

State Authority to Regulate Mobile Source Greenhouse Gas Emissions, Part I: History and Current Challenge

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Summary

The National Highway Transportation Safety Administration (NHTSA) and the U.S. Environmental Protection Agency (EPA) have proposed a new reading of the Energy Policy and Conservation Act of 1975 (EPCA) that governs federal fuel economy standards. The regulations would relax federal greenhouse gas tailpipe standards and fuel economy standards, and preempt emissions standards put in place by California and adopted by other states. This Article examines the agencies' proposal in light of previous regulatory actions; it considers the agencies' rationale and finds that their expansive theory of preemption poses significant practical problems and logical flaws. Finally, it examines the agencies' proposal in light of the U.S. Supreme Court's preemption jurisprudence, and argues that the agencies' analysis is lacking because it fails to adequately discuss the objectives of the federal fuel economy laws, nor the purpose and effect of the state requirements.

In September 2019, the National Highway Transportation Safety Administration (NHTSA) and the U.S. Environmental Protection Agency (EPA) finalized new regulations that upend how federal laws that set standards for air pollution and fuel economy for the nation's cars and trucks are implemented. The agencies have adopted a new reading of the Energy Policy and Conservation Act of 1975, which governs federal fuel economy standards. These regulations, which were promptly challenged in court by states, cities, and environmental groups, would preempt emission standards put in place by California and adopted by other states. It would also preempt California's zero emission vehicle program.

This Article examines the agencies' application of preemption in light of previous regulatory actions by NHTSA and the jurisprudence that governs preemption. A review of NHTSA actions since 1975 shows that from the beginning of implementation, the agency was aware that California emission standards could have significant effects on fuel economy. However, NHTSA's historic approach has been to simply factor the impacts of the state standards into the determination of the appropriate stringency for federal fuel economy standards. This approach can be seen from NHTSA's very first rulemaking through regulations governing model year 2011 vehicles.

Informed by this analysis, the Article proceeds to examine the agencies' preemption rationale and finds that the expansive theory of preemption advanced by the agencies poses significant practical problems and logical flaws. NHTSA judges its previous consideration of California emission standards to be appropriate, but then fails to provide a rational basis for distinguishing those actions from the standards it now seeks to preempt. NHTSA also does not provide a limiting principle that would prevent the agency's expansive preemption interpretation from being applied to a variety of state and local laws that seem well beyond a federal scheme relating to fuel economy performance requirements that apply to automobile manufacturers. NHTSA attempts to address or contain some of these problems. However, because the solutions are not rooted in statute, case law, or legislative history, these solutions may ultimately be viewed as arbitrary or capricious.

Finally, the Article examines the agencies' preemption interpretation in light of the U.S. Supreme Court's preemption jurisprudence. The Article argues that the agencies'

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analysis is lacking because it fails to adequately discuss the objectives of the federal fuel economy laws, nor the purpose and effect of the state requirements. An examination of these issues suggests a narrower interpretation of federal preemption is warranted that would preserve California's historic role in establishing tailpipe emission standards.

This Article examines more than 40 years of regulatory history to inform today's important debate over the future of the nation's cars and trucks. The resolution of this debate will determine the emissions profile of the nation's vehicle fleet in the years to come, and whether the United States continues to lead the world on vehicle technology innovation.

The U.S. approach to controlling and reducing car and truck pollution has been effective. Automobiles are dramatically cleaner today than they were 50 years ago.¹ Air quality has improved significantly, even though there has been a recent increase in the number of days each year that are considered unhealthy due to air pollution levels.² The automobile manufacturing sector, along with its pollution control industry, has been a bright spot in the U.S. economy.³

A critical element to the U.S. approach has been to promote innovation at the state level, innovation that is then often subsequently reflected at the federal level. The state of California is central to this approach. For nearly 50 years, California has been setting tailpipe standards for cars and trucks and has enjoyed for the most part consistent support, if not unanimous praise, from the U.S. Congress for its work. When the Clean Air Act (CAA)⁴ was enacted and subsequently amended and strengthened through the years, Congress has always been careful to preserve California's authority to continue to regulate tailpipe emissions from cars and trucks.

In 2018, however, federal agencies proposed regulatory amendments that would upend this decades-long successful structure. That year, the National Highway Traffic Safety Administration (NHTSA) and the U.S. Environmental Protection Agency (EPA) proposed regulations that would relax federal tailpipe standards for greenhouse gases (GHGs).⁵ The proposed regulations also included text providing that states are preempted from regulating GHG emissions and from requiring zero emission vehicles (ZEVs) to be offered for sale.⁶

That preemption proposal has raised debates within the Donald Trump Administration over the merits and defensibility of the proposal, and these debates have bubbled over into the public's view. On July 27, 2018, the *New York Times* reported that then-Acting Administrator of EPA Andrew Wheeler feared that the rule's "legal and technical arguments are weak and will set up the Trump administration for an embarrassing courtroom loss."⁷ Moreover, when the proposal was publicly released, states and environmental groups indicated that they would challenge the agencies' rule in court if it was finalized.⁸

This debate is highly consequential. California and the states that have adopted its standards have succeeded in requiring less-polluting vehicles being brought to market each year.⁹ These states are also requiring automakers to sell a growing fleet of ZEVs. These advanced technology requirements are laying the groundwork for a revolutionary transition in the technology that powers our cars and trucks. However, the Administration's preemption proposal, if finalized, would slow, if not stop, these efforts. By 2035, the annual increase in emissions associated with this proposal could be larger than the total national annual emissions of more than 80% of all nations.¹⁰

The uncertainty created by the agencies' proposal is already being reflected in auto manufacturers' public statements. The dominant reaction by the regulated industry appears to be one of skepticism toward the Administration's approach. Four major automakers have reached agreement with California to acknowledge the state's authority and reduce the GHG emissions of their vehicles.¹¹ On the other hand, one major automaker signaled its belief that the agencies' proposal would become national policy even though it had not yet been finalized, nor had it faced or withstood legal challenge. A Toyota spokesman recently explained Toyota's approach to vehicle electrification, saying, "This is going to be a slow evolution in the U.S. market, unlike in China and Europe where there are government regulations" hastening electrification.¹²

In September 2019, the agencies finalized the portions of the proposal that revoked EPA's 2009 waiver of federal

1. U.S. Environmental Protection Agency (EPA), *History of Reducing Air Pollution From Transportation in the United States* [hereinafter *History Reducing Air Pollution*], <https://www.epa.gov/transportation-air-pollution-and-climate-change/accomplishments-and-success-air-pollution-transportation> (last updated Apr. 19, 2018).

2. U.S. EPA, OUR NATION'S AIR: STATUS AND TRENDS THROUGH 2018 (2019), available at https://gispub.epa.gov/air/trendsreport/2019/documentation/AirTrends_Flyer.pdf.

3. See *History Reducing Air Pollution*, supra note 1.

4. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

5. U.S. EPA, NHTSA, Safer Affordable Fuel-Efficient Vehicles Rule, 83 Fed. Reg. 42986 (proposed Aug. 24, 2018) [hereinafter SAFER proposal], available at <https://www.govinfo.gov/content/pkg/FR-2018-08-24/pdf/2018-16820.pdf>.

6. *Id.* at 43232.

7. Coral Davenport, *Top Trump Officials Clash Over Plan to Let Cars Pollute More*, N.Y. TIMES, July 27, 2018, <https://www.nytimes.com/2018/07/27/climate/trump-auto-pollution-rollback.html>.

8. Joseph White, *U.S. States Vow to Fight Trump Rollback on Auto Emissions*, REUTERS, Aug. 2, 2018, <https://www.reuters.com/article/us-autos-emissions/us-states-vow-to-fight-trump-rollback-on-auto-emissions-idUSKBN1KN1AD>.

9. See *History Reducing Air Pollution*, supra note 1.

10. Trevor Houser et al., *The Biggest Climate Rollback Yet?*, RHODIUM GROUP, Aug. 2, 2018, <https://rhg.com/research/the-biggest-climate-rollback-yet/>.

11. Dino Grandoni & Juliet Eilperin, *The Energy 202: Four Carmakers Spurn Trump Over Mileage Rules. Will Others Follow?*, WASH. POST, July 26, 2019, <https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2019/07/26/the-energy-202-four-carmakers-spurn-trump-over-mileage-rules-will-others-follow/5d39ddce88e0fa1454f7ff66/>. Reportedly, Mercedes-Benz also planned to join the agreement with California. Coral Davenport & Hiroko Tabuchi, *Trump's Rollback of Auto Pollution Rules Shows Signs of Disarray*, N.Y. TIMES, Aug. 20, 2019, <https://www.nytimes.com/2019/08/20/climate/trump-auto-emissions-rollback-disarray.html>.

12. David Welch & Chester Dawson, *A \$255 Billion EV Debate Is Raging Among the World's Biggest Automakers*, BLOOMBERG, Apr. 16, 2019.

preemption for California's GHG standards and determined that the Energy Policy and Conservation Act of 1975 (EPCA) preempted state authority to set GHG emission tailpipe standards and require the sale of ZEVs.¹³ Citing the voluntary agreement between California and the four automakers as a reason for immediate action on the preemption aspects of the rule, the agencies stated that they would continue to work on a final rule to establish federal GHG and fuel economy standards.¹⁴ The final rule on preemption adopted the substance and rationale of the proposed rule with few significant differences.

The agencies' argument for preemption hinges on a few lines in the EPCA. The EPCA states that when a federal fuel economy standard is in effect, a state may not adopt "a law or regulation relating to fuel economy standards."¹⁵ The agencies' preemption proposal argues that "relating to" has such a broad definition that it sweeps in state laws that would reduce GHG emissions for purposes of protecting the public health and welfare.¹⁶ Therefore, California's regulation of GHGs relate to fuel economy, and the EPCA preempts California from issuing any tailpipe standard at all that controls GHG pollution or could have the effect of reducing petroleum consumption.¹⁷

Part I of this Article provides background information on the relevant portions of the CAA, the EPCA, and the Energy Independence and Security Act (EISA). This section explains the structure of these laws and how they interact as foundational information to the rest of the Article.

Part II explores the EPCA in greater depth. It explains some of the key elements of the Act and reviews the actions of NHTSA to implement the EPCA since 1975. The section shows that from the beginning of implementation, the agency was aware that California emission standards could have significant effects on fuel economy. The federal rulemaking record shows that California standards have affected fuel economy of specific models of vehicles by as much as 28%. However, NHTSA did not promulgate a rule to preempt California until 2019. Instead, NHTSA factored the fuel economy effects of California emission standards into the establishment of federal fuel economy standards as recently as model year 2011.

Part III explains the Trump Administration's preemption position. Part IV evaluates the Administration's preemption argument in light of NHTSA's history of implementation and current jurisprudence on the topic. Part V concludes that NHTSA and EPA's position that California was preempted by Congress 44 years ago is lacking, because the agencies have failed to provide a coherent and defensible interpretation of the EPCA's preemption language and have misapplied the governing jurisprudence.

13. U.S. EPA, NHTSA, Safer Affordable Fuel-Efficient Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51310 (Sept. 27, 2019) [hereinafter SAFER rule].

14. *Id.* at 51311.

15. 9 U.S.C. §32919.

16. See SAFER proposal, *supra* note 5, at 43232-35.

17. *Id.* at 43232-38.

I. Background on the Laws That Govern Air Pollution and Fuel Economy

Vehicles powered by internal combustion engines emit pollution and consume fuel. These impacts—multiplied by each mile driven and each vehicle in service—amount to serious local, national, and global externalities. However, the impacts from pollution are distinct from the effects of oil consumption. Air pollution from petroleum combustion is responsible for a range of morbidity and mortality, and is a major contributor to the atmospheric GHGs that are warming the planet. Putting aside the effects of petroleum combustion, the consumption of oil in itself has serious effects—ones that are geopolitical, economic, and environmental (associated with production, refining, and distribution).

In 2017, internal combustion engines in the United States consumed more than 8.9 billion gallons of gasoline and were responsible for more than one billion metric tons of carbon dioxide (CO₂) emissions.¹⁸ As large as these numbers are, they would be even higher had federal and state governments not acted to require better-performing vehicles to be manufactured over the years. This section provides background on the federal and state laws that have curbed air pollution and improved fuel economy.

The working relationship between state and federal automobile emission standards began in the 1960s. The first regulations governing motor vehicle emission standards were established in California pursuant to state law enacted in 1959.¹⁹ In 1967, Gov. Ronald Reagan signed legislation creating the California Air Resources Board (CARB), which would go on to become the most sophisticated air regulatory agency in the world.²⁰

The federal government established its first regulatory standards for motor vehicles in the CAA Amendments of 1965, which contained the Motor Vehicle Air Pollution Control Act (Motor Vehicle Act)²¹—five years before EPA was created. The Motor Vehicle Act did not contain a preemption provision. Instead, the 1965 Amendments embodied a desire for the federal and state governments to work together on reducing air pollution, as demonstrated by statutory language providing for the federal government

18. U.S. Energy Information Administration, *U.S. Total Gasoline Retail Sales by Refiners* (motor gasoline sales totaled 24,498.1 thousand gallons per day in 2017), <https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=p&t=103600001&f=a> (last released Sept. 3, 2019); U.S. ENERGY INFORMATION ADMINISTRATION, U.S. ENERGY-RELATED CARBON DIOXIDE EMISSIONS, 2017 (2018) (motor gasoline is responsible for 1,099 million metric tons of CO₂ emissions in the United States), available at https://www.eia.gov/environment/emissions/carbon/pdf/2017_co2analysis.pdf.

19. 1959 Cal. Stat. ch. 200, §1 (repealed 1967). For a discussion of these early years of motor vehicle regulation, see Timothy J. O'Brien, *Title II Motor Vehicle Provisions*, in CLEAN AIR LAW AND REGULATION 121 (Timothy A. Verlander & Henry A. Waxman eds., BNA Books 1992).

20. Kate Galbraith, *California's Powerful and Influential Air Pollution Watchdog*, L.A. TIMES, July 23, 2015, <https://www.latimes.com/local/california/la-me-explainer-air-20150723-story.html>.

21. CAA Amendments of 1965 §101(8), Pub. L. No. 89-272, 79 Stat. 992 (current version at 42 U.S.C. §7521 (Supp. 1984-1990)).

to offer “advisory only” recommendations to the states about how to address air pollution.²²

Beginning in the 1960s and continuing through today, Congress has been deferential to California’s authority to set automobile emission standards. The Air Quality Act of 1967 preempted states’ authority to set standards for emissions from new motor vehicles and engines, but provided that California could adopt and enforce more stringent standards under two conditions²³: if the state had shown that it required such standards to meet compelling and extraordinary conditions, and the standards were consistent with the federal emission standards.²⁴ California’s special authority to set its own motor vehicle standards was retained when Congress adopted the original 1970 CAA.²⁵

Then, in 1975, the federal government established a separate program to secure fuel economy improvements in the nation’s cars and trucks with enactment of the EPCA.²⁶ Implementation of the EPCA is discussed in greater detail in the next section.

California’s authority to set its own motor vehicle emission standards was then expanded in the 1977 CAA Amendments. In those amendments, Congress provided that EPA should waive federal preemption if California’s emission standards “in the aggregate” are “at least as protective of public health and welfare as applicable Federal standards.”²⁷ This language allowed California standards to be adopted and enforced even if some elements of a California standard appeared to be less stringent than a corresponding federal standard—as long as the California standards were at least as protective in the aggregate. Congress recognized that “the underlying intent” of the Act’s handling of state preemption is “to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.”²⁸

The 1977 Act also amended the CAA to permit other states to adopt and enforce standards “identical to the California standards for which a waiver has been granted,” without obtaining a separate waiver, provided that both California and the other state have given manufacturers a two-year lead time.²⁹

This structure continues to this day. The CAA allows for only two sets of standards to control tailpipe emissions

from motor vehicles. First, EPA can establish standards of national applicability.³⁰ Second, if California adopts tailpipe emission standards, EPA is directed to waive federal preemption so long as California’s standards meet the conditions discussed above.³¹ Other states are authorized to adopt the California standards if they so choose.³² This regulatory structure has promoted regulatory innovation and achieved environmental success more effectively than either devolving regulatory authority to the states or centralizing authority solely to the national level.³³

Generally, EPA has considered and approved California’s waiver requests on a routine basis. Between 1968 and 2017, EPA waived preemption of California’s rules at least 71 times.³⁴ The Agency examines three critical criteria: (1) whether California arbitrarily and capriciously determined that its standards are, in the aggregate, at least as protective of public health and welfare as the applicable federal standards; (2) whether California needs state standards to meet compelling and extraordinary conditions; and (3) whether California’s amendments are consistent with federal tailpipe emission standards promulgated under the CAA.³⁵ EPA has explained that “for EPA to deny the waiver, opponents bear the burden of providing EPA with sufficient information to convince EPA to make a negative determination on any of the criteria.”³⁶

30. *Id.* §7521.

31. *Id.* §7543.

32. *Id.* 42 U.S.C. §7507.

33. See ANN CARLSON, ITERATIVE FEDERALISM AND CLIMATE CHANGE (UCLA School of Law, Public Law & Legal Theory Research Paper Series Research Paper No. 08-09, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1115556.

34. See 33 Fed. Reg. 137 (Jan. 5, 1968); 34 Fed. Reg. 86 (Jan. 3, 1969); 36 Fed. Reg. 84 (Jan. 5, 1971); 36 Fed. Reg. 169 (Jan. 6, 1971); 37 Fed. Reg. 80 (Jan. 5, 1972); 37 Fed. Reg. 143 (Jan. 6, 1972); 38 Fed. Reg. 80 (Jan. 3, 1973); 38 Fed. Reg. 210 (Jan. 3, 1973); 39 Fed. Reg. 52 (Jan. 2, 1974); 39 Fed. Reg. 184 (Jan. 2, 1974); 40 Fed. Reg. 103 (Jan. 2, 1975); 40 Fed. Reg. 139 (Jan. 2, 1975); 41 Fed. Reg. 196 (Jan. 2, 1976); 42 Fed. Reg. 5 (Jan. 3, 1977); 42 Fed. Reg. 120 (Jan. 3, 1977); 43 Fed. Reg. 3 (Jan. 3, 1978); 43 Fed. Reg. 6 (Jan. 3, 1978); 43 Fed. Reg. 8 (Jan. 3, 1978); 43 Fed. Reg. 45 (Jan. 3, 1978); 43 Fed. Reg. 72 (Jan. 3, 1978); 43 Fed. Reg. 115 (Jan. 3, 1978); 43 Fed. Reg. 132 (Jan. 3, 1978); 43 Fed. Reg. 143 (Jan. 3, 1978); 43 Fed. Reg. 161 (Jan. 3, 1978); 44 Fed. Reg. 27 (Jan. 2, 1979); 44 Fed. Reg. 128 (Jan. 2, 1979); 44 Fed. Reg. 206 (Jan. 2, 1979); 45 Fed. Reg. 38 (Jan. 2, 1980); 45 Fed. Reg. 159 (Jan. 2, 1980); 45 Fed. Reg. 228 (Jan. 2, 1980); 46 Fed. Reg. 91 (Jan. 2, 1981); 46 Fed. Reg. 134 (Jan. 2, 1981); 46 Fed. Reg. 135 (Jan. 2, 1981); 47 Fed. Reg. 4 (Jan. 4, 1982); 47 Fed. Reg. 5 (Jan. 4, 1982); 47 Fed. Reg. 33 (Jan. 4, 1982); 49 Fed. Reg. 87 (Jan. 3, 1984); 51 Fed. Reg. 11 (Jan. 2, 1986); 51 Fed. Reg. 169 (Jan. 2, 1986); 52 Fed. Reg. 106 (Jan. 2, 1987); 53 Fed. Reg. 43 (Jan. 4, 1988); 54 Fed. Reg. 27 (Jan. 3, 1989); 55 Fed. Reg. 207 (Jan. 3, 1990); 57 Fed. Reg. 113 (Jan. 2, 1992); 57 Fed. Reg. 165 (Jan. 2, 1992); 58 Fed. Reg. 8 (Jan. 4, 1993); 59 Fed. Reg. 176 (Jan. 3, 1994); 59 Fed. Reg. 183 (Jan. 3, 1994); 61 Fed. Reg. 199 (Jan. 3, 1996); 63 Fed. Reg. 25 (Jan. 2, 1998); 63 Fed. Reg. 72 (Jan. 2, 1998); 64 Fed. Reg. 150 (Jan. 4, 1999); 67 Fed. Reg. 162 (Jan. 2, 2002); 68 Fed. Reg. 77 (Jan. 2, 2003); 69 Fed. Reg. 198 (Jan. 2, 2004); 70 Fed. Reg. 165 (Jan. 3, 2005); 71 Fed. Reg. 2 (Jan. 3, 2006); 71 Fed. Reg. 149 (Jan. 3, 2006); 71 Fed. Reg. 249 (Jan. 4, 2006); 73 Fed. Reg. 174 (Jan. 2, 2008); 74 Fed. Reg. 129 (Jan. 2, 2009); 75 Fed. Reg. 146 (Jan. 4, 2010); 76 Fed. Reg. 114 (Jan. 3, 2011); 76 Fed. Reg. 191 (Jan. 3, 2011); 77 Fed. Reg. 32 (Jan. 3, 2012); 77 Fed. Reg. 237 (Jan. 4, 2012); 78 Fed. Reg. 6 (Jan. 2, 2013); 78 Fed. Reg. 141 (Jan. 2, 2013); 79 Fed. Reg. 152 (Jan. 2, 2014); 81 Fed. Reg. 215 (Jan. 5, 2016); 81 Fed. Reg. 250 (Jan. 5, 2016).

35. 42 U.S.C. §7543.

36. U.S. EPA, California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption; Summary of Decision, 46 Fed. Reg. 36237 (July 14, 1981).

22. *Id.* §103(4).

23. Pub. L. No. 90-148, §208(b), 81 Stat. 485 (1967).

24. *Id.* (directing the Secretary of Health, Education, and Welfare to waive preemption for “any state which has adopted standards . . . for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966”).

25. Congress redesignated the preemption waiver provision established by the Air Quality Act of 1967 as §209(b) of the CAA. Pub. L. No. 91-604, §8 (1970). See *Motor & Equipment Mfrs. Ass’n v. Envtl. Prot. Agency*, 627 F.2d 1095, 1108-11, 9 ELR 20581 (D.C. Cir. 1979); *Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. New York State Dep’t of Envtl. Conservation*, 17 F.3d 521, 525, 24 ELR 20552 (2d Cir. 1994).

26. Energy Policy and Conservation Act (EPCA), Pub. L. No. 94-163, 89 Stat. 871 (1975), available at <https://www.govinfo.gov/content/pkg/STATUTE-89/pdf/STATUTE-89-Pg871.pdf>.

27. 42 U.S.C. §7543.

28. H.R. REP. NO. 95-294, at 301-02 (1977).

29. 42 U.S.C. §7507.

There is an important exception to EPA's history of waiving preemption. When California adopted GHG emission standards, EPA initially denied the request. However, even then, EPA subsequently reversed course within 18 months and approved California's waiver request, as detailed below.

On July 22, 2002, California Gov. Arnold Schwarzenegger signed into law A.B. 1493, which required CARB to set standards for the reduction of emissions of GHGs from motor vehicles.³⁷ In September 2004, CARB amended its existing motor vehicle regulations to adopt such standards for cars and light-duty trucks.³⁸ The standards were to begin with the 2009 model year and phase in gradually over eight years.³⁹ By the 2016 model year, they were designed to cut GHG emissions from new vehicles by almost 30% compared to current vehicles.⁴⁰ Thirteen other states—Arizona, Connecticut, Maine, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington—adopted the California standards.⁴¹ At the time, these 14 states' consumers were estimated to buy more than 40% of the new vehicles sold nationwide each year.⁴²

On December 21, 2005, California requested that EPA waive federal preemption for the California GHG emission standards.⁴³ Expecting that the U.S. Supreme Court might affect the Agency's consideration of the matter,⁴⁴ EPA took no public action on the waiver request before the Supreme Court's April 2007 ruling in *Massachusetts v. Environmental Protection Agency*.⁴⁵ Had the Supreme Court

not decided in that landmark case that GHGs were pollutants under the CAA, EPA's consideration of the waiver request would presumably have been significantly affected. EPA then published a notice on April 30, 2007, announcing a public hearing and a comment period on California's waiver request.⁴⁶ The public comment period closed on June 15, 2007.⁴⁷

Proponents of California's standards mounted a persistent and bipartisan effort to urge the George W. Bush Administration to grant the waiver.⁴⁸ However, on

37. Assemb. B. 1493, ch. 200 (Cal. 2002) (this law is often referred to as the "Pavley law" after its chief proponent, state Sen. Fran Pavley), <https://ww3.arb.ca.gov/cc/ccms/documents/ab1493.pdf>; see also CARB, *Clean Car Standards—Pavley, Assembly Bill 1493*, <https://ww3.arb.ca.gov/cc/ccms/ccms.htm> (last reviewed Jan. 11, 2017).
38. California Environmental Protection Agency Air Resources Board, Final Regulation Order—Amendments to Sections 1900 and 1961, and Adoption of New Section 1961.1, Title 13, California Code of Regulations as Approved by OAL, available at <https://ww3.arb.ca.gov/regact/grnhsas/revfro.pdf>; California Environmental Protection Agency Air Resources Board, California Exhaust Emission Standards and Test Procedures for 2001 and Subsequent Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles as Approved by OAL (Sept. 24, 2004 hearing date), available at <https://ww3.arb.ca.gov/regact/grnhsas/revtp.pdf>.
39. California Environmental Protection Agency Air Resources Board, Request for a Clean Air Act Section 209(b) Waiver of Preemption for California's Adopted and Amended New Motor Vehicle Regulations and Incorporated Test Procedures to Control Greenhouse Gas Emissions: Support Document 6 (Dec. 21, 2005).
40. Press Release, California Environmental Protection Agency Air Resources Board, ARB Approves Greenhouse Gas Rule (Sept. 24, 2004), <http://www.arb.ca.gov/newsrel/nr092404.htm>.
41. Union of Concerned Scientists, *Automakers v. the People*, https://web.archive.org/web/20080515091650/http://www.ucsusa.org/clean_vehicles/avp/ (last revised May 7, 2008).
42. *Id.*
43. Letter from Catherine Witherspoon, Executive Director, CARB, to Stephen L. Johnson, Administrator, U.S. EPA, Re: Regulations to Control Greenhouse Gas Emissions From Motor Vehicles; Request for Waiver of Preemption Under Clean Air Act Section 209(b) (Dec. 21, 2005) (on file with author).
44. Letter from Stephen L. Johnson, Administrator, U.S. EPA, to California Governor Arnold Schwarzenegger (June 21, 2007) (on file with author) (explaining that "[o]ur reason for withholding consideration was that the decision and opinion from the Supreme Court could be directly relevant to issues EPA must address in the context of CARB's waiver request").
45. 549 U.S. 497, 37 ELR 20075 (2007).

46. U.S. EPA, California State Motor Vehicle Pollution Control Standards; Request for Waiver of Federal Preemption; Opportunity for Public Hearing, 72 Fed. Reg. 21260 (Apr. 30, 2007).

47. U.S. EPA, California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12156, 12157 (Mar. 6, 2008).

48. See Letter from California Governor Arnold Schwarzenegger, to President George W. Bush (Apr. 10, 2006) (on file with author) (requesting that the president direct EPA to grant the California waiver); Letter from California Governor Arnold Schwarzenegger, to President George W. Bush (Oct. 24, 2006) (on file with author) (again asking for immediate approval of the California waiver); Press Release, California Office of the Governor, Intent to Sue the Federal Government From Governor Arnold Schwarzenegger (Apr. 25, 2007) (on file with author); Letter from Gina McCarthy, Commissioner, Connecticut Department of Environmental Protection, to Stephen L. Johnson, Administrator, U.S. EPA (Apr. 26, 2007) (on file with author) (requesting EPA expeditiously approve California's request for a waiver); Letter from Senators Diane Feinstein, Olympia Snowe, Arlen Specter, Maria Cantwell, Lincoln Chafee, Robert Menendez, Susan Collins, Barbara Boxer, John McCain, James M. Jeffords, Jack Reed, Frank Lautenberg, Patrick Leahy, Ron Wyden, Christopher J. Dodd, Joseph I. Lieberman, Paul S. Sarbanes, Patty Murray, Edward M. Kennedy, Charles E. Schumer, and Jeff Bingaman, to Stephen L. Johnson, Administrator, U.S. EPA (Mar. 31, 2006) (on file with author) (urging EPA to grant the waiver without delay); Letter from Rhode Island Governor Donald C. Carcieri and Vermont Governor James H. Douglas, to Stephen L. Johnson, Administrator, U.S. EPA (June 1, 2007) (on file with author) (urging EPA to approve the California waiver as quickly as possible); Letter from California Governor Arnold Schwarzenegger, to Stephen L. Johnson, Administrator, U.S. EPA (June 13, 2007) (on file with author) (threatening litigation unless EPA grants the waiver); Letter from Ian A. Bowles, Secretary, Massachusetts Executive Office of Energy and Environmental Affairs, to Stephen L. Johnson, Administrator, U.S. EPA (Apr. 26, 2007) (on file with author) (supporting California's request for a waiver); Letter from Shari T. Wilson, Secretary, Maryland Department of the Environment, to Stephen L. Johnson, Administrator, U.S. EPA (Apr. 26, 2007) (on file with author) (supporting California's request for a waiver); Letter from David P. Littell, Commissioner, Maine Department of Environmental Protection, to Stephen L. Johnson, Administrator, U.S. EPA (Apr. 25, 2007) (on file with author) (supporting California's request for a waiver); Letter from the National Conference of State Legislatures, to Stephen L. Johnson, Administrator, U.S. EPA (Sept. 27, 2007) (on file with author) (urging EPA to expeditiously approve California's request for a waiver); Official Action Policy from the National Conference of State Legislatures Committee on Agriculture, Environment, and Energy (Sept. 27, 2007) (urging EPA to grant California's waiver request); Letter from Oregon Governor Theodore R. Kulongoski, to Stephen L. Johnson, Administrator, U.S. EPA (Apr. 25, 2007) (on file with author) (supporting California's request for a waiver); Letter from Kathleen A. McGinty, Secretary, Pennsylvania Department of Environmental Protection, to Stephen L. Johnson, Administrator, U.S. EPA (Apr. 26, 2007) (on file with author) (supporting California's request for a waiver); Letter from W. Michael Sullivan, Director, Rhode Island Department of Environmental Management, to Stephen L. Johnson, Administrator, U.S. EPA (Apr. 25, 2007) (on file with author) (supporting California's request for a waiver); Press Release, Office of Rep. Peter Welch, Welch Leads Congressional Effort on Auto Standards, Citing Guidance of Vermont Court Case (Sept. 20, 2007) (90 members of Congress urge EPA to grant the waiver), <https://welch.house.gov/media-center/press-releases/welch-leads-congressional-effort-auto-standards-citing-guidance-vermont>; Letter from Governors Greigore, Huntsman, Kulongoski, Napolitano, Richardson, and Schwarzenegger, to Speaker Pelosi, Senate Majority Leader Reid, House Minority Leader

December 19, 2007, EPA Administrator Stephen Johnson announced that he had “found that California does not have a ‘need to meet compelling and extraordinary conditions,’” and thus denied California’s waiver request.⁴⁹ EPA did not release its formal legal justification for the decision until months later.⁵⁰ In the *Federal Register*, Administrator Johnson explained two alternative rationales for his decision:

I do not believe section 209(b)(1)(B) was intended to allow California to promulgate state standards for emissions from new motor vehicles designed to address global climate change problems; nor, in the alternative, do I believe that the effects of climate change in California are compelling and extraordinary compared to the effects in the rest of the country.⁵¹

In denying California’s request for a waiver, the EPA Administrator acknowledged that the Agency was not using its traditional analytic approach. EPA stated that “California does not need its motor vehicle [GHG] standards to meet compelling and extraordinary conditions,” as §209(b)(1)(B) requires.⁵² The Agency recognized that it had previously interpreted this subparagraph to ask only whether California continued to need its own motor vehicle program as a whole to address compelling and extraordinary conditions.⁵³ But it concluded in the notice of the denial decision that §209(b)(1)(B) was subject to multiple interpretations, and when applied to emission standards designed to address global as opposed to local or regional air pollution problems, it was best understood to require that EPA assess California’s need for the newly proposed standards by themselves.⁵⁴ California could not satisfy this requirement, EPA reasoned, because California-specific conditions are not “the fundamental causal factors for the air pollution problem of elevated concentrations of greenhouse gases,” and, alternatively, because the effects of global climate change in California “are not sufficiently different from conditions in the nation as a whole to justify separate state standards.”⁵⁵

The decision was met with strong concerns. California quickly filed suit against EPA for the denial.⁵⁶ Rep. Henry A. Waxman (D-Cal.), chairman of the U.S. House of Representatives Oversight Committee, launched an investiga-

tion of EPA’s decision.⁵⁷ After reviewing 27,000 pages of documents and deposing or interviewing eight EPA officials, the Oversight Committee found that “(1) the career staff at EPA unanimously supported granting California’s petition; (2) Administrator Johnson also supported granting California’s petition at least in part; and (3) Administrator Johnson reversed his position after communications with officials in the White House.”⁵⁸

According to the committee’s investigation, EPA’s career staff believed denying the waiver placed EPA in a legally tenuous position.⁵⁹ A lead lawyer for EPA’s Office of General Counsel had explained: “After review of the docket and precedent, we don’t believe there are any good arguments against granting the waiver. All of the arguments . . . are likely to lose in court if we are sued.”⁶⁰ The memo also noted a briefing from EPA’s Office of Transportation and Air Quality and Office of General Counsel expressing similar concerns: “The clearest and most defensible option is to grant the waiver. The other options have high to very high vulnerability to legal challenge.”⁶¹

The Oversight Committee sought documents to understand the extent of White House involvement and whether the involvement affected the Agency’s decision to proceed with a less defensible position.⁶² However, Pres. George W. Bush ultimately claimed executive privilege over communications between EPA and the White House regarding the denial of the waiver request.⁶³ Thus, EPA’s denial stood, awaiting the outcome of the 2008 presidential election. Just one day into the Barack Obama Administration, CARB asked EPA to reconsider the 2008 decision to deny the waiver request.⁶⁴ EPA agreed to reconsider and, on July 8, 2009, after a public hearing and comment period, issued a decision granting the waiver.⁶⁵

57. Letter from Rep. Henry A. Waxman, Chairman, House Committee on Oversight and Government Reform, to Stephen L. Johnson, Administrator, U.S. EPA (Dec. 20, 2007), <https://wayback.archive-it.org/4949/20141031200605/http://oversight-archive.waxman.house.gov/documents/20071220111155.pdf>.

58. Memorandum to Members of the Committee on Oversight and Government Reform from Committee on Oversight and Government Reform, Majority Staff, Re: EPA’s Denial of the California Waiver (May 19, 2008), <http://wayback.archive-it.org/4949/20141223185948/http://oversight-archive.waxman.house.gov/documents/20080519131253.pdf>.

59. *Id.*

60. *Id.* at 1.

61. *Id.* at 1-2.

62. For an archive of the documents collected by the Oversight Committee, see *White House Involved in California Waiver Denial* (May 19, 2008), <https://wayback.archive-it.org/4949/20141031181435/http://oversight-archive.waxman.house.gov/story.asp?id=1956>.

63. Letter from Christopher Bliley, Associate Administrator, U.S. EPA, to Rep. Henry A. Waxman, Chairman, Committee on Oversight and Government Reform (June 20, 2008), <https://wayback.archive-it.org/4949/20141031192556/http://oversight-archive.waxman.house.gov/documents/20080620114653.pdf>; Opening Statement of Rep. Henry A. Waxman, Chairman, Committee on Oversight and Government Reform Business Meeting Regarding the Contempt Resolution (June 20, 2008), <https://wayback.archive-it.org/4949/20141031192555/http://oversight-archive.waxman.house.gov/documents/20080620121418.pdf>.

64. Letter from Mary D. Nichols, Chairman, CARB, to Lisa P. Jackson, Administrator-Designate, U.S. EPA (Jan. 21, 2009), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2006-0173-7044>.

65. U.S. EPA, Decision Granting a Waiver of Clean Air Act Preemption, 74 Fed. Reg. 32744, 32783 (July 8, 2009).

Boehner, and Senate Minority Leader McConnell (June 14, 2007) (on file with author) (urging Congress to demand that the waiver be granted).

49. Letter from Stephen L. Johnson, Administrator, U.S. EPA, to California Governor Arnold Schwarzenegger (Dec. 19, 2007).

50. U.S. EPA, California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12156 (Mar. 6, 2008).

51. *Id.* at 12157.

52. U.S. EPA, Decision Denying a Waiver of Clean Air Act Preemption, 73 Fed. Reg. 12156, 12159 (Mar. 6, 2008).

53. *Id.* at 12159-61.

54. *Id.*

55. *Id.* at 12162, 12168.

56. Felicity Barringer, *California Sues E.P.A. Over Denial of Waiver*, N.Y. TIMES, Jan. 3, 2008, <https://www.nytimes.com/2008/01/03/us/03suit.html>.

In doing so, EPA rejected its 2008 interpretation of the CAA's preemption waiver section, returning to its earlier view and finding that California's request satisfied the provision because California still needed its own emissions program "as a whole."⁶⁶ In the alternative, EPA concluded that a waiver was warranted even if it were to examine California's GHG standards separately under the tests applied in its 2008 decision.⁶⁷ The Agency found that those standards were intended, at least in part, to address a local or regional problem because of the "logical link between the local air pollution problem of ozone and . . . [GHGs]."⁶⁸ It also determined that waiver opponents had not met their burden of demonstrating that "the impacts of global climate change in California are either not significant enough or are not different enough from the rest of the country to be considered compelling and extraordinary conditions."⁶⁹

In September 2009, the Chamber of Commerce and the National Association of Auto Dealers challenged EPA's approval of California's waiver petition.⁷⁰ The associations argued that the CAA requires EPA to assess California's need for the particular standards it presents for a waiver, not for its state-specific emissions program as a whole.⁷¹ This case was subsequently dismissed for lack of jurisdiction, without discussion of the merits.⁷²

The federal agencies and the state of California entered a period of peaceful cooperation during the Obama Administration. In addition to agreement between EPA and California regarding emission standards, NHTSA was also brought into the conversation because of its implementation of the national fuel economy program. On April 1, 2010, EPA and NHTSA jointly issued a national program of GHG emissions and fuel economy standards for model year vehicles 2012 to 2016.⁷³ The program was the result of an agreement between the federal government, California, and the major automobile manufacturers.⁷⁴

The new rules made it possible for automobile manufacturers to sell a "single light-duty national fleet" that satisfied the standards of EPA, NHTSA, California, and the states that had adopted California's standards.⁷⁵ Pursuant to that agreement, California amended its regulations to deem compliance with the national standards to be compliance with California's standards for model year vehicles 2012 to 2016.⁷⁶ Major automobile manufacturers and their

trade associations, in turn, made commitments not to contest the national standards, not to contest the grant of a waiver of preemption to California for its GHG emission regulations, and to request a stay and dismissal of all then-pending litigation challenging those regulations.⁷⁷

The cooperation between federal agencies and California repeated itself two years later. In July 2011, President Obama announced the extension of federal standards to include model years 2017 to 2025.⁷⁸ The standards would require cars and light-duty trucks to meet a standard equivalent to 54.5 miles per gallon or 163 grams of CO₂ per mile by model year 2025. The standards were finalized in August 2012.⁷⁹

In announcing the new standards, the agencies planned to conduct a mid-term evaluation of the standards "in close coordination with California."⁸⁰ This evaluation would allow for the standards to be made more stringent, relaxed, or retained depending on how technology development and adoption proceeded. To properly inform the mid-term evaluation, EPA developed a draft technical assessment report, accepted public comment on the report, proposed to find that the standards remained appropriate, and accepted public comment on that proposal.⁸¹ On January 12, 2017, EPA Administrator Gina McCarthy determined that the standards remained "feasible, practical and appropriate" and did not need to be revised by the agencies.⁸² To achieve the standards, the fleet would need to improve its fuel economy by about one mile per gallon per year through 2025.⁸³

These rules have been successful at reducing GHG emissions from vehicles. In 2017, the most recent year EPA has analyzed GHG emissions, the average estimated CO₂ emission rate for all new vehicles was at the lowest level ever measured—approximately one-half the emissions rate

66. *Id.* at 32762-63.

67. *Id.* at 32763.

68. *Id.*

69. *Id.* at 32765.

70. See Opinion, Chamber of Commerce of the United States v. Envtl. Prot. Agency, No. 09-1237 (D.C. Cir. Apr. 29, 2011) (dismissing the suit in April 2011 for lack of jurisdiction, without discussion of the merits), https://oag.ca.gov/sites/all/files/agweb/pdfs/environment/chambers_petition.pdf.

71. *Id.*

72. *Id.*

73. U.S. EPA, NHTSA, Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards (Final Rule), 75 Fed. Reg. 25324 (May 7, 2010).

74. Jody Freeman, *The Obama Administration's National Auto Policy: Lessons From the "Car Deal,"* 35 HARV. ENVTL. L. REV. 343 (2011).

75. 75 Fed. Reg. at 25324-28.

76. See CAL. CODE REGS. tit. 13, §1961.1(a)(1)(A)(ii).

77. See 75 Fed. Reg. at 25328.

78. Press Release, The White House, President Obama Announces Historic 54.5 mpg Fuel Efficiency Standard (July 29, 2011), <https://obama.whitehouse.archives.gov/the-press-office/2011/07/29/president-obama-announces-historic-545-mpg-fuel-efficiency-standard>.

79. U.S. EPA, NHTSA, 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards (Final Rule), 77 Fed. Reg. 62624 (Oct. 15, 2012), available at <https://www.govinfo.gov/content/pkg/FR-2012-10-15/pdf/2012-21972.pdf>.

80. Press Release, The White House, *supra* note 75.

81. For a list of the publications and technical projects that informed the mid-term evaluation, the documents associated with the technical assessment report, and the proposed and final determinations, see U.S. EPA, *Midterm Evaluation of Light-Duty Vehicle Greenhouse Gas (GHG) Emissions Standards for Model Years 2022-2025*, https://19january2017snapshot.epa.gov/regulations-emissions-vehicles-and-engines/midterm-evaluation-light-duty-vehicle-greenhouse-gas-ghg_.html (last updated Jan. 13, 2017).

82. U.S. EPA, Adjudicatory Final Determination (Jan. 12, 2017), <https://19january2017snapshot.epa.gov/sites/production/files/2017-01/documents/mte-stakeholder-letter-2017-01-12.pdf>.

83. U.S. EPA, FINAL DETERMINATION ON THE APPROPRIATENESS OF THE MODEL YEAR 2022-2025 LIGHT-DUTY VEHICLE GREENHOUSE GAS EMISSIONS STANDARDS UNDER THE MIDTERM EVALUATION 5 (2017) (EPA-420-R-17-001), available at <https://nepis.epa.gov/Exec/zyPDF.cgi?Dockkey=P100QQ91.pdf>.

of the 1975 vehicle fleet.⁸⁴ Additionally, fuel economy was at a record high.⁸⁵

II. The Federal Role in Regulating Fuel Economy

Soon after it enacted the CAA to address pollution, Congress enacted the EPCA to address the energy crises of the 1970s. The EPCA included a host of new policies and programs to reduce the nation's dependence on foreign oil and the vulnerability that follows from that dependence, including a new program in the U.S. Department of Transportation (DOT) to establish fuel economy standards for cars and trucks. Shortly after enactment of the EPCA, the Secretary of Transportation delegated implementation of the program to the administrator of NHTSA.⁸⁶ Thus, NHTSA was tasked with setting fuel economy standards for automobiles, responding to petitions from manufacturers to adjust standards, issuing exemptions, and generally ensuring the program was carried out.

For more than 25 years after Congress enacted the EPCA, NHTSA recognized that the EPCA (like the CAA) did not preempt California automobile emission standards even when those standards had significant effects on fuel economy. Both NHTSA's rulemakings and its decisions regarding exemptions reflect this understanding of Congress' intent.

In 2002, with California's adoption of GHG emission standards, NHTSA's approach to interpreting the EPCA changed. NHTSA began to develop policies suggesting that the EPCA could, in fact, preempt California's emission standards. However, when automobile trade associations attempted to rely on this new interpretation, federal courts rejected the argument that the EPCA preempted California's emission standards.⁸⁷ NHTSA faced the same rejection from Congress.⁸⁸

Nevertheless, in 2018 and 2019, the Trump Administration returned to the language of the EPCA to develop the most expansive interpretation of preemption yet contemplated. The Administration finalized a rule that not only attempts to preempt California's GHG emission standards, but also the state's program for ZEVs and potentially numerous other state and local laws.⁸⁹

This section chronicles this history of the EPCA—which includes NHTSA's early and long-held understanding that the EPCA permits California to pursue more stringent emission standards even when those standards have significant impacts on fuel efficiency, the more recent attempts to claim that it does not, and the federal courts' and Con-

gress' reactions to those differing interpretations. However, understanding that history first requires an explanation of three key parts of the EPCA's Mandatory Fuel Economy Performance Program.

A. Setting Average Fuel Economy Standards: Three Key Elements

The EPCA requires that manufacturers comply with the "average fuel economy standard" for any given model year.⁹⁰ Examination of three elements related to the average fuel economy standard is necessary to understand NHTSA's evolving position regarding whether the EPCA preempts California's emission standards. Those provisions are (1) NHTSA's process for determining the "maximum feasible average fuel economy" that is the basis for establishing the average fuel economy standard; (2) the availability of exemptions from or modifications to the maximum feasible average fuel economy standard; and (3) the preemption provision, which prohibits state and local governments from adopting any laws or regulations relating to EPCA's fuel economy standard.⁹¹

I. Maximum Feasible Average Fuel Economy

The EPCA establishes average fuel economy standards for vehicles that are manufactured primarily for use on public roads.⁹² Congress established a bifurcated process, setting key benchmarks itself and delegating select authorities to NHTSA. For passenger automobiles, which represented the vast majority of automobiles in 1975, Congress itself established fuel economy standards for model years 1978, 1979, 1980, and 1985 by statute.⁹³ NHTSA was authorized to modify these standards, set interim standards for model years 1981 to 1984, and revise the 1985 standard for subsequent model years.⁹⁴ For non-passenger vehicles, Congress authorized NHTSA to establish average fuel economy standards by regulation.⁹⁵

Although the program's details differ between passenger automobiles and non-passenger automobiles, both would ultimately be guided by NHTSA's determination of what is the maximum feasible average fuel economy for the fleet of passenger automobiles or non-passenger automobiles as a whole. As discussed below, NHTSA also applies this analysis to individual manufacturers for purposes of determining exemptions from or modifications to the average fuel economy standard.

84. U.S. EPA, THE 2018 EPA AUTOMOTIVE TRENDS REPORT: GREENHOUSE GAS EMISSIONS, FUEL ECONOMY, AND TECHNOLOGY SINCE 1975, at ES3 (2019) (EPA-420-S-19-001), available at <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100W3WO.pdf>.

85. *Id.*

86. 41 Fed. Reg. 25015 (June 22, 1976).

87. See Section II.D.2.

88. See Section II.D.3.

89. See SAFER rule, *supra* note 13.

90. EPCA §502(a)(1) (now 49 U.S.C. §32902), 89 Stat. at 902.

91. EPCA §503 (now 49 U.S.C. §32904) (calculating "maximum feasible average fuel economy"), 89 Stat. at 902; EPCA §502(a)(4)-(5), (c) & (d) (now 49 U.S.C. §32902(d)) (exemptions from "maximum feasible fuel economy"), 89 Stat. at 903-04; EPCA §509 (now 49 U.S.C. §32919) (preemption), 89 Stat. at 914.

92. EPCA §501(1) (now 49 U.S.C. §32901(3)), 89 Stat. at 901.

93. EPCA §502(a)(1), 89 Stat. at 902.

94. EPCA §502(a)(3)-(4), 89 Stat. at 903.

95. EPCA §502(a)(5)(b), 89 Stat. at 903.

Congress set a 10-year statutory schedule for fuel economy improvements for passenger automobiles.⁹⁶ “Passenger automobiles” were statutorily defined as vehicles intended primarily to transport not more than 10 individuals.⁹⁷ The EPCA required auto manufacturers to increase the efficiency of new passenger automobiles from what is now estimated to have been an average of 13.5 miles per gallon⁹⁸ to an average of 20 miles per gallon by 1980 and 27.5 miles per gallon by 1985.⁹⁹ After the initial statutorily required increase in fuel economy, NHTSA was authorized to modify the statutory standard based upon a determination of the maximum feasible average fuel economy.¹⁰⁰

Congress did not statutorily prescribe an increase in fuel economy for non-passenger vehicles. Instead, from the outset, NHTSA was required to set an average fuel economy standard based upon a determination about the maximum feasible average fuel economy appropriate for this category of vehicles.¹⁰¹

This approach allowed manufacturers to average the performance of all models of passenger vehicles manufactured to determine compliance with the passenger vehicle standard, and to separately average the performance of their non-passenger vehicles to determine compliance with that standard.¹⁰² Thus, whether a manufacturer produced only passenger automobiles, only non-passenger vehicles, or a combination of the two, the manufacturer would ultimately be governed by NHTSA’s decisions regarding maximum feasible average fuel economy. Importantly, a standard applies to all manufacturers, meaning that a standard may be easier or more difficult for any single manufacturer to comply with depending on the specific vehicles that manufacturer brings to market.

When NHTSA determines the maximum feasible average fuel economy for both passenger and non-passenger automobiles, NHTSA is required by the EPCA to consider four key factors: (1) technological feasibility; (2) economic practicability; (3) the effect of other federal motor vehicle standards on fuel economy; and (4) the need for the nation to conserve energy.¹⁰³

In the first standard-setting rulemaking in 1977, NHTSA explained how it would factor these considerations into the process.¹⁰⁴ To determine what is technologically feasible, NHTSA looked at automobiles currently in production and projected the effect of applying technology that was both currently available and expected to be available in the future. NHTSA created what amounted to a virtual fleet for each automaker, assuming certain weight

reductions, small decreases in acceleration performance, improved aerodynamics, and introduction of improved engine and drivetrain technology. During this step in the process, NHTSA applied a 1% fuel economy penalty due to the additional weight associated with equipment or design features necessary to comply with safety standards.¹⁰⁵

NHTSA then determined what was economically practicable. NHTSA made clear that this was not a cost-benefit test. Instead, the agency concluded that economic practicability “should be interpreted as requiring the standards to be within the financial capability of the industry, but not so stringent as to threaten substantial economic hardship for the industry.”¹⁰⁶

The third factor, “effect of other Federal motor vehicle standards on fuel economy,” is the one that most obviously provides for consideration of emission standards on fuel economy. In 1977, NHTSA explained that any “unavoidable consequence” of an emission standard would need to be accounted for in determining the fuel economy standard:

The third consideration in determining “maximum feasible average fuel economy” levels is “the effect of other Federal motor vehicle standards on fuel economy.” This term is interpreted to call for making a straight-forward adjustment to the fuel economy improvement projections to account for the impacts of other Federal standards, principally those in the areas of emission control, occupant safety, vehicle damageability, and vehicle noise. However, only the unavoidable consequences of compliance with these standards should be accounted for. The automobile manufacturers must be expected to adopt those feasible methods of achieving compliance with other Federal standards which minimize any adverse fuel economy effects of those standards.¹⁰⁷

This third factor intertwines fuel economy standards with emission standards and ultimately makes fuel economy standards dependent upon and subordinate to emission standards. Any “unavoidable consequence” of compliance with an emission standard should be accounted for in the setting of a fuel economy standard.

In short, EPA sets emission standards based upon the Agency’s mandate in the CAA. NHTSA sets fuel economy standards based upon its mandate in the EPCA. The EPCA requires NHTSA to adjust those fuel economy standards based upon the effects of EPA’s emission standards. Although an improvement in fuel economy could be technically feasible and economically practicable according to NHTSA’s analysis, a less ambitious improvement may have to be adopted if necessary due to the effects of required emission controls. As one court found, “This asymmetrical . . . duty to consider other governmental regulations indicates that Congress intended that . . . NHTSA, is to have the burden to conform its [fuel economy] program under

96. EPCA §502(a)(1), 89 Stat. at 902.

97. EPCA §501(2), 89 Stat. at 901.

98. U.S. EPA, *Explore the Automotive Trends Data*, <https://www.epa.gov/automotive-trends/explore-automotive-trends-data> (last updated Mar. 6, 2019).

99. EPCA §502(a)(1), 89 Stat. at 902.

100. EPCA §502(a)(4), 89 Stat. at 903.

101. EPCA §502(b), 89 Stat. at 903.

102. There is an additional complication that automakers determine compliance separately for its domestically manufactured vehicles and its imported vehicles. This Article does not detail this aspect of compliance.

103. EPCA §502(c) (now 49 U.S.C. §32902(f)), 89 Stat. at 905.

104. 42 Fed. Reg. 33534, 33535-37.

105. *Id.* at 33535-37.

106. *Id.* at 33537.

107. *Id.*

EPCA to EPA's determination of what level of regulation is necessary to secure public health and welfare."¹⁰⁸

Conversely, a required emission standard could also result in fuel economy performance that exceeds the standards that would be called for pursuant to the EPCA. Because CAA emission standards are not subject to the EPCA's technological feasibility and economical practicability filters, the CAA could ask more of auto manufacturers than the EPCA might.¹⁰⁹

In 1994, Congress revised the language of the third factor when it enacted a codification of the EPCA as part of Congress' ongoing effort to restate existing law as positive law titles of the U.S. Code.¹¹⁰ In undertaking this process, Congress is careful to ensure that the restatement conforms to the policy, intent, and purpose of Congress in the original enactments.¹¹¹ The restatement sought to improve the organizational structure of the law, eliminate obsolete provisions, clarify ambiguous provisions, resolve inconsistent provisions, and correct technical errors.¹¹²

When Congress restated the phrase "the effect of other Federal motor vehicle standards on fuel economy," it changed the statutory language to "the effect of other motor vehicle standards of the Government on fuel economy."¹¹³

It is clear that "other motor vehicle standards of the Government" includes emission standards promulgated pursuant to the CAA. However, different actors have reached different conclusions on whether the phrase also includes state emission standards for which preemption is waived under the CAA. Section II.D. explores how NHTSA, Congress, and the courts have answered that question.

2. Low-Volume Manufacturer Exemptions and Manufacturer Petitions for Modification

The EPCA provides two mechanisms for manufacturers to seek either modification of or exemption from the fuel economy standards that applied to them. One of the mechanisms authorizes low-volume manufacturers to seek exemptions from average fuel economy standards.¹¹⁴ If granted by NHTSA, the average fuel economy standard would not apply to these manufacturers, and NHTSA would instead establish a standard that applies

solely to the individual low-volume manufacturer petitioning for exemption.¹¹⁵

The second mechanism is now defunct. It allowed any manufacturer to petition for a modification of an average fuel economy standard, but only for model years 1978, 1979, and 1980.¹¹⁶ These petition provisions are important for two reasons. First, as explained in Section II.B.3., NHTSA's consideration of the low-volume manufacturer petitions illuminates its understanding of the relationship between California emission standards and the EPCA. Second, the provision that allowed manufacturers to petition for a modification of a standard for model years 1978 through 1980 provides the only definition of "other Federal motor vehicle standards."¹¹⁷ These two mechanisms are discussed below.

The exemption process is available only to low-volume manufacturers—those manufacturers that make fewer than 10,000 vehicles per year. The EPCA authorizes NHTSA, upon application from a manufacturer, to exempt that manufacturer from an average fuel economy standard for a given model year that would otherwise apply.¹¹⁸ NHTSA may issue an exemption when the otherwise applicable average fuel economy standard is more stringent than the maximum feasible average fuel economy level that the manufacturer can achieve.¹¹⁹

However, in granting such an exemption, NHTSA is required to establish an *alternative* average fuel economy standard set at a level that NHTSA determines is the maximum feasible average fuel economy level for the *specific* manufacturer to which the exemption applies.¹²⁰ For example, the manufacturer of exotic performance vehicles might not be able to comply with the average fuel economy standard because that standard is based in part on sales of family cars and commuter vehicles. In issuing an exemption to such a manufacturer, NHTSA would set an alternative standard that the manufacturer could comply with based solely upon the vehicles that the manufacturer produces.

The EPCA also contained a provision to allow any manufacturer to request that NHTSA relax passenger automobile fuel economy standards for that specific manufacturer for the model years of 1978, 1979, and 1980.¹²¹ This provision expressly provided for fuel economy compliance to be relaxed if necessary due to the effect of nonfuel economy standards.¹²² The nonfuel economy standards are federal or state emission standards, safety standards, noise standards, and damageability standards.¹²³ Congress had set statutory average fuel economy standards for those years, and this provision presumably was included to provide the

108. *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1168, 37 ELR 20309 (E.D. Cal. 2007).

109. The CAA has its own approach to assure that costs are taken into account when setting standards. In establishing mobile source emission standards under §202(a) of the CAA, the Administrator must determine the availability of emission-reduction technology giving "appropriate consideration to cost, energy, and safety factors associated with the application of such technology." 42 U.S.C. §7521(a)(3).

110. H.R. 1758, 103d Cong. (1994) (effective July 5, 1994).

111. Office of the Law Revision Counsel, *Positive Law Codification*, <http://uscode.house.gov/codification/legislation.shtml> (last visited Sept. 9, 2019).

112. *Id.*

113. 49 U.S.C. §32902(f). The change was made as a standard change without descriptive comment in the House Committee report. *See* H.R. REP. NO. 103-180, at 4 (accompanying H.R. 1758, 103d Cong. (1994)).

114. EPCA §502(c), 89 Stat. at 902.

115. *Id.*

116. EPCA §502(d), 89 Stat. at 904.

117. EPCA §502(d)(3)(D), 89 Stat. at 905.

118. EPCA §502(c), 89 Stat. at 903-04.

119. *Id.*

120. *Id.*

121. EPCA §502(d), 89 Stat. at 904-05.

122. *Id.*

123. EPCA §502(d)(3)(D), 89 Stat. at 905.

implementing agency with some flexibility in the event of unforeseen circumstances.

This provision contained a reference to emission standards that has remained a matter of disputed interpretation. As discussed in Section II.A.1., the effect of other federal motor vehicle standards on fuel economy is a critical consideration in determining the maximum feasible fuel economy for a given type of vehicle in a given model year. However, Congress did not define that important phrase in the general definition section of the fuel economy chapter of the code.¹²⁴ Instead, the only definition of other federal motor vehicle standards appeared in the modification provision that applied solely to model years 1978, 1979, and 1980.¹²⁵ This definition stated that “for purposes of [that] subsection,” “Federal standards” included federal automobile emission standards under the CAA, as well as California automobile emission standards for which federal preemption had been waived.¹²⁶

The 1994 positive law restatement eliminated this definition when it eliminated the no longer applicable modification provision.¹²⁷

3. The Putative Preemption Clause

The final provision critical to evaluating the relationship between the EPCA and California’s emission standards is the EPCA’s preemption clause. That provision prohibits state and local governments from adopting and enforcing laws and regulations relating to the EPCA’s fuel economy standards.¹²⁸ This 50-word provision in the 1975 law states:

Sec. 509. (a) Whenever an average fuel economy standard established under this part is in effect, no State or political subdivision of a State shall have authority to adopt or enforce any law or regulation relating to fuel economy standards or average fuel economy standards applicable to automobiles covered by such Federal standard.¹²⁹

The phrase “relating to” is the basis for NHTSA’s position that the EPCA preempts California emission standards. The proper interpretation of that phrase is now of central dispute between the Trump Administration and California and other states that have adopted GHG emission standards.

With those three elements in mind, let us turn to NHTSA’s interpretation of the relationship between the EPCA and California emission standards over time. The history

of NHTSA’s implementation of the fuel economy program can be thought of as taking place in four distinct periods, with a fifth period potentially pending. During the first 20 years of implementation, NHTSA secured and then maintained efficiency improvements in cars and trucks consistent with the goals of the EPCA. Then, when the prospect was raised of increasing ambition under the law, Congress stepped in and prohibited NHTSA from using any funds for fuel economy rulemakings from 1995 to 2001.¹³⁰ Congress lifted that prohibition in 2002. From that time until 2008, NHTSA slightly increased fuel economy standards for light trucks, but also tried and failed to block California from regulating GHG emissions.¹³¹

Finally, from 2009 until nearly the present, NHTSA’s rules have been harmonious with both EPA and the state of California.¹³² In 2019, the Trump Administration finalized a rule determining that California is preempted from regulating GHG emissions as described in this Article.¹³³ Whether implementation of the EPCA is truly entering a fifth distinct period with this proposal remains to be seen.

B. The First 20 Years: The EPCA Does Not Preempt California Emission Standards That Affect Fuel Economy

The potential and actual effect of California emission standards on fuel economy was an issue that NHTSA recognized from the earliest days of EPCA implementation. For instance, compliance with the 1975 California emission standards was calculated to impose a 5% fuel economy penalty as compared to compliance with the less stringent federal standard.¹³⁴ However, NHTSA implemented the EPCA for more than 25 years without raising a possibility that the EPCA preempted state emission standards. Even where California emission standards had significant impacts on fuel efficiency, NHTSA understood that the EPCA did not preempt these state standards. A review of NHTSA’s regulatory record in establishing non-passenger automobile average fuel economy standards and in exempting low-volume manufacturers of passenger automobiles during this period demonstrates the agency’s understanding.

I. Non-Passenger Automobiles

When NHTSA determined the maximum feasible fuel economy for non-passenger vehicles in 1977, the automakers commented on, and NHTSA responded to, the issue of fuel economy effects of California emission standards. NHTSA had the opportunity to assert that the EPCA preempted California’s emission standards but did not. There

124. See 49 U.S.C. §32901, Definitions.

125. EPCA §502(d)(3)(D), 89 Stat. at 905.

126. *Id.* (stating that “Federal standards” include “[e]missions standards under section 202 of the Clean Air Act, and emissions standards applicable by reason of section 209(b) of such Act”).

127. See Pub. L. No. 103-272, 108 Stat. 745 (1994), <https://uscode.house.gov/statviewer.htm?volume=108&page=745>.

128. EPCA §509(a), 89 Stat. at 914.

129. *Id.* Section 509 also contains subsection (b), which preempts state and local requirements regarding disclosure of fuel economy if such requirements are not identical to federal requirements. Section 509(c) states that the section should not be construed to affect state and local requirements with respect to the fuel economy of automobiles procured for government use.

130. See Section II.C.

131. See Section II.D.

132. See Section II.E.

133. See SAFER rule, *supra* note 13.

134. NATIONAL ACADEMY OF SCIENCES, A REPORT BY THE COMMITTEE ON MOTOR VEHICLE EMISSIONS 1 (1975).

is no evidence that NHTSA even considered preemption a possibility.

Automakers Ford and Chrysler argued that there was a fuel economy penalty associated with meeting California's emission standards that should be reflected in NHTSA's fuel economy standards.¹³⁵ NHTSA responded:

The NHTSA recognizes that emissions requirements for vehicles sold in California, and the different mix of vehicles sold in California may have the effect of lowering the 50-state average fuel economy of a manufacturer of non-passenger automobiles. However, neither Ford nor Chrysler made an adequate case for lowering the proposed standard because of the effect of the California vehicles.¹³⁶

NHTSA was unconvinced that compliance with the California emission standards would meaningfully affect the fuel economy improvements achievable nationally, in part because the California fleet was a small portion of the nation's total fleet.¹³⁷

Similarly, when NHTSA was developing fuel economy standards for light trucks manufactured in model years 1980 and 1981, Ford again argued that NHTSA needed to relax the proposed fuel economy standard for model year 1981 based upon the effects of California's emission standards.¹³⁸ NHTSA documented the concern in its final rule: "Ford also argued that the agency has not adequately accounted for the effect of California emission standards, which are more stringent than Federal standards."¹³⁹ Once again, NHTSA was unconvinced that the standards needed to be adjusted due to the agency's projections that advanced emission control systems would be used in sufficient numbers to eliminate the effect of the California standards.¹⁴⁰

These rulemakings indicate two important aspects about NHTSA's handling of non-passenger automobiles for the early model years. First, NHTSA considered the effects of California emission standards in the context of determining maximum feasible fuel economy. Second, the rules indicate that had NHTSA been convinced that compliance with the California standards would have meaningfully affected the total fleet's fuel economy, the resulting course of action was to adjust the fuel economy standards—not to deem California's standards preempted.

2. Passenger Automobiles and Manufacturer Petitions for Modification

For passenger vehicles in these early model years, NHTSA could not have considered California standards through

determinations of what was the maximum feasible fuel economy because Congress had set the average fuel economy standards by statute, and therefore NHTSA was not charged with determining maximum feasible fuel economy for passenger vehicles in these years.

However, Congress wanted to provide authority for NHTSA to modify these statutory standards if they proved infeasible. Therefore, EPCA §502(d) directed NHTSA to issue a rule to provide for any manufacturer to apply to DOT to effectively relax passenger automobile fuel economy standards for that specific manufacturer if necessary due to the effect of nonfuel economy standards.¹⁴¹

In establishing rules for the implementation of the manufacturer petitions for modification under §502(d), NHTSA explained that that petition process was the appropriate authority for addressing the fuel economy impacts of California emission standards.¹⁴² The agency did not in that rulemaking raise any consideration that perhaps California was preempted: "The more stringent California emission standards had a measurable impact upon average 50-State vehicle fuel economy in 1975. Congress recognized that fact in adopting section 502(d), and the final regulations must also take that fact into account."¹⁴³ It does not appear that any manufacturer applied for a modification of average fuel economy standards for model years 1978 through 1980.

For model years 1981 through 1984, Congress directed NHTSA to establish average fuel economy standards for passenger automobiles at a level that was the maximum feasible fuel economy level and that would "make steady progress" toward meeting the 1985 standard of 27.5 miles per gallon.¹⁴⁴

NHTSA's rulemaking for model years 1981 through 1984 passenger automobiles occurred before emission standards for those years had been established. Accordingly, the proposed and final rules reflect the resulting uncertainty. NHTSA issued a notice of proposed rulemaking for fuel economy standards for passenger automobile model years 1981 to 1984 in February 1977.¹⁴⁵ The agency noted the "high degree of uncertainty, since the levels at which these [emission] standards will be set during the 1981-84 period have not been established and still may not have been established by July 1."¹⁴⁶ Accordingly, NHTSA provided that it would "amend the standards after promulgation if subsequent developments regarding the assumed levels and impacts warrant."¹⁴⁷

135. NHTSA, Part 533—Average Fuel Economy Standards for Nonpassenger Automobiles, Final Rule, 42 Fed. Reg. 13807, 13814 (Mar. 14, 1977).

136. *Id.*

137. *Id.*

138. NHTSA, Part 523—Vehicle Classification, Part 533—Light Truck Fuel Economy Standards, Standards for Model Years 1980 and 1981, 43 Fed. Reg. 11995, 12010 (Mar. 23, 1978).

139. *Id.*

140. *Id.*

141. EPCA §502(d), 89 Stat. at 904-05.

142. NHTSA, Part 527—Reduction of Passenger Automobile Average Fuel Economy Standards, Final Rule, 42 Fed. Reg. 58938, 58942 (Nov. 14, 1977).

143. *Id.*

144. EPCA §502(a)(3), 89 Stat. at 903.

145. NHTSA, Notice of Proposed Rulemaking and Public Hearing; 1981-1984 Passenger Automobile Average Fuel Economy Standards, 42 Fed. Reg. 10321 (Feb. 22, 1977).

146. *Id.* at 10322.

147. *Id.* at 10323.

The rule was finalized in June 1977.¹⁴⁸ NHTSA explained that while it was “impossible” to predict with “perfect accuracy” the emission standards that would be in effect in the relevant model years, for the purposes of the rulemaking, the agency assumed the standards would be those proposed to Congress by the Administration.¹⁴⁹ NHTSA concluded, upon reviewing the automakers’ comments on the proposal, that the standards could be achieved with “little or no fuel economy penalty.”¹⁵⁰

Both proposed and final rules make no mention of California emission standards.¹⁵¹ This is no surprise because the California emission standards for passenger cars in effect at that time were less stringent than the federal standard NHTSA assumed would be in place. The month before NHTSA’s proposed rule was issued, EPA had announced that preemption was waived for California to enforce emission standards for model year 1978 cars insofar as they were identical to the standards in effect in 1977.¹⁵²

The 1977 California standards were 0.41 gram per mile for hydrocarbons, 9.0 grams per mile for carbon monoxide, and 1.5 grams per mile for nitrogen oxides.¹⁵³ The NHTSA rulemaking had assumed the Administration proposal would be in effect, which was 0.41 gram per mile of hydrocarbons, 3.4 grams per mile of carbon monoxide, and 1 gram per mile of nitrogen oxides, with waivers for nitrogen oxides up to 1.5 grams per mile, if necessary.¹⁵⁴ California did not finalize emission standards for passenger cars model year 1979 and later until September 1977.¹⁵⁵ EPA did not grant a waiver of preemption for those standards until June 1978—a year after NHTSA was finished with its rulemaking.¹⁵⁶

3. Low-Volume Manufacturer Exemptions

As described above, exemptions from average fuel economy standards for low-volume manufacturers do not provide explicitly for consideration of the effect of California standards on fuel economy.¹⁵⁷ Yet, implementation of this provision shows that the fuel economy effects of compliance with California emission standards were significant and were simply factored into agency determinations of maximum feasible average fuel economy. In other words, the effects of California’s emission standards helped form the bases for NHTSA’s decision, rather than raising the prospect of preemption.

Low-volume passenger automobile manufacturer Checker was one of the first manufacturers to apply for a low-volume manufacturer exemption.¹⁵⁸ In its petition, Checker broke down its projected sales of California-compliant and federally compliant vehicles. For model year 1978, the manufacturer told NHTSA that its mix of vehicles would be composed of “about 60% 6-cylinder Federal, 25% 6-cylinder California, 12% 8-cylinder Federal, and 3% 8-cylinder California.”¹⁵⁹ Accordingly, the manufacturer calculated that its average fuel economy for its vehicles of that model year would be 16.8 miles per gallon.¹⁶⁰

Checker anticipated that the average fuel economy of its model year 1979 vehicles would decline to 16.7 miles per gallon because the New York City Taxi and Limousine Commission had established requirements that taxis and limousines in New York City comply with the California emission standards.¹⁶¹ The EPCA, however, had set an average fuel economy standard for 1978 of 18 miles per gallon and for 1979 of 19 miles per gallon.¹⁶² Thus, given its mix of vehicles, Checker calculated that it would fail to comply with the statutory standards and requested an exemption.

NHTSA proposed to approve the Checker petition in June 1978.¹⁶³ Using updated EPA testing results, NHTSA projected that Checker’s average fuel economy for model year 1978 would be somewhat higher than previously anticipated at 17.6 miles per gallon.¹⁶⁴ Still, vehicles complying with the California emission standards achieved lower fuel economy than those designed for compliance in the other 49 states. A Checker automobile with a six-cylinder engine complying with the California standards had a fuel economy penalty of almost 9%.¹⁶⁵ An eight-cylinder Checker automobile complying with the California standards had a fuel economy penalty of almost 28%.¹⁶⁶

In conducting its analysis, NHTSA simply considered California-compliant vehicles as part of Checker’s production mix and determined that additional improvements in fuel economy were not technologically feasible and economically practicable.¹⁶⁷ This approach included the fuel economy effects of California vehicles as part of the foundation upon which a determination of maximum feasible fuel economy was built. By building in the effects of California standards in the beginning of the analytic process, NHTSA had no reason to explicitly assess a fuel economy penalty at the end of the analysis as a result of a nonfuel economy standard. NHTSA proposed to establish

148. 42 Fed. Reg. 33534, 33537 (June 30, 1977).

149. *Id.* at 33546.

150. *Id.* at 33547.

151. The final rule references automakers’ use of California-compliant technology. *Id.*

152. California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption, 42 Fed. Reg. 1503, 1504 (Jan. 7, 1977).

153. California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption, 40 Fed. Reg. 23102, 23103 (May 28, 1975).

154. 42 Fed. Reg. 33534, 33546 (June 30, 1977).

155. California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption, 43 Fed. Reg. 25729 (June 14, 1978).

156. *Id.*

157. EPCA §502(c), 89 Stat. at 902.

158. NHTSA, Notice of Receipt of a Petition for Exemption From Average Fuel Economy Standards, 42 Fed. Reg. 64169 (Dec. 22, 1977).

159. *Id.* at 64170.

160. *Id.*

161. *Id.*

162. EPCA §502(a)(1), 89 Stat. at 902.

163. NHTSA, Proposed Decision to Grant Exemption, 43 Fed. Reg. 24871 (June 8, 1978).

164. *Id.* at 24872.

165. *Id.* A 49-state-compliant six-cylinder achieved 18.5 miles per gallon. A California-compliant six-cylinder achieved 16.9 miles per gallon. *Id.*

166. *Id.* A 49-state-compliant eight-cylinder achieved 17.8 miles per gallon. A California-compliant eight-cylinder achieved 12.8 miles per gallon. *Id.*

167. *Id.* at 24873.

17.6 miles per gallon as the maximum feasible average fuel economy standard.¹⁶⁸ NHTSA finalized the exemption as proposed in August 1978.¹⁶⁹

NHTSA has consistently implemented the low-volume exemption to consider the effects of California standards through the years. Like Checker, Rolls-Royce petitioned for an exemption in 1977, explaining that the combined city/highway fuel economy values for its 1977 model year automobiles were “11.6 [miles per gallon] mpg for the 49-States configuration and 9.7 mpg for the California configuration, giving Rolls-Royce a 1977 fleet average fuel economy of 10.9 mpg.”¹⁷⁰ In that case, compliance with the California standards imposed a 16% fuel economy penalty upon Rolls-Royce. When NHTSA considered Rolls-Royce’s petition for an exemption for model years 1995 and 1996, NHTSA again considered the effects of California emission standards as part of their assessment of the effects of other motor vehicle standards.¹⁷¹ Although NHTSA found in that case that there was no anticipated fuel economy effect associated with those standards, the agency’s analysis demonstrated that it factored in the effects of state emission standards as part of the maximum feasible fuel economy determination.¹⁷²

The experience described here with low-volume manufacturer petitions for exemptions suggests an explanation for why “other Federal standards” was defined to include California emission standards for purpose of the petitions for modification described above. The petitions for modification were available only for model years 1978, 1979, and 1980. For these years, Congress had set statutory standards and NHTSA was not authorized to adjust the standards based upon maximum feasible fuel economy. Had NHTSA been authorized to adjust the standards for these years using a maximum feasible fuel economy determination and the agency performed that determination with the method used for consideration of low-volume manufacturer petitions, then the explicit inclusion of the effects of California standards would not have been necessary to ensure that the effects of those standards were considered.

4. After Initial Improvements in Fuel Economy, Standards Stagnated

After the decade-long, statutorily required improvement in fuel economy called for by the EPCA was implemented, standards for cars and trucks stagnated. From 1985 to 2007, fuel economy standards for passenger automobiles was 27.5 miles per gallon and fuel economy standards for light-duty trucks was 19.5 miles per gallon to 22.2 miles

per gallon.¹⁷³ Although these standards flatlined, the American fleet was becoming more dependent on oil than ever before. Not only were the number of vehicles on the road increasing, but the share of trucks as compared to cars was increasing.¹⁷⁴ Therefore, a higher percentage of the fleet was complying with a less fuel-efficient standard.

C. 1995 to 2001: Congress Blocks NHTSA From Revising Fuel Economy Standards

In 1992, Gov. Bill Clinton campaigned for president supporting legislation to increase fuel economy standards, while Pres. George H.W. Bush pledged to veto such legislation.¹⁷⁵ In April 1994, with President Clinton in office, NHTSA issued an advanced notice of proposed rulemaking to solicit views on fuel economy standards for light trucks model years 1998 through 2006.¹⁷⁶

This proposal was never acted upon. After control of Congress changed with the 1994 mid-term elections, Congress included restrictions in the annual appropriations bills for DOT, prohibiting NHTSA from using appropriated funds for the purpose of issuing rules for fuel economy. Congress included this “freeze” of fuel economy standards in the appropriations bills for fiscal years 1996 through 2001.¹⁷⁷

In December 2001, Congress enacted an appropriations bill for DOT that did not include an appropriations limitation relating to fuel economy standards.¹⁷⁸ Accordingly, NHTSA quickly promulgated a fuel economy standard for light trucks model year 2004.¹⁷⁹ However, because the agency had been prohibited from gathering and analyzing data to set fuel economy standards for six years, the agency did not have the basis of information necessary to support

173. The fuel economy standard for passenger automobiles dipped below 27.5 for years 1986 through 1989, but returned to 27.5 for years 1990 through 2007.

174. See, e.g., U.S. EPA, LIGHT-DUTY AUTOMOTIVE TECHNOLOGY AND FUEL ECONOMY TRENDS: 1995 THROUGH 2007 (2007) (EPA420-R-07-008), available at [175. David Lauter, *Clinton Eases Stand on Auto Fuel Economy*, L.A. TIMES, Aug. 23, 1992, <https://www.latimes.com/archives/la-xpm-1992-08-23-mn-7296-story.html>.](https://nepis.epa.gov/Exec/QueryNET.exe/P1004MA1.txt?ZyActionD=ZyDocument&Client=EPA&Index=2006%20Thru%202010&Docs=&Query=&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&UseQField=&IntQFieldOp=0&ExtQFieldOp=0&XmlQuery=&File=D%3A%5CZYFILES%5CINDEX%20DATA%5C06THRU10%5CTXT%5C00000009%5CP1004MA1.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h%7C-&MaximumDocuments=1&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=hpfr&DefSeekPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=7#.</p>
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176. ROBERT BAMBERGER, CONGRESSIONAL RESEARCH SERVICE, AUTOMOBILE AND LIGHT TRUCK FUEL ECONOMY: THE CAFE STANDARDS 4 (2003), https://www.everycrsreport.com/files/20030422_IB90122_635d40938abd_aedeb0239443e4df83e3909baea9.pdf.

177. §330, Pub. L. No. 104-50 (1995); §323, Pub. L. No. 104-205 (1996); §322, Pub. L. No. 105-66 (1997); §322, Pub. L. No. 105-277 (1998); §321, Pub. L. No. 106-69 (1999); §320, Pub. L. No. 106-346 (2000).

178. Department of Transportation and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-87 (2001).

179. NHTSA, Light Truck Average Fuel Economy Standards Model Years 2004; Final Rule, 67 Fed. Reg. 16052 (Apr. 4, 2002).

168. *Id.*

169. NHTSA, Final Decision to Grant Exemption From Average Fuel Economy Standards, 43 Fed. Reg. 34786 (Aug. 7, 1978).

170. NHTSA, Notice of Receipt of a Petition for Exemption From Average Fuel Economy Standards, 42 Fed. Reg. 64171 (Dec. 22, 1977).

171. NHTSA, Passenger Automobile Average Fuel Economy Standards; Proposed Decision to Grant Exemption, 58 Fed. Reg. 41228, 41230 (Aug. 3, 1993).

172. *Id.*

a standard different from the one that had been in effect for the past six years. Therefore, the agency set the model year 2004 standard at the level that had been in effect for those years, 20.7 miles per gallon.¹⁸⁰

D. *The Next Six Years: NHTSA Tries and Fails to Block State GHG Emission Standards*

As discussed above, California decided to adopt GHG standards for cars and trucks in July 2002. Within months, NHTSA's approach to California emission standards began to change. For the next six years, NHTSA continued to factor the effects of the state standards into the determination of maximum feasible fuel economy as it had prior to the fuel economy freeze of 1996 to 2001. However, during this time, NHTSA edged toward and then eventually asserted in hortatory language that the state GHG standards were preempted.

This argument was rejected where it was raised. Two federal courts rejected the agency's rationale when advanced by automakers. Congress also rejected repeated efforts by the Administration, including by top White House officials, to modify the law in support of NHTSA's position. Here, we will examine these developments in greater detail.

I. *Agency Actions Toward Preemption*

In a December 2002 notice of proposed rulemaking for fuel economy standards for light trucks model years 2005 to 2007, NHTSA discussed the potential interaction between California's GHG emission standards and the EPCA. NHTSA stated: "This does not mean that a state may issue a regulation that relates to fuel economy and which addresses the same public policy concern as the [Corporate Average Fuel Economy] CAFE statute."¹⁸¹ Under this approach, unless the EPCA was determined to have as one of its purposes the public policy goal of reducing GHG emissions, states would not be preempted from establishing GHG emission standards. When the rule was finalized in 2003, NHTSA briefly endorsed the discussion of preemption in the 2002 proposed rule.¹⁸²

It is also relevant to note that in the 2003 final rule, the agency considered both federal and state emission standards as "other standards of the Government."¹⁸³ The agency specifically discussed California's low-emission vehicle (LEV) II standards that applied to non-GHG emissions in their analysis, and concluded that these state standards would have "no impact on fuel economy from emission standards on light truck fuel economy" during the requisite years.¹⁸⁴

In August 2005, NHTSA proposed a rule to establish fuel economy standards for light trucks model years 2008 to 2011.¹⁸⁵ Unlike the 2002/2003 rulemaking that focused on the question of whether state regulations sought to address the "same public policy concern as the CAFE statute," the 2005 proposal was more expansive in its application. In the brief section of the preamble relating to federalism, the *Federal Register* notice concluded "[a] state law that seeks to reduce motor vehicle CO₂ emissions is both expressly and impliedly preempted."¹⁸⁶ The agency offered no consideration of the public policy concern that motivates the state law. NHTSA explained that state laws would be impliedly preempted because they would interfere with the implementation of the EPCA, such as the agency's balancing of "various statutory factors and other related considerations, as contemplated in the conference report on EPCA."¹⁸⁷

In October 2005, 29 members of the California congressional delegation wrote to Transportation Secretary Norman Mineta to "object strongly" to NHTSA's language.¹⁸⁸ The members of Congress explained that, in their view, "NHTSA has no jurisdiction over or expertise in the Clean Air Act, which governs regulation of air pollution from motor vehicles."¹⁸⁹ Transportation Secretary Mineta responded to these members of Congress that "[t]he issue of the relationship of Federal and State law is an important one, and NHTSA will fully consider your comments as we work toward a final rule on the subject."¹⁹⁰

Nevertheless, when NHTSA finalized the rule in April 2006, the agency included a lengthy discussion of state GHG emission standards and EPCA preemption in the rule's preamble. NHTSA noted the objections to the preemption language in their proposal, but nevertheless stated:

Given that a State CO₂ regulation is the functional equivalent of a CAFE standard, there is no way that NHTSA can tailor a fuel economy standard for light trucks so as to avoid preemption. Further, EPCA itself precludes a State from adopting or enforcing a law or regulation related to fuel economy (49 U.S.C. 32919(a)).¹⁹¹

NHTSA stated that therefore it could not "adopt" the states' views but concluded, "[n]evertheless, the agency

180. *Id.*

181. DOT, NHTSA, Light Truck Average Fuel Economy Standards Model Years 2005-07; Notice of Proposed Rulemaking, 67 Fed. Reg. 77015, 77025 (Dec. 16, 2002).

182. NHTSA, Light Truck Average Fuel Economy Standards Model Years 2005-2007; Final Rule, 68 Fed. Reg. 16868, 16895 (Apr. 7, 2003).

183. *Id.* at 16895.

184. *Id.* at 16896.

185. DOT, NHTSA, Average Fuel Economy Standards for Light Trucks Model Years 2008-2011; Notice of Proposed Rulemaking, 70 Fed. Reg. 51414 (Aug. 30, 2005).

186. *Id.* at 51457.

187. *Id.*

188. Letter to Norman Mineta, Secretary, DOT, from Reps. Henry A. Waxman, Anna Eshoo, Jim Costa, Sam Farr, Lynn Woolsey, George Miller, Nancy Pelosi, Doris Matsui, Xavier Becerra, Hilda Solis, Lois Capps, Barbara Lee, Grace Napolitano, Mike Honda, Linda Sanchez, Brad Sherman, Susan Davis, Ellen Tauscher, Loretta Sanchez, Zoe Lofgren, Pete Stark, Dennis Cardoza, Tom Lantos, Maxine Waters, Howard Berman, Joe Baca, Adam Schiff, Diane Watson, and Jane Harman (Oct. 17, 2005).

189. *Id.*

190. Letter from Norman Mineta, Secretary, DOT, to Rep. Anna Eshoo (Feb. 16, 2006).

191. DOT, NHTSA, Average Fuel Economy Standards for Light Trucks Model Years 2008-2011; Final Rule, 71 Fed. Reg. 17566, 17654 (Apr. 6, 2006).

continues to examine these issues and welcomes continued input.”¹⁹²

Importantly, in finalizing the fuel economy rule for light trucks model years 2008-2011, NHTSA again considered California LEV II standards as other standards of the government in determining maximum achievable fuel economy.¹⁹³ The ZEV program was considered as part of this program.¹⁹⁴

This final rule was thrown out by the U.S. Court of Appeals for the Ninth Circuit in *Center for Biological Diversity v. National Highway Transportation Safety Administration*, in part because NHTSA had failed to examine and quantify the climate change effects that would result from the final rule.¹⁹⁵ However, the court did not reach the issue of preemption because the preamble language did not constitute a final agency action.¹⁹⁶

2. Federal Courts Reject NHTSA's Preemption Policy

While NHTSA was in court attempting to defend its fuel economy standards for light trucks model years 2009-2011, the auto industry was also in federal court arguing that the EPCA, in fact, preempted state GHG standards. By the end of 2007, the auto industry's efforts had failed and two federal courts ruled that the EPCA did not preempt state GHG emission standards.¹⁹⁷

In *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, the court specifically examined the question of preemption and concluded that once approved by EPA, state GHG emission standards become other motor vehicle standards of the government.¹⁹⁸ The court stated:

Having reviewed the legislative history of the CAA and EPCA for evidence of Congress's intent, the Court concluded that Congress intended California emissions standards for which EPA granted a waiver pursuant to Section 209(b) of the CAA to constitute “other motor vehicle standards of the Government,” under Section 502 of EPCA. Such a finding is entirely consistent with the language of the statutes, the House and Senate reports that accompanied the legislation, and NHTSA's practice of

taking California standards into consideration when setting CAFE standards. Because this case involves potential conflict between “federal” provisions, preemption analysis does not apply.¹⁹⁹

This interpretation is consistent with NHTSA's approach for establishing fuel economy standards for light-duty trucks for the model years of 2005 through 2011. In two consecutive rulemakings, NHTSA had factored in the fuel economy effects of California's emission standards when establishing fuel economy standards in 2003²⁰⁰ and 2006.²⁰¹

The court also applied principles of express, field, and conflict preemption to the state GHG emission standards, and found in each case that the plaintiffs failed to prove the regulations were preempted.²⁰²

In *Central Valley Chrysler-Jeep v. Goldstene*, the court contemplated preemption in the context of the EPCA, the CAA, and *Massachusetts*, and determined that “relating to” had a narrow scope.²⁰³ The court reasoned that because state GHG emission standards had the purpose of protecting public health and welfare, like the CAA, the EPCA's preemption provision did not apply to the state requirements:

The court finds that the preemptive force of 49 U.S.C. §32919 extends very narrowly. State laws that are granted waiver of preemption under the Clean Air Act that have the effect of requiring even substantial increases in average fuel economy performance are not preempted where the required increase in fuel economy is incidental to the state law's purpose of assuring protection of public health and welfare under the Clean Air Act. The court also finds that a law that requires substantial improvement in average fleet mileage standards incidentally to its purpose of protecting public health and welfare does not constitute a *de facto* regulation of fuel economy standards unless there is a narrow one-to-one correlation between the pollution reduction regulation and the fuel efficiency standard. Where, as here, various considerations including fuel type and source and other sources of emission may have the effect of mitigating fuel efficiency improvement requirements, the pollution control standard does not constitute a *de facto* regulation of fuel efficiency.²⁰⁴

This interpretation is consistent with NHTSA's practice through 1995 of factoring in the fuel economy effects of California's emission standards when determining the maximum feasible average fuel economy.²⁰⁵

192. *Id.* at 17674.

193. *Id.* at 17643.

194. *Id.*

195. 508 F.3d 508, 547, 37 ELR 20281 (9th Cir. 2007).

196. *Id.* at 508 n.1. In its ruling, the court noted:

Petitioners also argued in their opening briefs that the EPCA does not preempt California's Clean Air Act motor vehicle greenhouse gas emissions standards. They raised this argument in response to NHTSA's assertion in the preamble of the Final Rule that the EPCA preempts state laws and regulations regarding fuel economy standards. See 71 Fed. Reg. at 17,654-70. We do not address this issue since the parties agreed in their response briefs and at oral argument that the preemption discussion in the preamble of the Final Rule is not final agency action and thus not currently reviewable.

Id.

197. *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 37 ELR 20309 (E.D. Cal. 2007); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 37 ELR 20232 (D. Vt. 2007).

198. *Green Mountain*, 508 F. Supp. 2d at 398.

199. *Id.*

200. See notes 183-84 and accompanying text.

201. See notes 193-94 and accompanying text.

202. *Green Mountain*, 508 F. Supp. 2d at 398.

203. *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 37 ELR 20309 (E.D. Cal. 2007).

204. *Id.* at 1176.

205. See the discussion in Section II.B.1. and Section II.B.3.

3. Congress Rejects NHTSA's Preemption Policy: The EISA

The year 2007 was seminal for the preemption issue. NHTSA's final rule was remanded in *Center for Biological Diversity*. Federal courts had ruled in both *Central Valley* and *Green Mountain* that the EPCA did not preempt state GHG emission standards. Congress also rejected repeated requests from the Administration to amend the law in favor of NHTSA's preemption policy. Specifically, in crafting the EISA, Congress rebuffed requests from the executive branch to include language to ensure that NHTSA alone would be setting standards relating to fuel economy and that EPA and the states would not be setting GHG emission standards.

When President George W. Bush assumed office in 2001, he immediately launched an effort to develop a national energy policy.²⁰⁶ Congress soon considered the legislative components of the proposed energy policy, but deliberations extended into three consecutive Congresses. During this multi-Congress effort to pass what would ultimately become the Energy Policy Act of 2005, Congress repeatedly considered and rejected proposals to increase the fuel economy of cars and trucks.²⁰⁷

In the 2006 State of the Union address, President Bush announced that the United States was "addicted to oil," and proposed a new program to produce motor fuel from sources other than petroleum, such as biomass and coal.²⁰⁸ The nation was fatigued with war in the Middle East, and the president's proposal was explicitly designed to reduce the nation's dependence on oil from that region.

During the course of the Bush Administration, demand for action on climate change had also been building. President Bush had begun his presidency by withdrawing from the Kyoto Protocol and renegeing on a campaign promise to regulate CO₂ emissions from power plants.²⁰⁹ Several years of tamping down action on climate change in Congress and in international venues had left many Democratic members of Congress and the Democratic party in general eager for a policy response. When control of Congress changed as a result of the 2006 mid-term elections, the stage was set for legislative action to reduce the nation's dependence on foreign oil and adopt an energy policy that would address climate change.

In April 2007, the Supreme Court issued its opinion in *Massachusetts*, ruling that CO₂ was a pollutant under the CAA and setting the stage for automakers to have to comply with both fuel economy standards and GHG emission standards.²¹⁰ Numerous proposals were made in Congress during development of the EISA to overturn the *Massachusetts* ruling, as well as block California's GHG emission standards, but Congress rejected these proposals.²¹¹ Instead, Congress included a specific clause to protect EPA and California's authority to regulate GHG emissions from cars and trucks.²¹² Additionally, the legislation adopted the California GHG standards as a benchmark for reducing the pollution from the federal fleet to a greater extent than required for the national fleet as a whole.²¹³

In December 2007, President Bush signed the EISA into law.²¹⁴ With this, Congress had not only fended off proposals to preempt California, but had established new law that buttressed the position that California was not preempted.

E. The Past Decade: NHTSA Tries Again, but a New Administration Finds Harmony Between Federal and State Standards

Despite having its views rejected by the courts and requests rejected by Congress, NHTSA tried again in 2008 to advance a theory of preemption in a proposal for average fuel economy standards for model years 2011-2015. The 2008 proposal stated:

There are two groups of State emissions standards [that] do not qualify under 49 U.S.C. 32902(f), and therefore are not considered. One consists [sic] of State standards that cannot be adopted and enforced by any State because there has been no waiver granted by the EPA under the preemption waiver provision in the Clean Air Act. The other consists of State emissions standards that are expressly or impliedly preempted under EPCA, regardless of whether or not they have received such a waiver. *Preempted standards include, for example:*

- (1) A fuel economy standard; and
- (2) A 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 CO₂ standard).²¹⁵

NHTSA did not finalize this proposal prior to the end of the Bush Administration. Shortly after taking office in January 2009, President Obama confronted the

206. For a summary of the resulting agenda, see The White House: President George W. Bush, *The President's Energy Legislative Agenda*, <https://georgewbush-whitehouse.archives.gov/news/releases/2001/06/energyinit.html> (last updated June 2001).

207. See, e.g., H. Amend. 288 to H.R. 4, 107th Cong. (2001) and H. Amend. 65 to H.R. 6, 108th Cong. (2003).

208. State of the Union Address by President George W. Bush (Jan. 31, 2006), <https://georgewbush-whitehouse.archives.gov/stateoftheunion/2006/>.

209. Julian Borger, *Bush Kills Global Warming Treaty*, GUARDIAN, Mar. 29, 2001, <https://www.theguardian.com/environment/2001/mar/29/globalwarming-usnews>; Douglas Jehl & Andrew C. Revkin, *Bush, in Reversal, Won't Seek Cut in Emissions of Carbon Dioxide*, N.Y. TIMES, Mar. 14, 2001, <https://www.nytimes.com/2001/03/14/us/bush-in-reversal-won-t-look-cut-in-emissions-of-carbon-dioxide.html>.

210. 549 U.S. 497, 37 ELR 20075 (2007).

211. See Greg Dotson, *State Authority to Regulate Mobile Source Greenhouse Gas Emissions, Part 2: A Legislative and Statutory History Assessment*, GEO. ENVTL. L. REV. (forthcoming).

212. H.R. 6, 110th Cong. §3 (2007), <https://www.congress.gov/bill/110th-congress/house-bill/6/text>.

213. See Dotson, *supra* note 211.

214. John M. Broder, *Bush Signs Broad Energy Bill*, N.Y. TIMES, Dec. 19, 2007, <https://www.nytimes.com/2007/12/19/washington/19cnd-energy.html>.

215. DOT, NHTSA, Average Fuel Economy Standards, Passenger Cars and Light Trucks; Model Years 2011-2015; Proposed Rule, 73 Fed. Reg. 24352, 24454 (May 2, 2008) (grammatical errors in original).

issue of NHTSA's preemption proposal. On January 26, 2009, President Obama sent a presidential memorandum to the Secretary of Transportation and the administrator of NHTSA.²¹⁶ The memorandum directed DOT and NHTSA to work with EPA to promulgate a final rule governing fuel economy for model year 2011 vehicles by the end of March 2009.²¹⁷ The presidential memorandum also noted the issue of preemption from the May 2008 proposal and the public comments raising concerns about it.²¹⁸ The president requested that DOT and NHTSA consider whether any provisions regarding preemption are consistent with the EISA, the Supreme Court's decision in *Massachusetts*, and other relevant provisions of law and the policies underlying them.²¹⁹

NHTSA finalized fuel economy standards for model year 2011 on March 23, 2009.²²⁰ The final rule did not contain the preemption language in the original proposal. Instead, it explained that the agency had decided not to include any provisions addressing preemption:

In response to the President's request that NHTSA consider whether any provisions regarding preemption are consistent with EISA, the Supreme Court's decision in *Massachusetts v. EPA* and other relevant provisions of law and the policies underlying them, NHTSA has decided not to include any provisions addressing preemption in the Code of Federal Regulations at this time. The agency will re-examine the issue of preemption in the content of its forthcoming rulemaking to establish Corporate Average Fuel Economy standards for 2012 and later model years.²²¹

EPA, NHTSA, and California subsequently agreed upon uniform tailpipe standards for model years 2012 through 2017, as discussed above, that did not contemplate preemption of California.²²²

President Obama directed EPA and NHTSA to build upon this success with the state of California and undertake a process to develop standards for 2017-2025 that would again be "harmonized" with state standards.²²³ As discussed in greater detail above, these standards were

finalized in August 2012 and did not contemplate preemption of California's authority to establish GHG emission standards.²²⁴

III. The Trump Administration's Preemption Position

In August 2018, NHTSA and EPA proposed the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks.²²⁵ In addition to proposing to relax federal standards governing GHG emissions and fuel efficiency of new vehicles, the agencies proposed to conclude that California is preempted from establishing GHG emission standards and requirements for ZEVs pursuant to a waiver under the CAA.²²⁶ The proposal would also block other states from adopting the California GHG and ZEV requirements.²²⁷ In September 2019, NHTSA and EPA finalized the portions of the proposal that revoke EPA's 2009 waiver of federal preemption for California's GHG standards and determine that the EPCA preempts state authority to set tailpipe GHG emission standards and require the sale of ZEVs.²²⁸

Although the agencies expanded or abandoned certain elements of the proposed rule, the agencies' final rule summarized and generally endorsed the proposed rule's discussion of preemption.²²⁹ Therefore, the proposal remains relevant to understanding the agencies' approach to preemption. This section describes the final rule and includes discussions of the proposed rule where relevant.

A. "Broad and Clear" Preemption

According to the agencies, the EPCA's preemption is "broad and clear."²³⁰ Early in the preamble to the proposed rule, the agencies succinctly explained the rationale for their expansive interpretation of preemption:

Improving fuel economy means getting the vehicle to go farther on a gallon of gas; a vehicle that goes farther on a gallon of gas produces less CO₂ per unit of distance; therefore, improving fuel economy necessarily reduces tailpipe CO₂ emissions, and reducing CO₂ emissions necessarily improves fuel economy. EPCA therefore necessarily preempts California's Advanced Clean Cars program to the extent that it regulates or prohibits tailpipe CO₂ emissions.²³¹

This expansive interpretation provides that any state or local law that causes vehicles to go further (or less far) on a gallon of gas would be preempted by the EPCA.

216. President Barack Obama, Memorandum of January 26, 2009, The Energy Independence and Security Act of 2007, Memorandum for the Secretary of Transportation [and] the Administrator of the National Highway Traffic Safety Administration, 74 Fed. Reg. 4907 (Jan. 28, 2009), available at <https://www.govinfo.gov/content/pkg/FR-2009-01-28/pdf/E9-1942.pdf>.

217. *Id.*

218. *Id.*

219. *Id.*

220. NHTSA, DOT, Final Rule; Record of Decision, Average Fuel Economy Standards Passenger Cars and Light Trucks Model Year 2011, at 17 (Mar. 23, 2009), https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/fmvss/CAFE_Updated_Final_Rule_MY2011.pdf.

221. *Id.*

222. See notes 73-77 and accompanying text.

223. President Barack Obama, Memorandum of May 21, 2010, Improving Energy Security, American Competitiveness and Job Creation, and Environmental Protection Through a Transformation of Our Nation's Fleet of Cars and Trucks; Memorandum for the Secretary of Transportation[,] the Secretary of Energy[,] the Administrator of the Environmental Protection Agency[,] and the Administrator of the National Highway Traffic Safety Administration, 74 Fed. Reg. 4907 (May 26, 2010), available at <https://www.govinfo.gov/content/pkg/FR-2010-05-26/pdf/2010-12757.pdf>.

224. See notes 78-83 and accompanying text.

225. See SAFER proposal, *supra* note 5.

226. *Id.*

227. *Id.*

228. See SAFER rule, *supra* note 13.

229. *Id.* at 51313.

230. See SAFER rule, *supra* note 13, at 51318.

231. See SAFER proposal, *supra* note 5, at 42999.

Paraphrasing the EPCA, the agencies explain that “EPCA broadly preempts all State and local laws ‘related to’ fuel economy standards or average fuel economy standards.”²³² Thus, the meaning of the word “relate” is essential to understanding the full scope of preemption. To examine the meaning of that word, the agencies look to Supreme Court cases interpreting preemptive language in the Employee Retirement Income Security Act of 1974 (ERISA) and the Airline Deregulation Act of 1978 (ADA).²³³

ERISA provides that it shall supersede “any and all state laws insofar as they may now or hereafter relate to any employee benefit plan” covered by ERISA.²³⁴ In *Shaw v. Delta Airlines*, the Court had to interpret this language and reasoned that the “breadth of [ERISA’s] preemptive reach is apparent from that section’s language.”²³⁵ Thus, the Court said that “[a] law ‘relates to’ an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.”²³⁶

The Supreme Court cited *Shaw* in later interpreting similar statutory preemption language in the ADA. In *Morales v. Trans World Airlines, Inc.*, the Court stated:

For purposes of the present case, the key phrase, obviously, is “relating to.” The ordinary meaning of these words 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.²³⁷

Citing the 1997 ERISA case *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, the agencies explain that “[c]ourts look ‘both to the objectives of the . . . statute as a guide to the scope of the state law that Congress understood would survive, [and] to the nature of the effect of the state law on [the Federal standards].’”²³⁸

Under the approach the agencies describe, to understand the scope of EPCA preemption, the agencies should perform a two-step analysis. First, one must understand the objectives of the EPCA and, second, use that understanding to determine Congress’ expectation of the scope of California emission standards that would survive preemption and the nature of the effect of state GHG emission standards on federal fuel economy standards. In the first step of this analysis, the agencies state that one of Congress’ objectives in enacting the EPCA is creating a national fuel economy standard.²³⁹ The agencies prioritize this purpose of the EPCA over those purposes that Congress specifically identified in statute as part of the legislation, which

include “to reduce demand for energy,” “to conserve energy supplies,” and “to provide for improved energy efficiency of motor vehicles.”²⁴⁰

The agencies do not transparently discuss the second step of the analysis. Instead, the proposal discusses the general proposition that requirements to reduce GHG emissions from internal combustion engines necessarily result in reduced petroleum consumption.²⁴¹ The agencies state that “CO₂ emissions are always and directly linked to fuel consumption because CO₂ is a necessary and inevitable byproduct of burning gasoline.”²⁴² In the final rule, the agencies conclude that “a State or local requirement limiting tailpipe carbon dioxide emissions from automobiles has the direct and substantial effect of regulating fuel consumption and, thus, is ‘related to’ fuel economy standards.”²⁴³

The agencies acknowledge in the proposal that the CAA provides for a waiver of that law’s preemptive effect for California emission standards meeting certain criteria.²⁴⁴ The agencies argue, however, that a CAA preemption waiver has no effect whatsoever on the EPCA’s preemption.²⁴⁵ This interpretation, the agencies note, is a more expansive interpretation than those in district court rulings in both the Ninth Circuit and the U.S. Court of Appeals for the Second Circuit discussed above. The agencies argue that the court’s interpretation in *Central Valley* was incorrect and “relating to” has a broad meaning that would preempt state standards.²⁴⁶ Additionally, the agencies argue that the court in *Green Mountain* was incorrect when it ruled that state tailpipe GHG emission standards qualify as other motor vehicle standards of the government when subject to a CAA preemption waiver.²⁴⁷ These points were affirmed in the final rule.²⁴⁸

The interpretation of preemption in the final rule is the broadest interpretation that NHTSA has embraced since NHTSA began wading into the issue in 2002. For example, in no previous iteration of NHTSA’s view on preemption has the agency argued that California’s ZEV program is preempted because it “directly and substantially affect[s] fuel economy standards by requiring manufacturers to eliminate fossil fuel use in a portion of their fleet.”²⁴⁹ Additionally, as discussed below, the agency

240. EPCA §2(1), (4), (5), 89 Stat. at 874.

241. See SAFER proposal, *supra* note 5, at 43233-34.

242. *Id.* at 43234.

243. See SAFER rule, *supra* note 13, at 51313.

244. See SAFER proposal, *supra* note 5, at 43235.

245. *Id.*

246. *Id.*

247. *Id.* at 43210.

248. See SAFER rule, *supra* note 13, at 51314.

249. *Id.* at 51313. In an October 2002 amicus brief, the U.S. government had argued that the Ninth Circuit should find the version of California’s ZEV program then in effect to be preempted by the EPCA. Brief for the United States as Amicus Curiae in Support of Affirmance, *Cent. Valley Chrysler-Plymouth Inc. et al., v. Kenny*, No. 02-16395 (9th Cir. 2002). However, the government’s interpretation of EPCA preemption in that brief was narrower than the one NHTSA makes in the 2019 final rule because the 2001 version of the ZEV program was specifically tied to fuel economy standards. The U.S. government argued in its brief, “California regulations directly refer to fuel economy levels, and because manufacturer credits are based on the level

232. See SAFER rule, *supra* note 13, at 51318.

233. See SAFER proposal, *supra* note 5, at 43233; see SAFER rule, *supra* note 13, at 51318.

234. ERISA §514(a).

235. 463 U.S. 85, 96 (1983).

236. *Id.* at 97.

237. 504 U.S. 374, 383 (1992) (quoting BLACK’S LAW DICTIONARY 1158 (5th ed. 1979)).

238. See SAFER proposal, *supra* note 5, at 43233.

239. *Id.*

interprets the EPCA's preemption provision as potentially applying to state and local laws governing the everyday use of vehicles.²⁵⁰

I. Express Preemption

In the proposed rule, the agencies further explain the basis for broad express preemption: “[s]ince there is but one pool of technologies for reducing tailpipe CO₂ emissions and increasing fuel economy available now and for the foreseeable future, regulation of CO₂ emissions and fuel consumption are inextricably linked.”²⁵¹ State regulations limiting tailpipe CO₂ emissions “are therefore unquestionably ‘related’ and expressly preempted.”²⁵² State laws “that have the effect of regulating” or prohibiting tailpipe CO₂ emissions are also preempted according to the agencies.²⁵³

In the final rule, the agencies added new appendices to the Code of Federal Regulations to clarify EPCA preemption.²⁵⁴ In addition to promulgating the EPCA's preemption language in the appendices, the agencies added identical language to the parts governing both passenger automobiles²⁵⁵ and light trucks.²⁵⁶ The subsections governing express preemption state in their entirety:

(a) Express Preemption:

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

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

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

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

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

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

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

(3) A law or regulation of a State or a political subdivision of a State having the direct or substantial effect of regulating or prohibiting tailpipe carbon dioxide emissions from automobiles or automobile fuel economy is a law or regulation related to fuel economy standards and expressly preempted under 49 U.S.C. 32919.²⁵⁷

The final rule's preemption language in the appendices is broader than the language in the proposed rule in one significant way. While the proposed rule sought to preempt laws having the “direct effect” of regulating or prohibiting tailpipe carbon dioxide emissions or fuel economy, the final rule seeks to preempt laws having the “direct or substantial effect” of doing so. The agencies provide little explanation about the reason for this change or its effect, saying only that the change “provides additional clarity on the scope of preemption”²⁵⁸ and does not preempt California's LEV III standards.²⁵⁹ It appears that this language is broad enough to preempt laws with the indirect effect of reducing oil consumption, if that effect is substantial.

2. Implied Preemption

The agencies also propose to add new identical language regarding implied preemption to the appendices governing both passenger automobiles²⁶⁰ and light trucks.²⁶¹ The subsection governing implied preemption states in its entirety:

(b) Implied Preemption:

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

(A) The fuel economy standards in this part;

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

of a vehicle's fuel economy rating, they are preempted under the plain terms of section 32919(a).” *Id.*

250. See Section III.B.

251. See SAFER proposal, *supra* note 5, at 43234.

252. *Id.*

253. *Id.*

254. See SAFER rule, *supra* note 13, at 51361-63.

255. *Id.* at 51361.

256. *Id.* at 51362.

257. *Id.*

258. *Id.* at 51328.

259. *Id.* at 51356.

260. *Id.* at 51361.

261. *Id.* at 51362.

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

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

(3) A law or regulation of a State or a political subdivision of a State having the direct or substantial effect of regulating or prohibiting tailpipe carbon dioxide emissions from automobiles or automobile fuel economy is impliedly preempted under 49 U.S.C. Chapter 329.²⁶²

B. Stepping Away From the Broadest Interpretation

Despite the very broad application of preemption the agencies pursue, they claim that they are not attempting to assert preemption over the full measure of state and local laws that the EPCA preempts.²⁶³ The agencies explained in the final rule, “Notwithstanding the broad sweep of EPCA preemption, NHTSA intends to assert preemption only over State or local requirements that directly or substantially affect corporate average fuel economy standards.”²⁶⁴

The agencies identify two areas where the EPCA does not preempt state GHG emission standards. First, the agencies explain that state requirements relating to vehicle refrigerant leakage are not preempted because the standards “have no bearing on fuel economy.”²⁶⁵ Second, the agencies explain that requirements with “only an incidental impact on fuel economy” are also not preempted by the EPCA.²⁶⁶ The only example offered of such a requirement is a state-imposed requirement to use child safety seats in automobiles.²⁶⁷ The agencies explained in the proposed rule that the use of such seats can add weight to a vehicle and therefore reduce the vehicle’s fuel economy.²⁶⁸ This second example is remarkable because it reveals that NHTSA interprets EPCA preemption as applying well beyond requirements applicable to automobile manufacturers and potentially extending to state and local requirements regarding the everyday use of vehicles.

In the proposed rule, the agencies proposed to potentially further limit the scope of preemption by introducing a functional equivalence test. The agencies stated, “The statutory test, whether the state standards are ‘related to’ the Federal standards, is met by showing that the state

GHG emission standards are not simply related to, but actually the functional equivalent of, the Federal fuel economy standards.”²⁶⁹ The term “functional equivalent” does not appear in the EPCA. It made little sense in the proposal as it was not proposed to appear in the regulatory text, and therefore how it would be practically applied was far from clear. The agencies appear to have realized that it posed problems as they omitted it from the final rule without comment.

C. Examination of Legislative History

In the proposed rule, the agencies provided a limited examination of relevant legislative history. Specifically, they described one aspect of the EPCA’s legislative history,²⁷⁰ explored one aspect of the positive law codification of the EPCA in 1994,²⁷¹ and mentioned floor statements made during consideration of the EISA.²⁷²

The EPCA preemption language initially passed by the U.S. Senate, the agencies noted, would have preempted only state standards “inconsistent” with the federal standards, while language initially passed by the House would have preempted only state standards not “identical” to the federal standards.²⁷³ The enacted language did not take either of these arguably more permissive approaches, instead providing that states “may not adopt or enforce a law or regulation related to fuel economy standards.”²⁷⁴ The agencies concluded that Congress therefore “intended the provision to be broadly preemptive.”²⁷⁵

With regard to the EISA, the agencies merely recognized that floor statements were made in the House and Senate relating to that law’s savings clause, discussed above. The agencies concluded that those statements “cannot expand the scope of the savings provision or even be used to ‘clarify’ it.”²⁷⁶ The agencies interpreted the EISA savings clause as having no effect on their preemption interpretation. The EISA provision by its terms sought to ensure that there were no changes to existing authorities unless expressly provided for in the EISA. Simply put, the agencies concluded that state GHG emission standards have been preempted since 1975. The EISA simply preserved the existing preemptive effect.

Finally, the agencies recounted the legislative history associated with the positive law codification of the EPCA in 1994 to argue that other motor vehicle standards of the government explicitly included state emission standards only with regard to the modification provision for model year automobiles 1978, 1979, and 1980.²⁷⁷

262. *Id.* at 51361.

263. *Id.* at 51318.

264. *Id.*

265. *Id.* at 51314.

266. *Id.* at 51328.

267. *Id.* at 51314.

268. See SAFER proposal, *supra* note 5, at 43235.

269. *Id.* at 43236.

270. *Id.* at 43233.

271. *Id.* at 43210.

272. *Id.* at 43234.

273. *Id.* at 43233.

274. *Id.*

275. *Id.*

276. *Id.* at 43234.

277. *Id.* at 43233 (relying on enactment of H.R. 1758, 103d Cong. (1994)).

D. *Past Consideration of California Emission Standards*

The agencies acknowledged in the proposed rule that in the past NHTSA has considered the effects of California emission standards when determining maximum feasible fuel economy, noting that, at times, the agency had considered the state standards to be other motor vehicle standards of the government.²⁷⁸ However, the proposal stated that both EPA and NHTSA now agree that California standards do not qualify as other motor vehicle standards of the government, and therefore it would be inappropriate to factor them into the determination of a maximum feasible fuel economy standard pursuant to that clause.²⁷⁹

Regardless, the agencies stated that it has been appropriate for NHTSA to factor California emission standards into fuel economy standards in the past “[n]otwithstanding the improper categorization” for doing so.²⁸⁰ The statutory criteria of economic practicability and technologic feasibility are broad enough terms to allow for the California emission standards to be considered in determining fuel economy standards. For that proposition, the agencies rely upon a U.S. Court of Appeals for the District of Columbia (D.C.) Circuit case that found it permissible for NHTSA to factor consumer demand into standard-setting even though consumer demand was not specifically identified as a permissible criterion in the EPCA.²⁸¹

IV. Evaluating the Trump Administration’s Preemption Argument

In the proposed rule, the agencies argued that California has forced the government’s hand to act on preemption. They stated that California’s requirements to reduce GHG emissions and promote ZEVs is, in large part, responsible for “regulatory uncertainty and increased costs.”²⁸² They also stated that accomplishing the goals of the EPCA “requires the agencies to clearly discuss the extent to which state and local standards are expressly or impliedly preempted.”²⁸³

The agencies’ expansive interpretation of the EPCA’s scope of preemption will now face legal challenge. Twenty-three states, along with three major U.S. cities, have filed suit to challenge the rule in court.²⁸⁴ A group of prominent environmental groups have also joined in this effort.²⁸⁵

From a policy perspective, this is an important issue and the agencies’ rationale should be carefully scrutinized.

If the agencies’ rule goes into effect, it would overturn a program that delivers important benefits for air quality, climate change mitigation, and technological transformation.²⁸⁶ States would be left with a substantially diminished set of tools to reduce GHG emissions from the transportation sector. The federal government would be deprived of a proven state laboratory of innovation.

Despite reduced emissions from individual vehicles in recent years, emissions from the transportation sector remain a serious concern. For the first time since the 1970s, GHG emissions from the transportation sector exceeded those of the power sector on a 12-month rolling basis from October 2015 to September 2016.²⁸⁷

Moreover, the prospective emission reductions that would be achieved by the current emission standards are larger than the total emissions of the vast majority of the world’s nations.²⁸⁸ One independent research organization has examined the effect of this proposal on global GHG emissions and made several estimates based upon what the price of oil could be in 2035. The organization found:

At our upper bound estimate, the increase in annual CO₂ emissions resulting from the [agencies’ proposal] by 2035 would be larger than the total national annual emissions today of 82% of the countries on earth, and larger than the COMBINED annual CO₂ emissions of the 70 smallest countries in the world.²⁸⁹

The agencies advance their interpretation at a time when the program has been in successful operation for a decade, and private-sector proponents of the same interpretation have had their interpretation rejected by two federal courts. The policy that would be effectuated by their interpretation has been rejected by Congress numerous times. The auto industry has been thriving under the policy the agencies now seek to overturn, and the public has benefitted from the introduction of advanced technology vehicles, reduced burden associated with fuel consumption, and decreased pollution.

From a public policy perspective, the agencies’ proposal is dubious. The agencies claim that they must take this step now because of regulatory uncertainty and increased costs facing the auto sector due “in no small part” to California’s requirements for cleaner vehicles.²⁹⁰ Yet, the agencies themselves introduce uncertainty in what would otherwise be a clear set of regulatory requirements through model year

278. *Id.* at 43210.

279. *Id.*

280. *Id.*

281. *Ctr. for Auto Safety v. Nat’l Highway Transp. Safety Admin.*, 793 F.2d 1322, 1340, 17 ELR 20039 (D.C. Cir. 1986) (holding that NHTSA’s consideration of the adverse effects of consumer demand on the fuel economy levels manufacturers can achieve is permissible).

282. See SAFER proposal, *supra* note 5, at 43233.

283. *Id.* at 43232.

284. Adam Beam, *23 States Sue Trump to Keep California’s Auto Emission Rules*, ASSOCIATED PRESS, Sept. 20, 2019, <https://www.apnews.com/557dac75254a4342b4176c064a534e3b>.

285. David Shepardson, *U.S. Environmental Groups Sue Over Trump Auto Emissions Move*, REUTERS, Sept. 27, 2019, <https://www.reuters.com/article/us-autos-emissions-california/u-s-environmental-groups-sue-over-trump-auto-emissions-move-idUSKBN1WC1VK>.

autos-emissions-california/u-s-environmental-groups-sue-over-trump-auto-emissions-move-idUSKBN1WC1VK.

286. For a brief discussion of these benefits, see Greg Dotson, *Why EPA’s U-Turn on Auto Efficiency Rules Gives China the Upper Hand*, CONVERSATION, Mar. 29, 2018, <https://theconversation.com/why-epas-u-turn-on-auto-efficiency-rules-gives-china-the-upper-hand-93840>.

287. U.S. Energy Information Administration, *Power Sector Carbon Dioxide Emissions Fall Below Transportation Sector Emissions*, TODAY IN ENERGY, Jan. 19, 2017, <https://www.eia.gov/todayinenergy/detail.php?id=29612>.

288. See Houser et al., *supra* note 10.

289. *Id.*

290. See SAFER proposal, *supra* note 5, at 43233.

2025. These requirements do bring more advanced vehicle technologies to market, but at a rate that has been previously endorsed by the automakers themselves. It should also be emphasized that a transition to cleaner vehicles and ZEVs amounts to a hard-won realization of the policies that Congress has advanced for more than 40 years.²⁹¹

A. *An Expansive and Problematic Approach to Preemption*

The agencies have stated that accomplishing the goals of the EPCA “requires the agencies to clearly discuss the extent to which state and local standards are expressly or impliedly preempted.”²⁹² Yet, the proposal falls short of clearly describing how the agencies’ new preemption approach will be applied. The heart of the NHTSA interpretation is the expansive reading of the word “relating.” As discussed above, the agencies rely upon *Shaw* and *Morales* as a basis for a broad reading.²⁹³

If a court were to uphold this reading, then the EPCA’s preemption provision would likely apply beyond any historic application of its use or even what the agencies explicitly contemplate in their proposed or final rule. Taken to its full logical extent, there are three areas where this interpretation of preemption would be especially problematic. First, as the agencies acknowledge, this interpretation is not limited to requirements placed upon auto manufacturers. Second, the interpretation would lead to preemption of emission standards for conventional air pollutants that the agencies say they do not intend to preempt. Finally, there would be no provision for exceptions or waivers of preemption, even though the agencies seek to apply such exceptions.

I. The Agencies’ Internally Inconsistent Approach to Determining the Scope of Preemption

The agencies seem to acknowledge the problems posed by such an expansive scope of preemption, stating that “Notwithstanding the broad sweep of EPCA preemption, NHTSA intends to assert preemption only over State or local requirements that directly or substantially affect corporate average fuel economy standards.”²⁹⁴ The terms “directly or substantially” do not appear in the statute, and the agencies’ adoption of these terms demonstrate that they are attempting to somewhat curb their expansive interpretation of EPCA preemption.

However, by the agencies’ own terms, they are choosing to leave an unexplored universe of state and local laws in effect, even though their proposed reading of the law is that Congress sought to preempt them. By proposing an expansive interpretation of preemption and then attempt-

ing to tailor and limit the preemption in select ways that do not appear to be supported by the statute, the agencies could be subject to claims of being arbitrary and capricious in its application.

Further, the agencies undercut their interpretation by characterizing their authority to adjust the scope of preemption as alternatively robust or severely limited, depending on the argument they are responding to. Commenters on the proposed rule argued that Congress had not delegated authority to NHTSA to promulgate regulations on this topic.²⁹⁵ NHTSA responds that the program’s general rulemaking authority provides it with the authority to issue regulations and presumably limit the full measure of preemption and establish certain exceptions.²⁹⁶ Other commenters urged the agencies to use their authority to take a collaborative approach with California and agree to a compromise.²⁹⁷ Here, NHTSA argues that no authority exists to do so.²⁹⁸ The agencies describe themselves as practically powerless to alter the scope of preemption under the EPCA:

Any preemptive effect resulting from this final action is not the result of the exercise of Agency discretion, but rather reflects the operation and application of the Federal statute. NHTSA does not have authority to waive any aspect of EPCA preemption no matter the potential impacts; rather, preempted standards are void *ab initio*.²⁹⁹

In practical effect, the agencies are waiving preemption over some unexplored subset of state and local laws while claiming that their hands are tied to prevent preemption of other state and local laws. The agencies do not articulate a clear governing principle by which state and local requirements can anticipate which laws and regulations will be subject to preemption and which will not.

2. An Exception That Raises Many Questions

Complicating matters further, the agencies offer an exception to their broad preemptive interpretation. This exception is not found in the statute, case law, or legislative history. Nor do the agencies attempt to reflect the exception in their proposed regulatory text. The result is an exception whose basis and application are unclear.

The agencies explain that “[s]tate safety requirements that have only an incidental impact on fuel economy . . . is [sic] not preempted because it does not sufficiently relate to fuel economy standards.”³⁰⁰ As previously noted, the only example the agency provides for this exception is a state mandate that children traveling in motor vehicles sit in child safety seats.³⁰¹ The application of the exception raises more questions than it answers. Does the EPCA preempt

295. *Id.* at 51320.

296. *Id.*

297. *Id.* at 51325.

298. *Id.*

299. *Id.* at 51356.

300. *Id.* at 51314.

301. *Id.*

291. See Dotson, *supra* note 211.

292. See SAFER proposal, *supra* note 5, at 43232.

293. *Id.* at 43233.

294. See SAFER rule, *supra* note 13, at 51318.

state laws and regulations that do not apply to auto manufacturers? How is an incidental impact determined? Why is this exception not reflected in the agencies' proposed regulatory text? Is this exception limited to safety requirements? If so, what is the basis for that limitation?

❑ *Preempting laws that do not apply to auto manufacturers.* Fuel economy standards are requirements that fall upon the manufacturers of automobiles, specifying performance characteristics of the manufactured vehicle. Manufacturers must be able to demonstrate that their vehicles will perform as required once they are introduced into commerce, but fuel economy rules have never been interpreted as applying to state requirements on the use of vehicles once introduced into commerce.³⁰² Yet, the agencies' example of an exception to preemption is precisely that, a state requirement regarding use of a vehicle. The agencies' potentially expansive application to nonmanufacturing-related requirements is incoherent and promises to be problematic and potentially significant.

To understand the unexpected results of the agencies' proposed interpretation, consider three examples. First, nine states have adopted legislation to limit vehicle "idling," the practice of running a vehicle's engine while the vehicle is stationary.³⁰³ Many cities or local governments have adopted anti-idling ordinances as well. According to the U.S. Department of Energy, idling of personal vehicles is responsible for wasting approximately three billion gallons of gasoline and emitting approximately 30 million tons of CO₂ per year.³⁰⁴ State and local laws and regulations to limit idling could have a greater than incidental effect on fuel economy. If the EPCA's preemption provision applies to laws and regulations governing the use of vehicles, it is not clear why such anti-idling rules would not be preempted under the interpretation proposed by the agencies. After all, a state or local prohibition on idling would have "the direct or substantial effect of . . . prohibiting tailpipe carbon dioxide emissions" in certain situations.

Second, consider the matter of state gasoline taxes. Although no state may have yet adopted a gasoline tax with the express purpose of GHG emissions reduction, all states have adopted gasoline taxes in some form. Economists report that levying taxes on gasoline results in reduced GHG emissions.³⁰⁵ Under the agencies' final

rule, if state gasoline taxes are seen as having a direct or substantial effect on fuel economy, they appear to be preempted. While states would be quick to point out that gasoline taxes do not impose a hard limit on the amount of permissible GHG emissions, opponents of gasoline taxes could point to *Metropolitan Taxicab Board of Trade v. City of New York*, in which the court found that a rate structure imposed on taxicabs amounted to a mandate because they "constitute[d] an offer which can not, in practical effect, be refused."³⁰⁶ The states would benefit from a clear explanation of why these state laws would not be preempted.

Finally, California has adopted and is implementing a low-carbon fuel standard.³⁰⁷ Oregon is implementing a similar clean fuels program,³⁰⁸ and similar policies have been under consideration for adoption in other states. These programs require a reduction in the carbon content of transportation fuels over time. In the proposed rule, the agencies explicitly stated that programs to reduce the carbon content of fuels are not preempted by the EPCA.³⁰⁹ Yet, the agencies fail to provide a coherent explanation that allows for the exception to be logically and consistently applied.

❑ *Deciphering "incidental."* Where a state safety standard has an incidental impact on fuel economy, the standard does not relate to fuel economy and therefore is not preempted, the agencies say.³¹⁰ However, it is unclear what the word incidental means in this context, and the agencies offer no explanation. Does it mean incidental in purpose or incidental in effect? Does incidental mean that the effect on fuel economy has to be ancillary to the primary purpose of the requirement?

It seems unlikely that this is what the agencies mean because the California rules under discussion are primarily designed to reduce GHG emissions, and improvements in fuel economy are a secondary effect of achieving that goal. There would be an even stronger case that the ZEV mandate is not preempted under such a reading, because the purpose of the program is not only to reduce GHG emissions, but also pollutants that contribute to ozone and particulate pollution. Under such a reading, reductions in fuel consumption could be seen as incidental to the purposes of both the state GHG standards and the ZEV mandate. Clearly, the current leadership of the agencies are not seeking to effectuate that result.

Instead, perhaps incidental means that reductions in fuel economy are a minor consequence of the state requirement. Under this reading of the exception, a state requirement with only a minor effect on fuel economy would not be preempted. Yet, this interpretation is never explicitly

302. Courts have found that the EPCA preempts local regulations governing taxicab rate structures when those rules are pretexts for addressing fuel economy. See notes 374-79 and accompanying text.

303. Riley Hutchings & Kim Tyrrell, *Putting the Brakes on Idling Vehicles*, NAT'L CONF. ST. LEGISLATURES, Sept. 11, 2018, <http://www.ncsl.org/research/environment-and-natural-resources/putting-the-brakes-on-idling-vehicles.aspx>.

304. OFFICE OF ENERGY EFFICIENCY AND RENEWABLE ENERGY, U.S. DEPARTMENT OF ENERGY, *IDLING REDUCTION FOR PERSONAL VEHICLES* (2015), available at https://afdc.energy.gov/files/u/publication/idling_personal_vehicles.pdf.

305. See Lucas W. Davis & Lutz Kilian, *Estimating the Effect of a Gasoline Tax on Carbon Emissions*, 26 J. APPLIED ECONOMETRICS 1187 (2011) (estimating that a 10-cent per gallon increase in the gasoline tax would reduce carbon emissions from vehicles in the United States by about 1.5%), <https://onlinelibrary.wiley.com/doi/pdf/10.1002/jae.1156>.

306. 633 F. Supp. 2d 83, 99, 39 ELR 20140 (S.D.N.Y. 2009).

307. See CARB, *Low Carbon Fuel Standard*, <https://www3.arb.ca.gov/fuels/lcfs/lcfs.htm> (last reviewed July 18, 2019).

308. See Oregon Department of Environmental Quality, *Oregon Clean Fuels Program*, <https://www.oregon.gov/deq/air/programs/Pages/Clean-Fuels.aspx> (last visited Sept. 9, 2019).

309. See SAFER proposal, *supra* note 5, at 43234 n.507.

310. See SAFER rule, *supra* note 13, at 51314.

endorsed in the proposed or final rule, nor is it supported by the text of the agencies' proposal.

The agencies say that requirements to use child safety seats have a merely incidental effect on fuel economy and therefore are not preempted.³¹¹ Let us examine that. The federal government has advised motorists that an extra 100 pounds in their vehicle could reduce their miles per gallon by about 1%.³¹² A child's safety seat may weigh 20 pounds and result in an approximate effect on fuel economy of 0.2%.

Yet, the introduction of this test begs the question of other state safety laws that NHTSA and EPA would now deem to be preempted. State speed limits would be an obvious point of focus, because the effect of a speed limit is much more consequential on fuel consumption than the effect of requiring the use of a child safety seat. Researchers have shown that fuel economy declines at higher speeds. For instance, most vehicles will have an 11.2%-16.1% drop in fuel economy when traveling 70 miles per hour as compared to 60 miles per hour.³¹³ This percentage change in fuel economy rivals the fuel economy improvement that would occur as a result of California's GHG standards.

Another example has to do with towing trailers. Each state allows motor vehicles to tow trailers or other vehicles subject to state restrictions. When testing for fuel economy, vehicles are assumed to carry just 300 pounds of passengers and cargo.³¹⁴ So of course pulling thousands of additional pounds would have significant effects on fuel economy. Surely, Congress could not have intended state laws providing for the practice of towing to be preempted by the EPCA, even though a reduction in fuel economy performance in excess of 25% could be easily anticipated. Yet, if child safety seat requirements are not preempted only because of their incidental effect, what is the preemptive effect of the regulations on state requirements regarding towing?

Consider this example. The state of Ohio limits the speed of a vehicle pulling a trailer to 55 miles per hour.³¹⁵ That means that a motor vehicle pulling a trailer on an interstate in Ohio would be required to travel 15 miles per hour slower than the posted speed limit, undoubtedly achieving a higher fuel economy performance than if the same vehicle travelled at 70 miles per hour. Additionally, when the same motor vehicle and trailer crossed Ohio's state line into a neighboring state that does not have the 55 miles per hour speed limit, we would see an example of

a car emitting CO₂ at different rates in Ohio as compared to, say, Indiana due to differences in those states' laws. Under the agencies' approach, one of the state's laws would presumably be preempted unless the difference in performance was determined to be incidental.

In sum, the agencies appear to have invented an exception that implies a greatly expanded scope of preemption. Then the agencies fail to provide any limiting principle that would explain why their expansive preemption interpretation would not apply to all manner of state laws, including state speed limits, gasoline taxes, or anti-idling laws.

3. Putting Conventional Air Emission Standards at Risk of Preemption

In the proposed rule, the agencies acknowledged that in the past NHTSA has considered the effects of California emission standards when determining maximum feasible fuel economy, noting that, at times, the agency had considered the state standards to be other motor vehicle standards of the government.³¹⁶ However, the proposal stated that both EPA and NHTSA now agree that California standards do not qualify as other motor vehicle standards of the government, and therefore it would be inappropriate to factor them into the determination of a maximum feasible fuel economy standard pursuant to that clause.³¹⁷

Regardless, the agencies stated that it has been "appropriate" for NHTSA to factor the fuel economy effects of California emission standards into fuel economy standards in the past "[n]otwithstanding the improper categorization" for doing so.³¹⁸ The agencies explained that the statutory criteria of economic practicability and technologic feasibility are broad enough terms to allow for the California emission standards to be considered in determining fuel economy standards.³¹⁹ For that proposition, the agencies relied upon a D.C. Circuit Court case that found it permissible for NHTSA to factor consumer demand into standard-setting even though consumer demand was not specifically identified as a permissible criterion in the EPCA.³²⁰

However, the agencies did not attempt to wrestle with the fact that in the past, California's emission standards have had significant impacts on fuel economy standards. As detailed in Section II.B., the effects of California emission standards resulted in adjustments in fuel economy standards in some cases by as much as 28% in specific vehicles. Additionally, NHTSA factored in California's ZEV program in 2006 in determining fuel economy standards,³²¹

311. *Id.*

312. U.S. Department of Energy Office of Energy Efficiency and Renewable Energy, *Driving More Efficiently*, <https://www.fueleconomy.gov/feg/driveHabit.jsp> (last visited Sept. 9, 2019).

313. John Thomas et al., *Predicting Light-Duty Vehicle Fuel Economy as a Function of Highway Speed*, 6 SAE INT'L J. PASSENGER CARS—MECHANICAL SYST. 859-75 (2013), <https://doi.org/10.4271/2013-01-1113>.

314. U.S. Department of Energy Office of Energy Efficiency and Renewable Energy, *Many Factors Affect Fuel Economy*, <https://www.fueleconomy.gov/feg/factors.shtml> (last visited Sept. 9, 2019).

315. See American Automobile Association, *Digest of Motor Laws: Ohio*, <https://drivinglaws.aaa.com/category/us-motor-laws/ohio/> (last visited Sept. 9, 2019).

316. See SAFER proposal, *supra* note 5, at 43210.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Ctr. for Auto Safety v. Nat'l Highway Transp. Safety Admin.*, 793 F.2d 1322, 1340, 17 ELR 20039 (D.C. Cir. 1986) (holding that NHTSA's consideration of the adverse effects of consumer demand on the fuel economy levels manufacturers can achieve is permissible).

321. DOT, NHTSA, *Average Fuel Economy Standards for Light Trucks Model Years 2008-2011*; Final Rule, 71 Fed. Reg. 17566, 17643 (Apr. 6, 2006).

yet the agency considers the program preempted in 2019. The agencies provide no basis for distinguishing these previous “appropriate” actions from today’s efforts to reduce emissions that they deem preempted. Explaining the basis for their assessment of how previous actions can be distinguished from current actions would have improved the foundation for the agencies’ interpretative actions and have been useful for all stakeholders.

B. *Is an Expansive Scope of Preemption Required by Law?*

The agencies present their proposal as though their hands are tied. Yet, the agencies’ analysis does not track the relevant jurisprudence.

I. *Rejecting “Uncritical Literalism” in Favor of Purpose and Effect*

Shaw provides precedence for broadly interpreting “relates to,” determining it extends to everything with a “connection with or reference to” an ERISA plan.³²² However, *Shaw* is not the Court’s final word on this topic. In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, the Court recognized that the very broad interpretation of “relates to” from *Shaw* was of limited use in determining the scope of preemption in that case.³²³

In *New York State Conference*, a group of insurers and their trade associations argued that New York State-imposed surcharges on patients’ bills were preempted if the insurance plans were purchased by an ERISA plan.³²⁴ In a nutshell, the plaintiffs argued that the surcharges related to the ERISA plans.³²⁵ The Court dissected the *Shaw* “connection or reference” interpretation,³²⁶ and stated, “If ‘relate to’ were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course. For [r]eally, universally, relations stop nowhere.”³²⁷ It rejected “uncritical literalism” and found that just as “infinite relations cannot be the measure of pre-emption, neither can infinite connections.”³²⁸ The Court concluded, “We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.”³²⁹ Upon analyzing the purpose and effects of the New York surcharge statute, the Court determined that it was not the type of law Congress intended to preempt.³³⁰

The Supreme Court reinforced this approach two years later in another ERISA case, *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*,³³¹ which raised the question whether California’s prevailing wage requirements related to ERISA and were therefore preempted. The Court examined the purpose of ERISA and determined that state prevailing wage law did not make reference to and was not connected to ERISA. Justice Antonin Scalia authored a concurrence stating that “applying the ‘relate to’ provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else.”³³²

As the discussion above regarding potential preemption of speed limits and gasoline taxes illustrates, applying “uncritical literalism” to the EPCA preemption provision could spawn unforeseen problems with preemption never running its course. However, applying the Supreme Court’s approach in *New York State Conference* and *California Division of Labor Standards Enforcement* offers an elegant solution to the problem at hand. Congress intended the EPCA to reduce the nation’s dependence on oil. The structure of the law suggests that Congress intended California’s laws for a different purpose—to protect public health and the environment—would survive EPCA preemption. This reading is consistent with decades of agency practice in which NHTSA factored in the fuel economy effects of California’s emission standards in implementing the law.

2. *California’s Historic Police Powers*

The agencies approvingly quote this excerpt from *California Division of Labor Standards Enforcement*: “Courts look ‘both to the objectives of the . . . statute as a guide to the scope of the state law that Congress understood would survive, [and] to the nature of the effect of the state law on [the federal standards].”³³³ However, the agencies omit the very next sentence in that case, which explains, “where ‘federal law is said to bar state action in fields of traditional state regulation, . . . we have worked on the ‘assumption that the historic police powers of the States were not superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”³³⁴

Later in the same term that the Supreme Court decided *California Division of Labor Standards Enforcement*, the Court decided yet another ERISA case that could further inform this discussion.³³⁵ In *De Buono v. NYSA-ILA Medical & Clinical Services Fund*, the Court considered whether ERISA preempted a state gross receipts tax on ERISA-

322. 463 U.S. 85, 97 (1983).

323. 514 U.S. 645 (1995).

324. *Id.* at 645.

325. *Id.*

326. *Id.* at 646, 656.

327. *Id.* at 655.

328. *Id.* at 656.

329. *Id.*

330. *Id.* at 658.

331. 519 U.S. 316 (1997).

332. *Id.* at 335.

333. See SAFER proposal, *supra* note 5, at 43233.

334. *Cal. Div. of Labor Standards Enf’t*, 519 U.S. at 325 (citing *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

335. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806 (1997).

funded medical centers.³³⁶ The Court again emphasized its assumption that the historic police powers of the states are not superseded by federal law unless the purpose of Congress is clear and manifest. Those state historic police powers, the Court notes, include the regulation of matters of health and safety.³³⁷

California more than any other state would have an argument that regulating mobile source air pollution is part of its historic police powers. In addition to it setting standards before the federal government or any other state, Congress has recognized California's unique status numerous times. For instance, in discussing the requirement for EPA to waive preemption of California auto standards, the House Committee report accompanying the CAA Amendments of 1977 stated, "California was afforded special status due to that State's pioneering role in regulating automobile-related emissions, which predated the Federal effort."³³⁸

Under this jurisprudence, a court should examine whether the preemption of state emission standards was a "clear and manifest purpose of Congress" in enacting the EPCA. That finding may be difficult to make given that NHTSA implemented the EPCA for decades without a whisper of preemption.

The agencies argue in their final rule that no presumption against preemption applies after *Commonwealth of Puerto Rico et al. v. Franklin California Tax-Free Trust et al.*³³⁹ In that case involving the applicability of bankruptcy law, the Court determined that "because the 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."³⁴⁰ If a court determines that *Puerto Rico* is governing authority on this point, then the legislative and statutory history issues discussed below are likely to take on even greater importance, as they provide evidence in the statute as to Congress' preemptive intent.³⁴¹

3. Objectives of EPCA Fuel Economy Standards

Understanding the purpose of Congress is a lodestar in determining preemption, and this is not limited to ERISA cases. In fact, in *Morales*, the other principal case that the agencies rely upon, the Court begins by noting, "The question [of preemption], at bottom, is one of statutory intent. . . ."³⁴² This has been a common query of the Supreme Court when assessing preemption in numerous areas. For example, the Court has looked to the intent of

Congress in determining the scope of federal preemption of state laws in matters involving the Federal Food, Drug, and Cosmetic Act,³⁴³ federal labor law,³⁴⁴ and federal law relating to agriculture.³⁴⁵

The agencies' final rule is premised on a statement that the primary objective of EPCA fuel economy standards was to establish one national uniform standard. However, a review of the statute and its history indicates that, at best, this is a secondary goal of the statute and certainly subordinated to the goal of petroleum conservation and efficiency.

My subsequent Article will examine the legislative and statutory history of the relevant acts of Congress in detail to explore congressional intent.³⁴⁶ However, a brief discussion of congressional intent is appropriate here.

□ "*Balancing*" air emissions and fuel economy. Production and consumption of oil became a matter of the highest level of concern in the 1970s. Serious concerns over increasing reliance on oil imports and possible shortfalls between supply and demand gave way to full-blown emergency in 1973. In October of that year, the Arab members of the Organization of Petroleum Exporting Countries imposed an oil embargo against the United States and other nations supporting Israel during the Arab-Israeli war.³⁴⁷ The embargo posed tremendous economic and governance challenges to the country. These challenges formed the backdrop for congressional consideration and enactment of the EPCA.

Congress and the Administration spent the entire year of 1975 working on energy legislation. Negotiations over oil price controls between the White House and Congress was perhaps the most significant contested issue. However, fuel economy was also a key issue in the legislation. The need to achieve better fuel economy in the nation's automobiles had prompted the question of whether fuel economy could be improved even as automobiles were required to emit less pollution.

In 1973, the National Academy of Sciences had reported that some emission controls had a "profound effect" on fuel economy.³⁴⁸ Later that same year, EPA Administrator Russell Train testified that model year 1973 automobiles had suffered a fuel penalty attributable to meeting emission standards of 10%.³⁴⁹ However, by model year 1975, auto manufacturers were reporting to EPA that the use of catalytic converters would allow vehicles to become significantly more fuel-efficient.³⁵⁰ As Administrator Train

336. *Id.*

337. *Id.* at 814.

338. CAA Amendments of 1977, Report by the Committee on Interstate and Foreign Commerce (to accompany H.R. 6161), H.R. REP. NO. 95-294, at 301 (1977).

339. See SAFER rule, *supra* note 13, at 51318; 136 S. Ct. 1938 (2016).

340. 136 S. Ct. 1938, 1946 (2016) (quoting Chamber of Commerce of United States of America v. Whiting, 563 U.S. 582, 594 (2011)).

341. See Section IV.C.

342. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).

343. *Wyeth v. Levine*, 555 U.S. 555 (2009).

344. *Retail Clerks v. Schermerhorn*, 375 U.S. 96 (1963).

345. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

346. Dotson, *supra* note 211.

347. U.S. State Department Office of the Historian, *Oil Embargo, 1973-1974*, <https://history.state.gov/milestones/1969-1976/oil-embargo> (last visited Sept. 9, 2019).

348. NATIONAL RESEARCH COUNCIL, REPORT BY THE COMMITTEE ON MOTOR VEHICLE EMISSIONS 62 (1973), available at <https://www.nap.edu/read/11096/chapter/1>.

349. *Hearing on New Motor Vehicle Emission Standards and Fuel Economy Before the Subcommittee on Public Health and the Environment of the House Committee on Interstate and Foreign Commerce*, 93d Cong. (1973) (statement of Russell E. Train, Administrator, U.S. EPA).

350. *Id.*

concluded, “Considering the Nation’s anticipated gasoline shortage and considering the fact that different emission control systems have different energy requirements, there is clearly a need to provide detailed analysis of this matter.”³⁵¹

Accordingly, a number of studies were undertaken to inform policymakers about the interaction between fuel economy and emission standards. In the Energy Supply and Environmental Coordination Act of 1974, Congress directed DOT and EPA to conduct a joint study on the practicality of establishing a fuel economy improvement standard.³⁵² Congress specifically required the study to examine “the technological problems of meeting any such standard, including . . . the impact of applicable safety and emission standards.”³⁵³

DOT and EPA transmitted the report to Congress in October 1974.³⁵⁴ The report concluded that major improvements in fuel economy were feasible, but detailed the numerous factors that might inform whether to require such an improvement and at what level. With regard to emission standards, the report concluded:

Fuel economy improvements obtained while simultaneously achieving interrelated objectives such as low emissions and occupant safety will involve competition for capital, expertise, and other resources. Impacts, some of which may require compensating action, include: . . .

Achievement of the statutory emission standards for hydrocarbons and carbon monoxide with substantial fuel economy improvement is feasible in the new car fleet of 1980 compared to 1974. The issue of the level and cost of the oxides of nitrogen emission achievable by 1980 concurrent with substantial fuel economy improvement is unresolved.³⁵⁵

The report explained that achievement of the nitrogen oxide standard “simultaneously with good fuel economy, is judged to be possible, but has not been demonstrated.”³⁵⁶

In a June 1975 report, the National Academy of Sciences advised against relaxing emission standards, concluding that emission improvements could and should be “achieved while improving fuel economy.”³⁵⁷ The report noted that a significant improvement in fuel economy can be achieved by changes that are “independent of the level of emissions.”³⁵⁸ The authors of the report later clarified

that while there was generally a fuel economy penalty associated with greater emissions control, that could change with developments in emission control technology.³⁵⁹ The National Academy ultimately calculated that compliance with the 1975 California emission standards imposed a 5% fuel economy penalty as compared to compliance with the less stringent federal standard.³⁶⁰

There was concern that requiring automakers to comply with an emission standard would divert limited resources from efforts to improve fuel economy. For example, in the 1974 DOT-EPA report *Potential for Motor Vehicle Fuel Economy Improvement*, the agencies concluded that “[f]uel economy improvements obtained while simultaneously achieving interrelated objectives such as low emissions and occupant safety will involve competition for capital, expertise, and other resources.”³⁶¹

This history reveals an important theme that is directly relevant to interpreting the EPCA’s preemption provision. Policymakers and stakeholders were concerned about interactions between fuel economy and emission standards because of evidence that emission standards could inhibit increased fuel economy.³⁶² In 1975, the field of emissions control was still young, and its full potential had yet to be realized. There was an understanding that depending on the control technology used, compliance with emission standards could have a negative effect on a vehicle’s potential fuel efficiency. A concern expressed by lawmakers, executive branch officials, scientists, automakers, and others was whether emission standards might limit the amount of oil that could be conserved.³⁶³ Conversations around this topic were a key part of deliberation over EPCA’s new fuel economy program.

This history shows that Congress had concerns that goals for achieving fuel economy improvements could compete for resources from efforts to improve air quality. These concerns are ameliorated in the discussions over GHG emissions and fuel economy, however, because resources used to comply with one standard also help achieve the other standard.³⁶⁴

□ *A blindered view on availability of oil.* Increases in domestic oil production play an outsized role in the agencies’ rationale for this rule. The agencies recognized the physical availability of oil, especially domestically, and concluded that there is a diminished need for conservation.³⁶⁵ Yet, Congress made the policy choice in favor of conservation in 1975 and did not authorize the agencies to revisit it based upon projections of domestic oil produc-

351. *Id.*

352. Pub. L. No. 93-319, 88 Stat. 246.

353. DOT & U.S. EPA, POTENTIAL FOR MOTOR VEHICLE FUEL ECONOMY IMPROVEMENT, REPORT TO CONGRESS (1974) (available in S. REP. NO. 94-6, at 53 (1975)).

354. Letter from Claude S. Brinegar, Secretary, DOT, and Russell Train, Administrator, U.S. EPA, to Sen. Warren G. Magnuson (Oct. 24, 1974) (available in S. REP. NO. 94-6, at 31 (1975)); Letter from Claude S. Brinegar, Secretary, DOT, and Russell Train, Administrator, U.S. EPA, to Rep. Harley Staggers (Oct. 24, 1974) (available in S. REP. NO. 94-6, at 32 (1975)).

355. DOT & U.S. EPA, *supra* note 353 (available in S. REP. NO. 94-6, at 40 (1975)).

356. *Id.* (available in S. REP. NO. 94-6, at 130 (1975)).

357. NATIONAL RESEARCH COUNCIL, REPORT OF THE CONFERENCE ON AIR QUALITY AND AUTOMOTIVE EMISSIONS (1975).

358. *Id.*

359. NATIONAL RESEARCH COUNCIL, A SUPPLEMENTARY STATEMENT CONCERNING THE REPORT OF THE CONFERENCE ON AIR QUALITY AND AUTOMOBILE EMISSIONS 8 (1975).

360. NATIONAL ACADEMY OF SCIENCES, A REPORT BY THE COMMITTEE ON MOTOR VEHICLE EMISSIONS, at 1 (November 1975).

361. DOT & U.S. EPA, *supra* note 353 (available in S. REP. NO. 94-6, at 40 (1975)).

362. Dotson, *supra* note 211.

363. *Id.*

364. For further discussion on the compatible nature of these public policy goals, see Section IV.B.4.

365. See SAFER proposal, *supra* note 5, at 43216.

tion. Moreover, this analysis does not confront the possibility that oil reserves could become unavailable for policy or economic reasons in the years to come. Such an outcome is possible or even likely if governments continue the trend of increasing efforts to address climate change.

The agencies appear heavily influenced by the increase in domestic oil production in recent years, which the agencies claimed can dampen price shocks.³⁶⁶ The proposal explained the agencies' view that the overarching purpose of the EPCA is fundamentally in need of being reinterpreted because of the growth in domestic oil production:

NHTSA tentatively concludes that the need of the U.S. to conserve energy may no longer function as assumed in previous considerations of what CAFE standards would be maximum feasible. The overall risks associated with the need of the U.S. to conserve oil have entered a new paradigm with the risks substantially lower today and projected into the future than when CAFE standards were first issued and in the recent past. . . . The world has changed, and the need of the U.S. to conserve energy, at least in the context of the CAFE program, has also changed.³⁶⁷

From a natural resource perspective, the oil industry has developed more oil resources than might have been anticipated decades ago and has developed the technological capability to produce far more oil in the decades to come. Yet, the D.C. Circuit has cautioned NHTSA from straying from the statute's goal of fuel conservation based upon contemporary views of fuel availability: "It is axiomatic that Congress intended energy conservation to be a long term effort that would continue through temporary improvements in energy availability. Thus, it would clearly be impermissible for NHTSA to rely on consumer demand to such an extent that it ignored the overarching goal of fuel conservation."³⁶⁸

The court's cautionary message is particularly apt as the world wrestles with an appropriate response to climate change. Vast reserves of oil that could physically be produced may actually not be available for consumption for policy or economic reasons, if the world continues to adopt policies that reduce carbon emissions. In such a carbon-constrained world, the availability of vast oil reserves would actually be illusory, and a federal policy that relies on their availability would ill-prepare the nation for those constraints. The proposed and final rule do not grapple at all with how policy responses to climate change could affect oil availability either domestically or globally. Nor do the agencies explain how they examined or considered the benefits of addressing climate change.

There is a precedent for NHTSA considering the potential of future environmental requirements in the estab-

lishment of fuel economy standards. When NHTSA established average fuel economy standards for model years 1981 through 1984, the agency acted cautiously due to the prospect of future environmental regulations.³⁶⁹ NHTSA determined that increased utilization of "alternative engines" such as those that run on diesel fuel should not be considered in determining how much improvement in fuel economy would be appropriate for passenger automobiles because of the uncertainty associated with their emissions and available technology to control those emissions.³⁷⁰ NHTSA makes clear that the emissions consideration of diesel is dominant to the fuel savings:

The Department is also concerned about the possible adverse environmental impacts associated with some alternative engines, notably the diesel. As discussed above, several commenters pointed out that particulate and [polynuclear aromatics] emissions of these engines may pose a health hazard. If the existence of a health hazard is confirmed by the Environmental Protection Agency, then regulation of those emissions will presumably follow. The stringency of those regulations and their effect on the fuel economy of the alternative engines is indeterminate at this time. As information from that agency and other sources clarifies this question, the Department will begin to consider whether to base fuel economy standards on the use of those engines.³⁷¹

Similarly, when establishing standards for non-passenger vehicles for model years 1980 and 1981, NHTSA refused to factor in potential fuel savings that could be attributable to increased use of diesel engines, saying, "NHTSA deems it inappropriate to encourage [sic] the manufacturers to make investments in tooling for diesel engines when the use of those engines may not be tolerated in the future."³⁷²

In refusing to factor in the potential fuel efficiency benefits offered by diesel engines into the standards for non-passenger vehicles, NHTSA stated that it recognized the danger of basing decisions on extra-statutory considerations as EPA had not yet regulated these engines' emissions.³⁷³ To consider the possibility of carbon constraints on oil reserves, however, would not require any extra-statutory considerations; it simply requires forbearance from relying on the current domestic oil production outlook to reinterpret the EPCA's fundamental goal of promoting fuel conservation.

4. Purpose and Effect of State GHG Emissions

The agencies emphasize that many of the technologies currently used to decrease GHG emissions also happen to increase fuel economy. The agencies see this as the critical

366. *Id.*

367. *Id.*

368. *Ctr. for Auto Safety v. Nat'l Highway Transp. Safety Admin.*, 793 F.2d 1322, 1340, 17 ELR 20039 (D.C. Cir. 1986) (holding that NHTSA's consideration of the adverse effects of consumer demand on the fuel economy levels manufacturers can achieve is permissible).

369. *See, e.g.*, 42 Fed. Reg. 33533, 33546-47 (June 30, 1977).

370. *Id.* at 33540-41.

371. *Id.* at 33545.

372. NHTSA, Part 523—Vehicle Classification, Part 533—Light Truck Fuel Economy Standards, Standards for Model Years 1980 and 1981, 43 Fed. Reg. 11995, 12002 (Mar. 23, 1978).

373. *Id.*

evidence that GHG emission standards and fuel economy standards are essentially the same, and therefore GHG emission standards are preempted.

However, there is another appropriate way to approach this issue. The agencies could recognize that unlike the situation in the 1970s, where fuel economy and emissions control were at odds, we have arrived at a new point where technologies to achieve one goal also help to achieve the other goal. Under this rationale, even though the purpose of the state GHG emission standards is different than the purpose of the federal fuel economy standards, the effect of the state standards is to assist in better achieving the goals of the federal fuel economy program. Therefore, the effect of the state law is to further the goals of the federal legislation, not to hinder them.

In determining the purpose of a state law for purposes of EPCA preemption, courts have looked beyond the text of a regulation to determine if a stated purpose is actually a pretext. In 2008, a federal district court found that a regulation adopted by New York City requiring all new taxicabs to meet specific miles-per-gallon performance requirements was preempted by the EPCA.³⁷⁴ Shortly thereafter, the city announced a new rate structure for taxicabs that significantly reduced the profits that could be earned on vehicles that were less fuel-efficient. The city explained, “By offering incentives that will encourage more taxi fleet owners to purchase hybrids, we have found another avenue to reach our goal of greening our yellow cabs, improving our air quality, and reducing our carbon emissions.”³⁷⁵

The court examined the purpose of the EPCA and looked at the purpose and effect of the new city rules.³⁷⁶ The court found that the city had constructed a policy designed to force taxicabs to meet the same fuel economy standards that would have been required under the regulation that had previously been determined to be preempted.³⁷⁷ Additionally, the court referenced statements from a city official stating, “Our goal from the beginning was to get fuel efficient taxis on the road using whatever appropriate methods required to achieve our goal.”³⁷⁸ The court looked beyond the stated purpose of the local regulation and determined it was pretextual, merely obscuring a real attempt to regulate fuel economy. The court found the rules to be preempted. The court’s interpretation was upheld on appeal.³⁷⁹

Under this analytic approach, a court could examine whether California’s emission standards are a pretext for fuel economy standards. Given the scientific consensus on the threat of climate change and the near universal agree-

ment on the need for action, the possibility of finding such a pretext is remote.

C. Legislative and Statutory History

The analysis above does not include powerful arguments that California is not preempted based upon legislative and statutory history. There is abundant evidence of Congress’ consistent intent to ensure that state emission standards are protected from preemption. Importantly, this evidence is not limited to the ample legislative history, which includes statements made by key legislators, congressional committees, and the president during consideration of key legislation. It also includes what Prof. William Eskridge calls statutory history, “the formal changes in the Code made by the legislature when it enacts new laws and amends them over time.”³⁸⁰ While the interpretative value of *legislative* history has been discounted by some in recent years due to the arguments of Justice Scalia and others, *statutory* history remains relevant in the interpretation of law to even the staunchest textualist.

As Justice Scalia wrote with co-author Bryan Garner: “But quite separate from legislative history is *statutory* history—the statutes repealed or amended by the statute under consideration. These form part of the context of the statute and (unlike legislative history) can properly be presumed to have been before all the members of the legislature when they voted.”³⁸¹ These arguments will be explained and examined in my subsequent Article.³⁸²

V. Conclusion

NHTSA and EPA’s position that California’s authority to adopt GHG emission standards was preempted by Congress 44 years ago is lacking, because the agencies have failed to provide a coherent and defensible interpretation of the EPCA’s preemption language.

NHTSA has a long history of accommodating California emission standards when setting fuel economy standards. From the first days of implementation of the EPCA, NHTSA factored in the fuel economy effects of California’s emission standards when determining the maximum feasible average fuel economy. The record shows that despite the emissions impact sometimes amounting to as much as 28% in specific models of vehicles, NHTSA merely built those impacts into their implementation of fuel economy standards, rather than determining that California was preempted by federal law.

This practice was interrupted when Congress froze all agency action on fuel economy standards from 1995 to 2001, but it resumed afterwards. In 2003 and 2006, NHTSA considered the fuel economy effects of Califor-

374. *Metro. Taxicab Bd. of Trade v. City of N.Y.*, 2008 WL 4866021 (S.D.N.Y. 2008).

375. *Metro. Taxicab Bd. of Trade v. City of N.Y.*, 633 F. Supp. 2d 83 (S.D.N.Y. 2009) (quoting Press Release, Office of the Mayor, Mayor Bloomberg Announces New Incentive/Disincentive Program to Reach Goal of Green Taxi Fleet (Nov. 14, 2008)).

376. *Id.* at 100-01.

377. *Id.* at 102.

378. *Metro. Taxicab Bd. of Trade v. City of N.Y.*, 633 F. Supp. 2d 83 (S.D.N.Y. 2009) (quoting a taxicab and limousine commissioner upon announcement of the city requirements).

379. *Metro. Taxicab Board of Trade v. City of N.Y.*, 615 F.3d 152 (2d Cir. 2010).

380. WILLIAM N. ESKRIDGE JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 204 (2016).

381. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 256 (2012).

382. DOTSON, *supra* note 211.

nia's emission standards when setting standards for light trucks model years of 2005 through 2011. NHTSA collaboratively developed fuel economy standards with the state of California for model years 2012 through 2025. In their 2018 proposal, NHTSA and EPA say that this approach was appropriate in the past but that now if a state or local law or regulation has an impact on petroleum consumption, the regulation is preempted.

The agencies further confuse matters by introducing a number of interpretations not found in statute, case law, or legislative history. For instance, in a significant expansion of preemption, the agencies imply that state regulations governing the *use* of vehicles could be preempted in addition to regulations governing the performance of new vehicles. This raises questions about whether state and local rules never thought of as being covered by EPCA preemption, such as speed limits or gasoline taxes, may be subject to the agencies' expansive scope of preemption.

Federal preemption jurisprudence has focused on both the purposes of the federal law and the purpose and effect of the state law. The agencies fail to examine this in detail and

therefore are dismissive of two overarching policy goals—the federal priority of reducing oil consumption and the very different state goal of mitigating climate change. Moreover, the agencies do not recognize that rather than being in conflict, these goals are complementary.

Applying the Supreme Court's approach in *New York State Conference and California Division of Labor Standards Enforcement*, which the agencies approvingly cite, offers an elegant alternative to the illogical and disruptive preemption interpretation that the agencies have pursued. Congress intended the EPCA to reduce the nation's dependence on oil. The structure of the law suggests that Congress intended state laws intended to address different public policy purposes to survive EPCA preemption. Those public policy purposes include protection of public health and the environment, safeguarding the public's safety, and raising revenue for public purposes, among others. This alternative approach to preemption would be consistent with decades of agency practice in which NHTSA factored in the fuel economy effects of California's emission standards in implementing the law.