 Clean Air Act Amendments and said that section 209(b) and 177 waive preemption only from section 209(a) of the Clean

[203] Pub. L. No. 103-272, 108 Stat. 745 (1994).

[204] *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001).

[205] The Federalist No. 44 (Madison).

Air Act, it silently also meant to allow any section 177 state to copy California's *de facto* fuel economy standards.

Congress does not act in such a secretive fashion when making decisions of vast political and economic importance.

Nor does the variance definition of "Federal standards" reflect any congressional judgment that California standards would never be preempted by CAFE. More likely, it reflects the fact that California's 1975 standards targeted smog-forming emissions—nitrogen oxides or hydrocarbons—that are not "related to fuel economy standards." Nitrogen oxides and hydrocarbons are controlled through a variety of emission control technologies, including the installation of three-way catalysts, more sophisticated fuel injection software, or charcoal canisters to control hydrocarbon emissions.[206] None of these are efficiency technologies. By contrast, "[a]lmost all technologically feasible reduction of tailpipe emissions of carbon dioxide is achievable through improving fuel economy, thereby reducing both the consumption of fuel and the creation and emission of carbon dioxide."[207]

Nothing in the variance provisions can be sensibly read as exempting *de facto* fuel economy standards adopted by California or any other copycat state. Congress plainly contemplated that any regulations functionally related to fuel economy standards—for example, regulating vehicle weight or horsepower—would be preempted. Carbon is even more functionally related to fuel economy than vehicle weight or horsepower, so it is preempted. As NHTSA has long said, even if the Agency must consider California's pollution standards when setting maximum feasible fuel economy standards, that does not mean NHTSA must consider California standards prohibited by CAFE or that California gets a free pass.[208] California may not "adopt" or "enforce" any rules related to fuel economy standards, so any such standards are void *ab initio*. Unlike California's reading, NHTSA's long-standing approach reconciles

[206] For a description of technologies, *see* Control of Air Pollution from Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards Final Rule, Regulatory Impact Analysis, Ch. 1 (2014).

[207] *See* 40 C.F.R. Part 531, App'x B(a)(1)(D).

[208] *Light Truck Average Fuel Economy Standards Model Years 2005-2007*, 67 Fed. Reg 77,015, 77025 (Dec. 16, 2002).

both provisions and preserves the integrity of the exclusively national approach chosen by Congress.

CAFE's preemption provision is simple. Any state regulations related to fuel economy standards or average fuel economy standards are preempted, regardless of how they are labeled. California gets no special treatment. Indeed, implying a special exemption for California would raise serious equal sovereignty constitutional concerns given the lack of any reasonable policy justification for such disparate treatment, so any ambiguity must be construed against California's reading of the statute.[209]

* * *

State carbon dioxide and zero-emissions technology standards like California's effectively control the rate of automobile fuel economy improvements, mandate specific fuel-efficiency technologies, second-guess NHTSA's expert judgments, and replace one national fuel economy standard with a patchwork of overlapping state standards dictated from Sacramento, at the expense of car buyers and consumers nationwide. This does nothing meaningful to increase fuel economy or reduce atmospheric carbon dioxide concentrations. Indeed, California's separate standards likely increase national carbon emissions. They also needlessly increase the economic costs of meeting NHTSA's maximum feasible standards. Strained attempts to infer an exemption for California standards do serious violence to unambiguous statutory text and the national design of the standards. If this California carveout is the more "nuanced approach" NHTSA's repeal has in mind, it lacks any merit whatsoever.

III. NHTSA'S EXPLANATIONS FOR REPEALING THE ONE NATIONAL PROGRAM ARE ARBITRARY AND CAPRICIOUS.

A. The proposal ignores a central problem: what to do about California's attempt to commandeer NHTSA's authority to set national fuel economy standards?

In the One National Program, NHTSA was responding to a real-world practical problem. California has splintered fuel economy regulation into two separate regimes, one national fleet-average standard and a dozen other state fleet-average

[209] *See Nw. Austin Mun. Util. Dist. No. One. v. Holder*, 557 U.S. 193, 203 (2009).

standards. Apart from threatening the automobile industry with regulatory chaos, NHTSA said this regime would "lead to increased compliance costs and highly uncertain, if any, benefits, because they constrain the ability of [manufacturers] to meet the Federal standard without in anyway altering their obligations under that standard."[210]

NHTSA was right. California's separate standards balkanize the national program and create intolerable uncertainty—which is especially acute in the complex business of designing and manufacturing automobiles. And these separate standards would undermine *all* of the purposes of CAFE, likely *decreasing* national fleet-average fuel efficiency while increasing compliance costs.[211] Failure to address preemption in these circumstances, as NHTSA put it last year, "amounts to ignoring the existence of [CAFE's] preemption provision."[212]

An agency may not "entirely fail to consider an important aspect of the problem when deciding whether regulation is appropriate."[213] Moreover, "[a]gencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.[214] Agencies must also provide a "reasoned explanation" for a new rule and cannot change its position while "disregarding facts and circumstances that underlay" a prior policy."[215]

Yet NHTSA says nothing about the real-world concerns that led to the rule in the first place. For example, in its repeal proposal, NHTSA does not address:

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[210] One National Program Rule, 84 Fed. Reg. at 51,353.

[211] *See* Affidavit of John D. Graham (explaining why separate state standards likely lead to increased national emissions while significantly increasing industry compliance costs).

[212] One National Program Rule, 84 Fed. Reg. at 51,317.

[213] *Michigan v. EPA*, 576 U.S. 743, 752 (2015) (cleaned up).

[214] *Id.* at 752–53.

[215] *FCC v. Fox TV Stations*, 556 U.S. 502, 516 (2009).

- the risks posed by state and local regulations to the uniform system of national fuel economy standards Congress created in the CAFE program;[216]

- the need for certainty for manufacturers and other stakeholders regarding applicable future standards and the risk of future preemption;[217]

- the extent to which state and local regulations, "unbound by the [statutory factors specified in CAFE], frustrate NHTSA's statutory role" in setting fuel economy standards at "maximum feasible" levels;[218]

- the unlawful costs to consumers outside of the states that impose mandates related to fuel economy (and, conversely, the cross-subsidy to and costs not borne by consumers in the states that imposed the mandates);

- or the extent to which state and local electric-vehicle mandates conflict with the CAFE program's technology-neutral policy for improving fuel economy.[219]

NHTSA acknowledges in its proposal that "'a more detailed justification is appropriate in some cases," including "when [an agency's] new policy rests upon factual findings that contradict those which underlay its prior policy."[220] But NHTSA's assertion that "[t]his is not one of those cases" is wrong.[221] NHTSA's proposed repeal rests on the agency's finding that preemption regulations are no longer necessary or advisable. And that finding directly contradicts the NHTSA determinations that undergirded the One National Program Rule. At the least, NHTSA must provide a "reasoned explanation" "for disregarding the facts and circumstances that underlay" the

[216] One National Program Rule, 84 Fed. Reg. at 51,316.

[217] *Id*. at 51,317.

[218] *Id*. at 51,311, 51,314.

[219] *Id*. at 51,321.

[220] Notice of Proposed Repeal, 86 Fed. Reg. at 25,984, n. 41 (quoting *Fox*, 556 U.S. at 515).

[221] *Id*.

One National Program Rule.[222] NHTSA's failure to do so is fatal to its proposed repeal.

B. NHTSA's arguments for why it believes that it needs to rescind the rule first before (maybe) addressing California's carbon dioxide and zero-emission vehicle requirements do not make sense.

1. NHTSA's failure to explain what "the force and effect of law means" in this context is arbitrary and capricious.

It would be arbitrary and capricious for the Agency to rescind a rule for improperly speaking with the "force and effect of law" without explaining (i) what the "force and effect of law" means in this context, (ii) how it is distinguished from permissible interpretation, (iii) why the meat of the One National Program Rule falls into the former category and not the latter. As already explained, the Proposal's legal analysis is a grab bag of administrative law doctrines that is fundamentally mistaken on a number of points and would not constitute a valid or legally permissible basis for rescinding the One National Program Rule. But even if there were a sound basis for NHTSA's approach, it has not endeavored to share it with the public. The Agency must address this crucial point if it wishes to forge ahead with repeal.

2. NHTSA's claimed "need" for "clarity" is entirely manufactured.

The lack of clarity that NHTSA laments is not lack of clarity about what the One National Program Rule says, but rather how it should be understood within the taxonomy of different types of rules under the APA. As already explained, NHTSA's analysis of this "problem" is both wrong and irrelevant. But, again, even if one sets these flaws to the side, the lack of clarity is about an abstract question of administrative law, not about the real-world import of NHTSA's interpretation of CAFE. It would be arbitrary and capricious for NHTSA to repeal the One National Program Rule without discussing the full range of clarity issues.

[222] *Fox*, 556 U.S. at 516.

3. NHTSA cannot erase past "interpretations" and "positions" in the Federal Register by fiat.

NHTSA seeks to repeal all interpretive statements on preemption because they are somehow "inextricably intertwined" with the supposedly *ultra vires* rules in the Code of Federal Regulations. This contention is very puzzling. At times, the Proposal seems to suggest without explanation that NHTSA's substantive view regarding CAFE's preemption provision in various preambles are somehow contaminated by the legislative rule.

Old Testament Levitical law required those who touched something unclean to go out of the camp for a period of time. But there is no analogous "unclean hands" doctrine of administrative law. An agency's interpretation of a statute does not need to be cast out if it at one point came into contact with an "*ultra vires*" legislative rule. Indeed, the proposal itself does not seem to believe its own argument, as it turns around and expands the proposed repeal to all interpretations it does not like "regardless of whether they are linked to the codified text."

C. The proposal's rationale appears to be pretextual.

Given the absence of legal and factual basis for its action, NHTSA's stated purposes appear to be political pretext, engineered to ignore CAFE preemption and to appease the Administration's political allies in California and electric car lobby groups.[223] An agency action that "rest[s] on a pretextual basis . . . would warrant a remand to the agency."[224]

Both NHTSA's preemption regulations and EPA's withdrawal of California's Clean Air Act waiver were based, in part, on NHTSA's interpretation of CAFE's preemption provision. Repealing NHTSA's regulations and interpretations, as the proposed repeal purports to do, can only be explained as an attempt to enable California's continued attempts to unlawfully steer national automobile fuel economy policy. Moreover, NHTSA's repeated attempts to cast its determinations as "tentative"

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[223] In concert with NHTSA's proposed repeal, EPA is reconsidering its withdrawal of California's Clean Air Act waiver. *Reconsideration of a Previous Withdrawal of a Waiver of Preemption*, 86 Fed. Reg. 22.421, 22,428–29 (Apr. 28, 2021).

[224] *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573 (2019).

suggest that the agency's present view stems from convenience rather than conviction. In its notice of proposed repeal, NHTSA repeatedly describes its new determinations as "tentative conclusion[s]" based on "provisional views."[181] Indeed, the word "tentative" or "tentatively" appears nine times in the concise notice, and the word "doubt[s]" appears fifteen times. This tentativeness does not reflect the "due deliberation" required for an agency policy change under the APA.[182] Instead, it suggests an attempt to repeal regulations and interpretations that pose an obstacle to the current leadership's political priorities (specifically identified in an Executive Order to be completed by a date certain, facts be damned), while permitting NHTSA leeway to reverse course in a future rulemaking and promulgate preemption regulations more aligned with its preferred policies.

Given the absence of sound legal or factual support for NHTSA's repeal, it can only be described as pretext, in violation of the APA.

D. The proposed repeal does not even accomplish NHTSA's pretextual goals.

Even if NHTSA's stated objectives were not pretextual, the proposed rationale for the repeal would be arbitrary and capricious because getting rid of the One National Program Rule and other, similar interpretations will not accomplish those objectives. The repeal adds—not lessens—uncertainty, does not resolve the scope of NHTSA's preemption authority, and does not provide a "clean slate" for future preemption actions.

Instead of removing uncertainty, repealing NHTSA's preemption regulations would increase the on-the-ground uncertainty that the One National Program Rule responded to: reaffirming which set of conflicting standards govern an automaker's fleet—federal CAFE standards that prescribe a particular national maximum fleet-average fuel economy rather than California's conflicting carbon dioxide emissions and zero-emissions vehicles standards.[225]

Repeal also will increase uncertainty because regulated parties will not know which prior NHTSA statements they can rely on, since NHTSA proposes to withdraw an unspecified number of statements that "espoused views directly defining [CAFE]

[225] *See* SAFE Vehicles Rule NPRM, 83 Fed. Reg. at 43,233.

preemption under Section 32919 or the Agency's role in such preemption," some issued decades ago.[226] Without identifying the statements to be excised, parties will be left guessing whether a particular prior statement still has any effect. And by failing to identify the statements the agency proposes to somehow "repeal" or "rescind," parties will be deprived of the opportunity to comment on the propriety of their removal.

Nor will NHTSA's proposed repeal provide a "clean slate" for future preemption actions.[227] Even if the One National Program Rule and any prior NHTSA statements or positions "directly defining" CAFE preemption are "repealed"—whatever that means—other statements by NHTSA and EPA over the past twenty years will remain "unrepealed." For example, in a 2011 joint rulemaking for medium- and heavy-duty engines, NHTSA and EPA stated, "any rule that limits tailpipe CO_2 emissions is effectively identical to a rule that limits fuel consumption."[228] NHTSA has no authority to withdraw this joint statement, even though it bears directly on the interpretation of the CAFE preemption provision. Indeed, NHTSA's views in the preamble of the One National Program Rule are consistent not just with numerous agency preambles, press releases, and fact-sheets, but also with the view NHTSA expressed in an *Amicus* Brief for the Ninth Circuit in support of preemption of California's zero-emissions vehicle requirements.[229] There is no way for NHTSA to achieve a "clean slate."

More fundamentally, it makes no sense to speak of "rescinding" or "repealing" mere interpretative rules or "positions" in a preamble published in the Federal Register. Such interpretations can no more be rescinded or repealed than can an Agency's *Amicus* Brief or a "press release similarly announcing its policy."[230] The Office of the Federal Register cannot be ordered to "memory hole" the preamble pages NHTSA's leadership now dislikes, so those statements will remain like it or not. And how does

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[226] Notice of Proposed Repeal, 86 Fed. Reg. at 25,982, n. 9 (Selectively referencing two NHTSA rulemakings from 2008 and 2009 and noting, "[t]o be clear though, the Agency is proposing to withdraw all of such statements that may appear in prior NHTSA Preambles, regardless of whether they are expressly cited herein.").

[227] Notice of Proposed Repeal, 86 Fed. Reg. at 25,989.

[228] *Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles*, 76 Fed. Reg. 57,106, 57,124–25 (Sept. 15, 2011).

[229] *See* Docket in *Central Valley Chrysler-Plymouth, Inc.. v. Kenny*, No. 02-16395, (9th Cir. 2002).

[230] *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 422 (1942).

NHTSA intend to "repeal" its *Amicus* Brief? Since none of these statements are binding in any event, NHTSA also gains no future increase in rulemaking discretion from purporting to "repeal" them now. The futile attempt at "repeal" does add confusion, however, which the proposal nowhere discusses.

Last, NHTSA ties itself in knots. It complains about the One National Program Rule's failure to evaluate programs "specifically" enough and with reference with "particular state programs" while simultaneously expressing "significant doubts" about "the specific state programs discussed in" the rule.[231] In just a single paragraph, NHTSA manages to condemn the rule both for speaking too generally and too specifically. That makes no sense. In reality, the One National Program rule is as specific as a prospective rule of general applicability can possibly be, and NHTSA discussed specifically and in great detail why California's particular standards—which EPA was also specifically addressing in the same joint One National Program rulemaking—where preempted in exquisite detail, taking up numerous pages of the Federal Register. NHTSA's contradictory "too general" and "too specific" protestations do not stand up to scrutiny.

E. NHTSA should consider less disruptive alternatives to repeal that would address its concerns.

NHTSA's proposal does not consider any potential alternatives to repeal of the One National Program Rule. While the concerns about its authority to address preemption with "the force and effect of law" are misplaced, if the Agency nevertheless believes that clarity on this point is necessary, it can do so simply by issuing a clarifying statement or rule that establishes that the One National Program Rule is not "binding" but is rather an interpretation.

IV. NHTSA'S PROPOSAL VIOLATES THE NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act (NEPA) requires federal agencies to provide an environmental impact statement for any "major Federal action[] [that] significantly affect[s] the quality of the human environment," including the adoption of "rules, regulations, and interpretations" under the APA and "agency[] policies

[231] Notice of Proposed Repeal, 86 Fed. Reg. at 25,990.

which will result in or substantially alter agency programs."[232] NHTSA's failure to provide an environmental impact statement for its proposed repeal violates its obligations under NEPA.

NHTSA's proposed repeal easily satisfies the agency's own standards for "major actions" that require an environmental impact statement.[233] NHTSA's proposed repeal undermines enforcement of the federal CAFE preemption provision and so "involves inconsistency with [] Federal, State, or local law."[234] Electric automobiles' hefty battery packs mean that these vehicles weigh considerably more than gasoline automobiles and so generate more non-exhaust particulate matter pollution.[235] Consequently, reinstating zero-emissions vehicle standards "may directly or indirectly result in a significant increase in the weight of a motor vehicle" and "may directly or indirectly result in a significant increase in the amount of harmful emissions resulting from operation of a motor vehicle."[236] And electric automobile batteries require scarce and toxic minerals, such that repealing preemption may directly or indirectly increase "exposure to toxic or hazardous materials" used in the manufacture of automobiles, increase environmental issues associated with the disposal of automobiles, and contribute to "depletion of scarce natural resources associated with the manufacture" of electric automobiles.[237]

As a discretionary action with significant implications for automobile emissions, NHTSA's proposed repeal requires an environmental impact statement.

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[232] 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.18.

[233] *See* 49 C.F.R. §§ 520.4(b)(3), 520.5.

[234] *Id*. § 520.5(b)(6)(i).

[235] *See, e.g.,* Victor R.J.H. Timmers and Peter A.J. Acthen, *Non-exhaust PM emissions from electric vehicles*, 134 Atmospheric Env't 10, 12–13, 15, Tables 5 and 6 (2016) (observing that, "[o]n average, the electric automobiles are] 24% heavier than their [internal combustion engine] counterparts," leading to increased non-exhaust particulate matter emissions).

[236] 49 C.F.R. § 520.5(b)(8).

[237] *Id*. § 520.5(b)(10)–(12).

V. NHTSA'S PROPOSAL VIOLATES EXECUTIVE REGULATIONS AND ORDERS

A. The Proposed Repeal of the One National Program Rule Is Contrary to Executive Order 13990.

The impetus behind NHTSA's proposed repeal of the One National Program Rule can be found in Executive Order 13990.[238] This Executive Order seeks to promote the government's "abiding commitment to empower our workers and communities" by setting national policy goals pertaining to the environment and the climate. As relevant here, it directs that federal agencies "must be guided by the best science and be protected by processes that ensure the integrity of Federal decision-making."[239] They must work to "listen to the science," "improve public health and protect our environment," "ensure access to clean air," "reduce greenhouse gas emissions," and "prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals."[240]

The Executive Order then directs federal agencies to review regulations from the prior administration (including the One National Program Rule) to see if they are "inconsistent with, or present obstacles to, the policy set forth in . . . this order. For any such actions identified by the agencies, the heads of agencies shall, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding the agency actions" in order to bring them into line with the new administration's policies.[241]

Repeal of the One National Program Rule would be inconsistent with these policy goals. As explained at length already, repeal does serious violence to the "integrity of Federal decision-making," replacing NHTSA with a Madisonian monster where the head is controlled by the parts. And, because of its faulty legal reasoning about "*ultra vires*" preemption rules, NHTSA's proposal if adopted will undermine "the integrity of Federal decision-making" regarding preemption across the board.

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[238] Executive Order 13990, 86 Fed. Reg. 7,037 (Jan. 20, 2021) ("Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis").

[239] *Id.*

[240] *Id.*

[241] *Id.*

The repeal proposal also does not follow the "best science"; experts like Professor John D. Graham have shown that balkanization and electric car mandates will likely *decrease* fleet-average fuel economy while simultaneously *increasing* costs. California's rules also reallocate financial benefits through enormous cross-subsidies from traditional automakers to electric vehicle manufacturers (primarily California-based giant, Tesla). This *harms* "workers and communities." Lower average fuel economy means higher average emissions, which will increase "greenhouse gas emissions" and can hurt "public health," damage "our environment," and decrease "access to clean air." And, instead of creating "well-paying union jobs," it destroys them by requiring traditional auto manufacturers to spend their money on buying credits from Tesla, rather than paying workers in the Midwest to design and build more fuel-efficient vehicles. This regressive policy is also contrary to the Executive Order's concern with environmental justice because the harms of higher air pollution, fewer union jobs, and more expensive cars will likely be felt most acutely by poor communities, particularly in densely populated urban areas.

B. The Rule is "Economically Significant" and Produces Net Costs.

In NHTSA's own view, the One National Program Rule is "binding" on states like California. As Professor John D. Graham explains, under the repeal's own legal premise, repeal of the One National Program therefore would reimpose enormous regulatory burdens on the automotive industry, with attendant annual costs in the *b*illions of dollars and no demonstrated corresponding benefit. Under Executive Order 12,866, this means the rule is "economically significant," and NHTSA must prepare a detailed regulatory impact analysis acknowledging these net costs. It has not done so. NHTSA cannot have it both ways: either the One National Program rule was not binding on California, or it was, in which case NHTSA cannot avoid responsibility by stating that the rule does "not *directly* reinstate any state programs or otherwise affect the self-executing statutory preemption framework."[242] Under NHTSA's own legal logic, the unmaking of a "binding" rule must be a direct causal factor in reinstating California's net costs on society.

[242] Notice of Proposed Repeal, 86 Fed. Reg. at 25,990 (emphasis added).

CONCLUSION

California is scorning CAFE's preemption provision. If left unchecked, this will put an end to NHTSA's national fuel economy standards and frustrate *all* of CAFE's core purposes by decreasing national fleet average fuel efficiency and simultaneously increasing vehicle costs. This is bad for the economy, bad for the environment, and bad for the rule of law. At the very least, NHTSA must confront these issues if it wishes to lawfully repeal the One National Program Rule and abandon nearly two decades of consistent interpretation of CAFE's preemption provision. NHTSA cannot hide behind newfound "doubts" about irrelevant questions of administrative law and pretextual policy justifications. NHTSA must abandon its proposed repeal and faithfully enforce the law Congress enacted.