DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Parts 531 and 533

[Docket No. NHTSA-2021-0030]

RIN 2127-AM33

Corporate Average Fuel Economy (CAFE) Preemption

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Final Rule.

SUMMARY: This document finalizes NHTSA's proposal to repeal in full "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program," published September 27, 2019 (SAFE I Rule), in which NHTSA codified regulatory text and made additional pronouncements regarding the preemption of state and local laws related to fuel economy standards. NHTSA originally proposed to repeal the SAFE I Rule in a Notice of Proposed Rulemaking entitled "Corporate Average Fuel Economy Preemption," which was published on May 12, 2021. After evaluating all public comments submitted for this Proposal, the Agency is finalizing the Proposal. As such, the Agency is repealing all regulatory text and appendices promulgated in the SAFE I Rule. In doing so, the Agency underscores that any positions announced in preambulatory statements of prior NHTSA rulemakings, including in the

SAFE I Rule, which purported to define the scope of preemption under the Energy Policy and Conservation Act (EPCA), do not reflect the Agency's reconsidered understanding of its proper role in matters of EPCA preemption. Through this final rule, NHTSA makes clear that no prior regulations or positions of the Agency reflect ongoing NHTSA views on the scope of preemption of states or local jurisdictions under EPCA.

DATES: This action is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Petitions for Reconsideration: Pursuant to 49 CFR 553.35, petitions for reconsideration of this final rule must be received not later than [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Any petitions for reconsideration should refer to the docket number of this document and be submitted to: Deputy Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE, West Building, Fourth Floor, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Hunter B. Oliver, Office of Chief Counsel, NHTSA, telephone (202) 366-5263, facsimile (202) 366-3820, 1200 New Jersey Ave, SE, Washington, DC 20590.

The Deputy Administrator of the National Highway Traffic Safety Administration, Steven S. Cliff, Ph.D., signed the following Final Rule on December 21, 2021, which the Agency is submitting for publication in the Federal Register. While NHTSA has taken steps to ensure the accuracy of this Internet version of the Final Rule, it is not the official version of the Final Rule. Please refer to the official version in a forthcoming Federal Register publication, which will appear on the Government Printing Office's FDSys website (www.gpo.gov/fdsys/search/home.action) and on Regulations.gov (http://www.regulations.gov/) in Docket No. NHTSA-2021-0030. Once the official version of this document is published in the Federal Register, this version will be removed from the Internet and replaced with a link to the official version.

SUPPLEMENTARY INFORMATION:

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I. Overview of Final Rule

A. Summary of Proposal

On May 12, 2021, NHTSA published in the Federal Register a Notice of Proposed Rulemaking (NPRM or Proposal) entitled "Corporate Average Fuel Economy (CAFE)

Preemption," which set forth the proposal that NHTSA is finalizing today.[1] As explained in the Proposal, this NPRM considered a repeal of NHTSA's portion of a joint agency action completed by NHTSA and the Environmental Protection Agency (EPA) in 2019, "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program" (SAFE I Rule or Rule).[2] In the SAFE I Rule, NHTSA and EPA finalized a joint agency action relating to the state regulation of greenhouse gas (GHG) emissions from motor vehicles and state mandates for zero emission vehicles (ZEVs). In that action, NHTSA codified regulatory text and appendices, which expressly declared that certain types of state regulation were preempted due to a perceived irreconcilable conflict with the Agency's fuel economy standards. In addition, the Agency published further statements in the preambles of the SAFE I rulemaking, which described various types of state regulations as preempted. As part of the SAFE I action, EPA also withdrew portions of a waiver that EPA had previously extended to the California Air Resources Board (CARB) under Section 209 of the Clean Air Act to regulate new motor vehicle emissions through GHG standards and a ZEV mandate.[3]

[1] *See* DOT, NHTSA, Notice of Proposed Rulemaking, Corporate Average Fuel Economy (CAFE) Preemption, 86 FR 25980 (May 12, 2021) (referred to in subsequent citations as "CAFE Preemption NPRM").

[2] *See generally* NHTSA, EPA, Withdrawal of Waiver; Final Rule, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310 (Sept. 27, 2019).

[3] Unless otherwise stated herein, all references to the SAFE I Rule and any associated discussions in this final rule refer only to NHTSA's portions of the SAFE I action and do not include any EPA actions on the California waiver.

On January 20, 2021, President Biden signed Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis," which, among other actions, directed DOT, NHTSA, and EPA to immediately review and consider suspending, revising, or rescinding their respective portions of the SAFE I Rule. NHTSA's resulting comprehensive assessment of the SAFE I Rule identified potential problems relating to both the legal authority claimed by NHTSA for the rulemaking and the degree to which the categorical prohibitions announced by the Agency failed to appropriately account for the substantial and often nuanced state interests in the measures purportedly preempted by the SAFE I Rule. As a result of these considerations, NHTSA published the NPRM, to propose a repeal of the SAFE I Rule and to solicit public comment on the Agency's concerns about the legality and prudence of the rulemaking. On April 28, 2021, EPA outlined its own review of the EPA aspects of the SAFE I joint agency action, publishing a Notice of Opportunity for Public Hearing and Comment that proposed a reconsideration of EPA's withdrawal of California's waiver under the Clean Air Act.[4] Both agencies have expressly recognized that their respective reconsideration proposals are separate, independent proceedings.[5]

[4] *See generally* EPA, Notice of Opportunity for Public Hearing and Comment, 86 FR 22421 (Apr. 28, 2021).

[5] *See id.* at 22422 n.3 ("This action is being issued only by EPA and, therefore, does not bear upon any future or potential action NHTSA may take regarding its decision or pronouncements in SAFE I."); CAFE Preemption NPRM, 86 FR 25981 n.3 ("This proposed rule is being issued only by NHTSA. As such, to the extent EPA subsequently undertakes an action to reconsider the revocation of California's Section 209 waiver, such action would occur through a separate, independent proceeding.").

In the CAFE Preemption NPRM, NHTSA proposed to repeal the SAFE I Rule for several independent reasons. First, the Agency repeatedly expressed substantial doubts regarding the legal validity of the Rule. As the NPRM explained, NHTSA became concerned about whether the Agency possesses the authority to define the scope of EPCA through rulemaking. Accordingly, NHTSA proposed to repeal and withdraw the codified regulations and appendices, as well as any associated interpretations or views on EPCA preemption contained in the SAFE I Rule, including in the regulatory text of Sections 531.7, 533.7, and appendices B to Parts 531 and 533.

In the Proposal, NHTSA recognized that the statutory preemption provision in EPCA, Section 32919, was self-executing. In this respect, Section 32919 is able to preempt state or local laws directly, without the need for a DOT or NHTSA regulation that further implements either EPCA preemption or this particular statutory provision. As such, the statutory provision is both standalone and fails to articulate any role for the Agency in further dictating a preemptive scope. Accordingly, the NPRM proposed that Section 32919 and EPCA were more appropriately read as indicating that Congress did not intend to empower NHTSA to define preemption in this manner. As a result, NHTSA's Proposal expressed concern that in the SAFE I Rule, the Agency acted outside of its delegated authority by publishing regulations and pronouncements that sought to do just such a thing. Accordingly, the NPRM proposed to repeal the SAFE I Rule

In addition, the Proposal also articulated a separate basis for repealing the entirety of the SAFE I Rule, which rested upon the inappropriateness of such a sweeping pronouncement of preemption. Even if EPCA had imbued NHTSA with power to dictate preemption through regulations, the expansive manner in which this authority was wielded in the SAFE I rulemaking failed to appropriately account for a variety of important considerations. These include legally relevant factors, such as the substantial federalism interests of states and local jurisdictions who had long relied on programs to address environmental hazards in their local communities or comply with other federal air pollution requirements. In addition, the categorical and generally applicable scope of the SAFE I Rule also precluded consideration of other fact-specific attributes of particular programs, many of which represent diverse characteristics that bear upon the application of EPCA preemption and the accuracy of any ensuing preemption analysis. Many of these factors—some of which were not even discussed in the SAFE I rulemaking—strongly suggest that a more considered and circumscribed dispensation of any preemption authority would more narrowly tailor any preemptive pronouncements to better account for the diverse, nuanced, and relied upon federalism interests of the preempted state governments and their constituents. As described further below, these concerns were raised and expressed by a significant number of public comments, especially from those local jurisdictions most affected by the rulemaking. These jurisdictions described numerous unique considerations regarding their programs that the SAFE I Rule's absolute proclamation of preemption did not fully contemplate.

These considerations reflected the Agency's similar concerns in the NPRM, which proposed to repeal the SAFE I Rule in its entirety in order to establish a "clean slate," that restores NHTSA's longstanding practice of undertaking a more careful and particularized role in the EPCA preemption discourse.

Finally, even apart from the lack of rulemaking authority and the overly broad manner of the SAFE I Rule's prohibitions, the NPRM also proposed a repeal of the SAFE I Rule in order to remove the regulation that overcomplicated or potentially confused an otherwise direct application of Section 32919's statutory standards. In connection with a proposed repeal of the regulatory text from the SAFE I Rule, the NPRM also proposed to clarify that, to the extent prior statements from rulemaking preambles (from the SAFE I Rule or otherwise) discussed aspects of EPCA preemption or could be read as interpretative views on the subject, those statements should not be read as continuing views of the Agency. While this clarification was not legally necessary, NHTSA still considered it worthwhile because the inconsistent nature of many of the Agency's prior statements on EPCA preemption and the oftentimes imperative language utilized in such statements—especially during the SAFE I rulemaking—risked a confusing landscape in which regulated entities and the public were unsure of the precise legal effect of Agency statements that purported to control EPCA's preemptive reach. Moreover, NHTSA felt that many of those statements, particularly in the preambles of the SAFE I Rule, contained sweeping and definitive language on preemption, which left no room for nuance or further deliberation about

particular programs, and obscured the Agency's ongoing internal consideration of whether EPCA actually enacted a narrower scope of preemption than claimed in the rulemaking. In light of these considerations, the NPRM proposed to expressly disclaim any of these prior statements to make clear they no longer accurately reflected the Agency's position on the issue.

B. Public Participation Opportunities and General Overview of Comments

The public docket opened for this rulemaking following the Federal Register publication of the NPRM on May 12, 2021. The public comment period spanned 30 days, with comments due on June 11, 2021. During that time, the Agency received 445 comments. As of the date of today's final rule, NHTSA has not received any late comments posted after the close of the comment period.[6]

NHTSA closely reviewed each of the comments posted to the docket for this Proposal. While NHTSA is responding to the particular comments in further detail in the substantive analysis in the following sections of this final rule, at a high level, the public comments spanned a diverse array of state and local jurisdictions, regulated entities and trade associations for regulated industries, public interest groups and other nonprofit organizations, and individual

[6] Following the close of the comment period, the State of California requested a meeting to describe aspects of a public comment submitted by California, along with other states and cities. *See* State of California et al., Docket No. NHTSA-2021-0030-0403, *Comments of States and Cities Supporting Repeal of NHTSA's "SAFE" Part One Preemption Rule* (June 11, 2021). In this meeting, which occurred on August 26, 2021, California walked through the various sections of their comment. A docket memo posted by NHTSA to the rulemaking docket provides more information regarding this meeting. See *NHTSA*, Docket No. NHTSA-2021-0030-0450, Docket Memo, *Meeting with the State of California*, (Sept. 7, 2021).

members of the public. The Agency appreciates the time and effort dedicated by these parties in submitting their comments and is grateful for the diversity and depth of views, both for and against the Proposal, expressed by the commenters.

Overall, the Agency received comments spanning the entire spectrum of perspectives with respect to the Proposal. The vast majority of comments from the entities most immediately affected by the rulemaking, *i.e.*, states and local jurisdictions, strongly supported the Proposal. In particular, as explained further below, many of these comments provided tangible examples of hardships imposed by the SAFE I Rule and identified nuanced aspects of their affected programs that were not fully considered during the SAFE I rulemaking. Likewise, comments from entities or associations in the automotive industry, who are directly affected by motor vehicle emission regulations, largely tended to support the Proposal or offer more neutral views. With a few exceptions, most other institutional commenters strongly supported the rulemaking as well. Such commenters consisted of public interest groups, such as environmental or consumer advocacy organizations, who overwhelmingly supported the Proposal and urged a swift repeal of the SAFE I Rule for many of the same reasons expressed in the NPRM.

The Agency also received several institutional comments that expressly opposed the Proposal. While these comments are discussed in depth later in this final rule, in a general sense, these comments urged the Agency to retain the SAFE I Rule in its entirety. Many of these comments defended the substantive validity of the preemption scope announced in the SAFE I

Rule, and construed NHTSA's governing authorities as delegating to the Agency the power to regulate preemption in the manner attempted in that rulemaking. Several of these comments also questioned the sufficiency of NHTSA's proposed justifications to repeal the SAFE I Rule, essentially arguing that NHTSA could not reasonably repeal a substantive position on preemption without replacing it with an alternative substantive view. While a number of individuals commented in support of the Proposal, the Agency recognizes that many individual members of the public also opposed a repeal of the SAFE I Rule.[7]

Finally, a significant portion of the comments raised, either in full or in part, issues beyond the narrow scope on which NHTSA proposed to repeal the SAFE I Rule. Such topics, which appeared in comments both supportive of and opposed to the Proposal, tended to focus on the substantive aspects of the CAFE program, such as the appropriate levels of fuel economy stringency, the effect of any particular state programs on the environment or vehicle fleets, or specific vehicle technologies, such as electrification. Likewise, as anticipated in the NPRM, many of the commenters also articulated substantive views on the appropriate scope of EPCA preemption.[8] NHTSA recognizes that many of these issues pose important societal or public

[7] The vast majority of these individual commenters who opposed the rulemaking appeared to participate in an organized letter writing campaign, judging from the fully or partially verbatim overlap in language or terminology in many of those comments, and raised the same general objections to the proposed rule.
[8] *See, e.g.*, CAFE Preemption NPRM, 86 FR at 25982 n.8 ("The Agency anticipates that many stakeholders may comment, urging the Agency to go further—not mere not merely to repeal the preemption determination, but to affirmatively announce a view that State GHG and ZEV programs are not preempted under EPCA. Nevertheless, the Agency deems any such conclusions as outside the scope of this Proposal.").

policy questions and, in fact, analyzed a number of these topics in significant detail as part of its standard-setting analysis proposed in the Federal Register on September 3, 2021, "Corporate Average Fuel Economy Standards for Model Years 2024-2026 Passenger Cars and Light Trucks."[9] Nevertheless, most of these issues do not directly speak to the proposed bases of NHTSA's repeal of the SAFE I Rule, given the very narrow scope of this rulemaking, which principally arose from a reconsideration of the discrete legal issues that underpinned the exercise of Agency authority in the SAFE I rulemaking. As such, while NHTSA greatly appreciates the efforts of commenters to submit such views and thoroughly reviewed them as part of the Agency's continuous efforts to understand broader public perspectives on NHTSA's fuel economy responsibilities, such views do not directly bear upon today's final rule.

C. Finalized Approach

Today's final rule finalizes the proposal set forth in the CAFE Preemption NPRM. As such, this final rule repeals all aspects of the SAFE I Rule, both the codified regulatory text and the accompanying pronouncements about the scope of CAFE preemption. Specifically, the final rule repeals 49 CFR Sections 531.7 ("Preemption") and 533.7 ("Preemption"), as well as each Appendix B in 49 CFR Part 531 ("APPENDIX B TO PART 531—PREEMPTION") and Part 533 ("APPENDIX B TO PART 533—PREEMPTION"). In doing so, NHTSA's regulations will

[9] NHTSA, Corporate Average Fuel Economy Standards for Model Years 2024–2026 Passenger Cars and Light Trucks, 86 Fed. Reg. 49602 (Sept. 3, 2021).

return to the same state for which they existed throughout the nearly 50-year history of the Agency's CAFE program—in which no regulation existed to purport to broadly define the scope of EPCA preemption.

In finalizing this Proposal, NHTSA concludes that it lacked authority to dictate the scope of EPCA preemption enacted in Section 32919. The plain language of Section 32919 establishes a clearly executable preemptive framework that can be applied by any reviewing court in the absence of an Agency regulation purporting to further dictate EPCA's preemptive scope. This conclusion is not simply presupposition, but as NHTSA's Proposal referenced and many commenters subsequently emphasized, the self-sufficiency of Section 32919 is a straightforward historical observation demonstrated by the provision's repeated application by Federal courts across the country—both to uphold and to preempt various state and local laws. The text of Section 32919 does not mention any role for NHTSA in codifying binding preemption requirements, nor does it state that the Agency is conferred with preemption rulemaking authority. Instead, the statute is self-executing and suffices to control the preemption analysis. The courts retain their authority to decide preemption questions; furthermore, the Agency may, consistent with law, provide interpretations of CAFE preemption questions other than by legislative rule. Thus, repeal of the SAFE I Rule is not simply appropriate, but a necessary measure to ensure that NHTSA is acting within the appropriate scope of its authority under EPCA.

In addition, today's final rule also concludes that a repeal of the SAFE I Rule is appropriate irrespective of whether NHTSA had legal authority for the SAFE I rulemaking. Through both its regulations and preambulatory language, the SAFE I Rule sweepingly preempted expansive categories of state and local motor vehicle emissions regulations. In doing so, the SAFE I Rule imposed immutable preemption requirements of general applicability, while ignoring the substantially important federalism interests affected by such prohibitions. Many of the comments from states and local jurisdictions underscored this position, identifying specific state programs affected by the SAFE I Rule that those states had previously relied on to protect their citizens from environmental hazards and to meet federal obligations, such as attainment goals for National Ambient Air Quality Standards for criteria pollutants.[10] By imposing categorical preemption prohibitions without regard for such considerations, the SAFE I Rule impermissibly failed to account for legally relevant factors, such as reliance interests of states and local jurisdictions in longstanding programs potentially affected by the Rule. In doing so, the SAFE I Rule precluded potential avenues for a more tailored approach that considered programs

[10] *See, e.g.*, National Association of Clean Air Agencies, Docket No. NHTSA-2021-0030-0140 (June 10, 2021) ("For California and states that implement California's motor vehicle emissions program under Section 177 of the federal Clean Air Act, their GHG and ZEV programs are vitally important. Such programs enable long-term planning and yield critical emission reductions that will contribute significantly to states' abilities to meet their climate goals and their statutory obligations to attain and maintain the health-based National Ambient Air Quality Standards (NAAQS) for criteria pollutants.").

in a more particularized setting rather than prematurely overriding those federalism interests in a categorical manner.

Moreover, by purporting to preempt abstract categories of regulation, the SAFE I Rule's prohibitions were both categorical and anticipatory—largely precluding entire subjects of state regulations without analyzing important factual questions or variables, such as the particulars of state programs, their specific manners of implementation, or possible scientific developments that may affect the relevant technologies. Therefore, even if the SAFE I Rule constituted a legitimate exercise of the Agency's authority, it represented an overly broad attempt to preempt state and local laws that precluded more detailed, and therefore potentially more accurate, considerations of specific programs. As such, NHTSA considers the SAFE I Rule's categorical and anticipatory scope to express an inappropriately broad and restrictive view on EPCA preemption. Accordingly, independent from the authority question, the SAFE I Rule conflicts with the need for a more focused consideration of preemption issues and, as such, must be repealed.

Finally, as part of today's notice, NHTSA is also expressly emphasizing that language in the preambulatory statements of other rulemakings, including the SAFE I Rule, which purport to dictate the scope of EPCA preemption, should no longer be viewed as the position of the

Agency.[11] Indeed, several commenters expressed a view that those statements should be naturally understood as defunct upon a formal repeal of any attendant regulatory text.[12] In any event, given the degree to which many of these statements—especially in the SAFE I Rule—employ absolute language and purport to outright prohibit certain regulations, the Agency feels that it is important to make abundantly clear that these statements should not be read out of context to suggest that they remain current views of the Agency. This ensures that parties otherwise affected by such statements are not confused about whether the admonitions and prohibitions contained in the statements, which remain published in the Federal Register even after the repeal of the actual regulations from the Code of Federal Regulations, continue to apply.

II. Final Rule

A. This final rule is a proper exercise of NHTSA's reconsideration authority.

As emphasized in the Proposal, NHTSA, like any other Federal agency, is afforded an opportunity to reconsider prior views and, when warranted, to adopt new positions. Indeed, as a matter of good governance, agencies *should* revisit their positions when appropriate, especially to ensure that their actions and regulations reflect legally sound interpretations of the agency's authority and remain consistent with the agency's views and practices.

[11] The specific statements identified by the Agency are described further in Section II.B.iii.b. *See also infra* n.252 (listing statements appearing in rulemakings other than the SAFE I Rule).
[12] *See* State of California et al., Docket No. NHTSA-2021-0030-0403 (June 11, 2021); Center for Biological Diversity et al., Docket No. NHTSA-2021-0030-0369 (June 11, 2021).

The need for an ongoing reconsideration of prior positions applies to both reevaluations of an agency's statutory authority, as well as reassessments of policy decisions. Overwhelmingly, commenters to this Proposal did not question the general discretion of NHTSA, as a Federal agency, to reconsider either statutory or policy-based decisions. Indeed, most commenters expressly supported NHTSA's reconsideration efforts and articulated numerous reasoned justifications for the undertaking. The few commenters who opposed the reconsideration tended to focus on the adequacy of the *reasons* for the reconsideration rather than NHTSA's prerogative to conduct the reconsideration. Such objections are addressed below within the specific reconsideration basis to which they were directed. However, a small number of dissenting comments raised issues more broadly applicable to the reconsideration process.

i. The Agency's reconsideration authority applies irrespective of any changes in facts or circumstances.

Several commenters contended that the Agency lacks a sufficient legal basis to withdraw the SAFE I Rule, arguing that no legal or factual circumstances changed between the issuance of the SAFE I Rule and the Proposal.[13] At the outset, it is important to be clear that the procedural question of whether an agency may reconsider a prior action is separate from whether the reconsideration is itself reasonable. We discuss the first here, while we address the second issue below in Part II.B. NHTSA does not agree that no relevant legal or factual developments

[13] *See* National Automobile Dealers Association, Docket No. NHTSA-2021-0030 (June 10, 2021).

occurred following the SAFE I Rule. But even before reaching this question, the Agency stresses that the governing administrative law framework does not require that any such changes occur before an agency may reconsider a prior position. A change in factual circumstances is only one amongst a host of different reasons that may cause an Agency to reconsider a prior agency action. Agencies may reconsider an issue "for example, in response to changed factual circumstances, *or* a change in administrations."[14] Pure policy reconsiderations also remain sufficient grounds, with "evolving notions" about the appropriate balance of varying policy considerations constituting sufficient reason for a change in position.[15] This is all part of the natural and appropriate role of an agency engaging in informed rulemaking, which "must consider varying interpretations and the wisdom of its policy on a continuing basis."[16]

This reconsideration exemplifies the types of reassessments for which a change in facts is not required or even particularly pertinent. As described throughout this notice, NHTSA's repeal of the SAFE I Rule is especially necessary because the Agency no longer reads EPCA as providing NHTSA the authority to dictate the scope of preemption through regulations. This is principally a narrow legal determination, which focuses on whether Congress intended to provide the requisite rulemaking authority to the Agency. Such a question does not turn upon

[14] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005) (emphasis added).
[15] *N. Am.'s Bldg. Trades Unions v. Occupational Safety & Health Admin.*, 878 F.3d 271, 303 (D.C. Cir. 2017).
[16] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 838 (1984).

factual circumstances, but instead depends upon a statutory construction of Section 32919. Further, as discussed below, even if the prior rule was a valid exercise of its authority, NHTSA concludes that the SAFE I Rule was overly broad and restrictive as it ignored important reliance interests and distinctions within state and local laws.

Even so, NHTSA notes that new factual developments since the SAFE I Rule's 2019 promulgation have occurred. Commenters stressed many of these factual updates as illustrative of the sweeping scope of the SAFE I Rule. For example, since the SAFE I Rule's promulgation, several additional states have expressed a desire to adopt future motor vehicle emissions measures under Section 177 of the Clean Air Act.[17] Moreover, many commenters stressed that every successive year, additional information and scientific data emerges regarding the climate crisis.[18] Multiple other comments emphasized that technological progress on motor vehicle emissions reduction strategies creates a dynamic regulatory landscape in which compliance paths are more complex than the static assumptions in the SAFE I Rule.[19] Thus, even though a change in facts is not necessary for NHTSA's reconsideration to occur, the Agency disagrees with

[17] *See, e.g.* Edison Electric Institute, Docket No. NHTSA-2021-0030-0396 (June 11, 2021) (*"*Since the finalization of SAFE I, Nevada, New Mexico, Minnesota and Virginia have announced their intent to adopt California's criteria-pollutant, GHG, and ZEV regulations. Washington, which has already adopted California's criteria-pollutant and GHG standards, has announced its intent to adopt California's ZEV standards.").
[18] *See generally* Allergy & Asthma Network et al., Docket No. NHTSA-2021-0030-0299 (June 4, 2021).
[19] South Coast Air Quality Management District, Docket No. NHTSA-2021-0030-0446 (June 11, 2021).

several commenters who argued that no factual circumstances have changed since the SAFE I rulemaking occurred.

ii. The Agency can reconsider the SAFE I Rule without the need to announce new substantive positions on EPCA preemption.

Several other commenters opposed the Proposal by arguing that any repeal of the SAFE I Rule that did not announce a new substantive position on EPCA preemption was arbitrary and capricious. These comments especially criticized aspects of the Proposal, such as footnote 8, that expressly clarified that any new substantive conclusions on EPCA preemption were "outside the scope of this Proposal."[20] For instance, a joint comment submitted by a collection of entities, including the Competitive Enterprise Institute (CEI), labeled the Proposal "the first-ever assertion of regulatory cancel culture" because "the NPRM declines to debate the opinions it proposes to delete."[21] Ultimately, these commenters suggested that NHTSA could not repudiate the views of EPCA preemption announced in the SAFE I Rule without simultaneously replacing those views with a new substantive position on preemption.

NHTSA understands that many commenters feel strongly about the important policy dynamics underlying the scope of EPCA preemption. This applies both to commenters such as CEI, who support sweeping EPCA preemption and seek to defend the substance of the SAFE I

[20] CAFE Preemption NPRM, 86 FR at 25982 n.8.
[21] Competitive Enterprise Institute et al., Docket No. NHTSA-2021-0030-0411 (June 11, 2021).

Rule's scope,[22] and to commenters who prefer NHTSA to declare expressly that EPCA preemption is inapplicable to state programs.[23] Several such comments that oppose the rulemaking argue that unless the agency announces new substantive positions on EPCA preemption, it has failed to provide a legally adequate justification for a repeal.[24]

However, by advancing directly to substantive policy questions, such comments skip a critical step in the rulemaking analysis. As an agency, NHTSA's exercise of rulemaking authority is bound by specific statutory and legal frameworks that govern not only the substantive scope of available policies, but also the manner in which such policies may be

[22] *Id.*

[23] *See, e.g.*, Tesla, Inc. Docket No. NHTSA-2021-0030-0398 (June 11, 2021). This is not to say that all commenters advocated for the rulemaking to expand into substantive EPCA areas. In fact, a large number of commenters appeared to understand the narrow legal focus of this rulemaking, with many expressly supporting the Agency's bifurcated approach of first sorting out issues of Agency authority before grappling with substantive EPCA preemption questions. *See, e.g.*, Center for Biological Diversity et al., Docket No. NHTSA-2021-0030-0369 (June 11, 2021) ("While the substantive errors in the Rule's preemption analysis could have formed an independent ground for repeal, Commenters understand that NHTSA considers those issues to be "outside the scope of this Proposal" because NHTSA will not be '[r]eassessing the scope of preemption under EPCA' or 'announcing new interpretive views" in this proceeding.'"); Rivian, Docket No. NHTSA-2021-0030-0413 (June 11, 2021) ("Rivian agrees in the appropriateness to leave an affirmative announcement of the view that State GHG and ZEV programs are not preempted under EPCA for another rulemaking."); National Coalition for Advanced Transportation, Docket No. NHTSA-2021-0030-0310 (June 11, 2021) ("NCAT recognizes that NHTSA is not seeking comment on substantive interpretation of EPCA preemption").

[24] *See* American Fuel & Petrochemical Manufacturers, Docket No. NHTSA-2021-0030-0425 (June 11, 2021) (arguing that NHTSA's "recission of the SAFE I Rule would be unlawful" because the rulemaking "fails to explain how ZEV mandates and GHG tailpipe standards are not 'related to' the federal CAFE standards, a foundational requirement for a regulatory reversal such as the one NHTSA is proposing here.").

articulated.[25] Therefore, NHTSA may not proceed directly to the policy questions surrounding EPCA preemption without first carefully considering whether the manner in which its views are expressed is appropriate and permissible. In this respect, both the Proposal and final rule are based on issues that arise prior to reaching any substantive conclusions about EPCA preemption. Namely, this reconsideration principally evaluates the legal authority for NHTSA to issue legislative rules implementing Section 32919 and the overly broad form in which NHTSA promulgated those regulations. As such, this action addresses these threshold questions while establishing space for the Agency to more thoroughly consider whether, when, and how to express its views on the subsequent substantive matters, such as whether particular state and local programs are preempted. In fact, the Proposal expressly acknowledged that NHTSA continues to deliberate further about "the scope of preemption under EPCA" and in the future may "announc[e] new interpretative views regarding Section 32919."[26] But before doing so, NHTSA must ensure that the manner in which the issues are raised—including the manner in which the Agency has spoken about them in the past—conforms to the authority delegated to the Agency by Congress and is otherwise appropriate, as discussed in Part II.B. That is the focus of this rulemaking and a principal impetus for today's repeal of the SAFE I Rule.

[25] *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994) (en banc) (stressing that "[a]gencies owe their capacity to act to the delegation of authority, either express or implied, from the legislature").
[26] CAFE Preemption NPRM, 86 FR at 25982 n.8.

As described throughout this Final Rule, NHTSA has concluded that the SAFE I Rule exceeded the Agency's authority by attempting to dictate the scope of EPCA preemption through regulations. Upon such a determination, the most responsible and legally essential course of action is for the Agency to exercise its reconsideration authority to rectify the overstep. The importance of the policy interests underlying the EPCA preemption issue do not compel a different approach. Instead, they only underscore the need for NHTSA to ensure that when it attempts to speak to these notable policy issues, it only does so as properly authorized and through an appropriate scope.

Moreover, now that NHTSA has determined that the SAFE I Rule exceeded the Agency's authority for the reasons expressed in Part II.B.i. below and also impermissibly ignored important federalism interests without regard for the availability of a more circumscribed approach instead, as explained in Part II.B.ii. below, it would be problematic to delay a repeal of the Rule until new interpretative positions on EPCA preemption (following the appropriate process) can be formulated. Many commenters, and particularly local jurisdictions directly affected by the SAFE I Rule's preemption determination, urged a swift finalization of this rulemaking in order to resolve their federalism interests.[27] Although the Agency agrees with

[27] *See* District of Columbia Department of Energy and Environment, Docket No. NHTSA-2021-0030-0412 (June 11, 2021) ("The District of Columbia calls on the NHTSA to finalize this rule proposal as expeditiously as practicable. The District and other 177 states need regulatory certainty to implement clean cars programs for the benefit of the health and welfare of our residents."); National Coalition for Advanced

these commenters about the need to repeal the SAFE I Rule swiftly, NHTSA stresses that today's action is not intended to determine that any particular State or local law is or is not preempted. As evidenced by other comments' diversity and depth of views on the substance of EPCA preemption, applying Section 32919 to particular state programs or types of regulations requires a more careful and comprehensive analysis, that is attentive to the legal and factual issues presented by a particular action. As explained further in Section II.B.ii., these intricacies are best addressed through careful deliberation and attention to the factual context relevant to the respective preemption considerations. Accordingly, requiring new substantive views on EPCA preemption to accompany any repeal of the SAFE I Rule would require the Agency to either delay a repeal of the SAFE I Rule even though the Agency considers it an invalid rule or, conversely, formulate a new overly broad substantive view on EPCA preemption that risks similar overgeneralizations as exhibited in the SAFE I Rule. However, this false dichotomy is avoidable by first focusing on a repeal of the SAFE I Rule before subsequently—and separately—taking the time needed to fully consider how to best approach any nuanced substantive issues that remain, if the Agency determines that such action is necessary.

Finally, it is worth emphasizing that EPCA does not state that NHTSA *must* speak substantively on EPCA preemption. This clear reading of Section 32919 was affirmed by

Transportation, Docket No. NHTSA-2021-0030-0310 (June 11, 2021) (urging the Agency to finalize the repeal "as promptly as possible").

commenters both supportive of and opposed to the Proposal. For instance, a supportive comment submitted by the State of California, together with numerous other states and local jurisdictions, emphasized that "even if EPCA did give NHTSA that authority [for the SAFE I Rule], the statute does not compel NHTSA to issue such rules."[28] Similarly, a comment from the National Automobile Dealers Association (NADA), who opposed the Proposal, echoed the sentiment that the SAFE I Rule was "not specifically required by EPCA to be issued" as it was "not a necessary predicate to EPCA preemption."[29]

Such comments recognize, as they must, that EPCA is totally silent as to any role for NHTSA in further defining EPCA preemption. They simply disagree on what that silence means. But even construing this silence permissively, as commenters such as NADA urged,[30] whether to speak substantively about EPCA preemption is, at most, a matter of Agency discretion. In this respect, EPCA contrasts sharply with other enactments in which Congress expressly instructed NHTSA or DOT to promulgate implementing regulations about a particular subject. Examples of such enactments abound even within EPCA, such as the unambiguous instruction in Section 32902 that "the Secretary of Transportation *shall prescribe by regulation* average fuel economy standards for automobiles manufactured by a manufacturer in that model year."[31] In comparison

[28] State of California et al., Docket No. NHTSA-2021-0030-0403 (June 11, 2021).
[29] National Automobile Dealers Association, Docket No. NHTSA-2021-0030-0435 (June 10, 2021).
[30] *Id.*
[31] 49 U.S.C. 32902(a) (emphasis added). *See also infra*. nn.125-131.

to such statutorily mandated regulations, the silence of Section 32919 cannot reasonably be read as a requirement that NHTSA promulgate any particular preemption regulations or even opine on the substance of preemption at all. Under the framework advanced by these commenters, an agency could never return to silence after speaking substantively on a topic, even if it had good reasons to do so and the statute did not require the agency to speak on the issue. This unsustainable standard would permanently erode any NHTSA discretion to remain silent under Section 32919.

Therefore, regardless of the authority question, EPCA at most only afforded NHTSA discretion to decide how or even whether to speak on matters of preemption. Thus, even if Section 32919 is construed as commenters such as NADA urge, EPCA still must be read to permit NHTSA to remain silent on EPCA preemption. This includes neither codifying regulations on preemption nor making broadly applicable statements on EPCA preemption where the Agency has valid reason not to do so. And here, as discussed in Section II.B., NHTSA has identified multiple clear grounds to repeal the SAFE I Rule. Such silence remains a viable option because, as commenters across the board recognized, the self-executing language of

Section 32919 is fully capable of controlling the preemption question without the presence of Agency regulations.[32]

iii. The narrow scope of this reconsideration renders substantive policy issues raised in the comments outside of the scope of this rulemaking.

The narrow legal scope of this rulemaking renders many of the substantive issues raised in the comments irrelevant to NHTSA's reconsideration and repeal of the SAFE I Rule. Comments on both sides of the spectrum—both for and against the Proposal—fall outside of this narrow scope. The Agency carefully evaluated such comments, both to identify any nuances that may yet bear upon this rulemaking and to cultivate a greater understanding of how the public views broader issues associated with the CAFE program. Nevertheless, NHTSA does not consider such issues as informing the narrow legal focus of today's repeal of the SAFE I Rule. Several categories of such comments are identified below, along with an explanation of how they fail to intersect with the specific grounds that motivated this reconsideration.

[32] Emmett Institute on Climate Change and the Environment, Docket No. NHTSA-2021-0030-0218 (June 10, 2021) ("[w]e do not believe that such guidance—or a more formal preemption determination along those lines—is necessary in light of the self-executing nature of EPCA's preemption language, the statutory and legislative history of EPCA and its amendments, and legal precedent regarding EPCA's relationship to state and federal fuel economy standards."); Alliance for Automotive Innovation, Docket No. NHTSA-2021-0030-0400 (June 11, 2021) (acknowledging that any offending state programs are "automatically preempted under the terms of the statute. Federal courts can apply EPCA's preemption provision to any such law or regulation"); National Automobile Dealers Association, Docket No. NHTSA-2021-0030-0435 (June 10, 2021) ("NADA concurs with NHTSA's repeated suggestions that EPCA's express and implied preemption is self-executing. Consequently, the SAFE I Rule's regulatory language is *not* essential to effectuate EPCA's express and implied preemption of state laws governing or related to the fuel economy of new light-duty motor vehicles.") (emphasis in original).

Many commenters, both supportive of the Proposal and opposed to a repeal of the SAFE I Rule, advanced their views about the proper scope of EPCA preemption and, in particular, how "related to" in Section 32919 should be substantively construed. Some of these commenters expressly recognized that such views fell outside of the Proposal, but nevertheless included them in the event the Agency elected to delve into substantive issues in another context, such as an interpretation or in a subsequent action after this rulemaking.[33] Likewise, many commenters supportive of the Proposal identified what they viewed as the SAFE I Rule's erroneous legal conclusions on the scope of EPCA preemption, as part of their broader support for any action that repealed the Rule.[34] Other comments mistook the Proposal as setting forth substantive views and welcomed the new positions the Agency was assumed to have adopted.[35] Moreover, multiple comments opposing the Proposal sought to defend the SAFE I Rule on substantive grounds,

[33] *See, e.g.*, Emmett Institute on Climate Change and the Environment, Docket No. NHTSA-2021-0030-0218 (June 10, 2021) ("To the extent NHTSA believes a statement confirming EPCA's lack of preemptive effect on state vehicle GHG emission and ZEV standards would be useful and appropriate, it could issue interpretive guidance to that effect. However, we do not believe that such guidance—or a more formal preemption determination along those lines—is necessary").
[34] *Id*.
[35] *See, e.g.*, Tesla, Inc. Docket No. NHTSA-2021-0030-0398 (June 11, 2021) ("NHTSA's proposal to clarify that EPCA should not be read to preempt state emission standards that are contemplated and authorized by the CAA is welcomed."); Maine Department of Environmental Protection, Docket No. NHTSA-2021-0030-0249 (June 10, 2021) ("As NHTSA's Proposed Rule now acknowledges, this interpretation was flawed, for California's GHG emissions standards are not 'related to' and do not otherwise conflict with federal fuel economy standards simply because CO2 emissions correlate with fuel consumption The Department applauds this correction.").

labeling the original rulemaking a correct interpretation of EPCA.[36] These comments tended to focus on the meaning of "related to" under Section 32919 and essentially tracked the reasoning of the SAFE I Rule in construing the phrase's substantive scope.[37]

While all of these comments raise the important questions of how far EPCA's scope extends and which state programs may be affected by such a scope, as the Agency explained both in the Proposal and in today's final rule, those issues are distinct from the narrow legal considerations that factor into this rulemaking. NHTSA's statutory authority to codify standalone requirements for EPCA preemption is a separate question from whether the substance of those requirements exceeds the scope of Section 32919. Likewise, even if the Agency had authority for the SAFE I Rulemaking, it remains possible for NHTSA to have wielded this authority in an inappropriately broad or inattentive manner, irrespective of the ultimate substantive preemption scope propounded in such an action. Consequently, none of the grounds invoked in this rulemaking for a repeal of the SAFE I Rule depend upon a particular interpretation of EPCA's preemptive scope. As such, as NHTSA explained elsewhere in this notice, finalizing this rulemaking without delving into those issues presents the most responsible option, which best

[36] *See, e.g.*, National Automobile Dealers Association, Docket No. NHTSA-2021-0030-0435 (June 10, 2021) (stressing that the "the SAFE I Rule contains a well-reasoned analysis" before outlining the substantive points in the Rule to which NADA agreed).

[37] *See* American Fuel & Petrochemical Manufacturers, Docket No. NHTSA-2021-0030-0425 (June 11, 2021) (undertaking a statutory construction analysis of "related to" under Section 32919). *See also* Urban Air Initiative et al., Docket No. NHTSA-2021-0030-0423 (June 11, 2021) (discussing federal jurisprudence defining the scope of the term "related to").

satisfies the need for a swift repeal of the SAFE I Rule while preserving space for an ongoing thoughtful consideration of these complex substantive issues.

In a similar vein, several comments opposing the NPRM argued that NHTSA's Proposal was inadequately justified because the proposed repeal of the SAFE I Rule was not accompanied by a detailed economic analysis, such as a regulatory impact statement. These commenters, such as the American Fuel and Petrochemical Manufacturers (AFPM), contended that NHTSA could not repeal the SAFE I Rule without "fully analyz[ing] the impacts" or "examin[ing] the relevant data" behind economic impacts from this rulemaking.[38] For example, AFPM argued that such an analysis must undertake a detailed economic estimate of a litany of considerations, including "the foreseeable impacts" to "vehicle cost, jobs, low-income households, small businesses, etc.," as well as an evaluation of how possible programs that may be initiated by states following a repeal affect other estimates, such as electric vehicle pricing or the stringency of subsequent CAFE standards.[39] Other commenters argued similarly, insisting that a repeal of the SAFE I Rule would "almost certainly lead to" more stringent fuel economy standards and inflated vehicle prices, thereby eroding consumer choice.[40] Additional commenters propounding this view submitted their own voluminous impacts analyses of a repeal of the SAFE I Rule, which included submissions of material such as declarations from academics, published journal articles

[38] American Fuel & Petrochemical Manufacturers, Docket No. NHTSA-2021-0030-0425 (June 11, 2021).
[39] *Id.*
[40] Competitive Enterprise Institute et al., Docket No. NHTSA-2021-0030-0411 (June 11, 2021).

analyzing particular regulatory programs, and past regulatory analyses conducted by EPA and CARB regarding specific regulatory programs.[41]

To the extent commenters articulated these positions as reasons NHTSA failed to satisfy various Executive Orders, the National Environmental Policy Act (NEPA), and other broadly applicable requirements, those aspects of the arguments are addressed in Section III (Rulemaking Analyses and Notices).[42] However, insofar as those comments suggest that the absence of a detailed economic analysis inadequately justifies a repeal, NHTSA rejects such arguments as misconstruing the nature of this rulemaking.

As explained throughout this final rule, NHTSA has concluded that the SAFE I Rule was legally flawed in a manner that legally necessitates a repeal. First, as Section II.B.i. of the final rule concludes, NHTSA issued the SAFE I Rule in excess of its authority. Accordingly, the Agency believes that the only legally appropriate course of action is to repeal the SAFE I Rule in order to undo the legally invalid action. Similarly, as Section II.B.ii. of this notice explains, NHTSA also ignored significant and legally relevant factors when promulgating the SAFE I Rule. Overlooking these considerations also renders the SAFE I Rule legally invalid and in need of repeal. Each of these grounds is governed by a legal determination, such as the legal standards and questions of statutory construction applicable to an agency's delegation of authority. These

[41] *See* Urban Air Initiative et al., Docket No. NHTSA-2021-0030-0423 (including Attachments 2-9).
[42] Likewise, many of the reasons outlined here also apply to those rulemaking analyses sections.

principles of law dictate a repeal of the SAFE I Rule irrespective of the policy concerns or impacts asserted by such commenters, which cannot cure the legal deficits in the SAFE I Rule. Therefore, the concerns raised by such commenters do not alter either the legal frameworks or the legally necessitated outcomes described in Sections II.B.ii. and II.B.iii. of this notice.

Moreover, such commenters also fail to account for the fact that, through this repeal, NHTSA's regulations are simply returning to the status quo as it existed prior to the legally invalid action of the SAFE I Rule. Thus, in this rulemaking, NHTSA is not taking a position on whether any individual program is preempted or not. And, even after this final rule, the viability of individual state or local programs and any associated policy impacts from those programs will be dependent on a host of particularized and contingent variables. In light of this, it is difficult to project, even for illustrative purposes, the incremental impacts of this regulatory action.[43]

In addition, because the Agency does not consider an analysis of those programs in the abstract or aggregate appropriate, doing so here for purposes of analyzing impacts would risk the same sort of sweeping and overly broad preemption conclusions characteristic of the SAFE I Rule. As described in Section II.B.ii., the Agency has determined that the SAFE I Rule was both far too broad and too restrictive and did not take into account a host of legally relevant

[43] NHTSA expands on this same issue in the NEPA section of this final rule, which explains that a statutory construction analysis controls the question of whether Section 32919 delegated authority to NHTSA to promulgate express preemption regulations. This analysis, in turn, looks to the language of the statute to discern Congress' intent.

considerations, such as reliance interests, the important reasons for the state and local laws it sought to preempt, and, most importantly, the actual details of those laws. Accordingly, hypothesizing about the substantive scope of EPCA preemption for purposes of a cost-benefit analysis would undermine one of the principal goals of this rulemaking, which seeks to defer assessments of programs until the times and places in which they can be more particularly and thoroughly considered. Moreover, hypothesizing as such also further diminishes the extent to which the results of a cost-benefit analysis could inform this rulemaking because those programs are more appropriately and accurately considered in more particular contexts where it is not necessary to make abstract projections or theorize about programs or technologies that may not even exist yet.

Furthermore, in this repeal, the Agency is not declaring any particular program preempted or not preempted. Instead, this repeal simply makes the point that any such preemption analysis should be undertaken more narrowly and carefully and does not seek to alter the preemption landscape already established by Section 32919. In contrast, it was the SAFE I Rule that marked a departure from the Agency's longstanding practice of refraining from issuing EPCA preemption rules. In reality, as both the Proposal and this final rule have stressed, EPCA preemption is properly governed by the self-executing statutory language of Section 32919. That language remains in place, unchanged, irrespective of this rulemaking. The courts, of course, retain their usual authority to decide matters of EPCA preemption. In turn, the Agency may also

at some point offer interpretations as guidance on its views on questions of EPCA preemption, though not through the mechanism of a legislative rule. Nevertheless, the preemption framework established by the statutory language in Section 32919 continues to govern the ultimate preemption analysis.

Moreover, it is worth noting that the SAFE I Rule itself did not include a quantitative analysis of the costs or benefits that these commenters now argue should accompany its repeal, but rather only provided a "qualitative discussion of the impacts" of the preemption regulations it promulgated.[44] This is despite the fact that the SAFE I Rule purported to preempt many state and local programs that were already in place, which would have had significant economic effects. This provides a clear contrast to this final rule, which takes no position on whether any particular programs are preempted.

Various commenters raised other issues that are clearly outside the scope of this rulemaking. A joint comment submitted by the State of Ohio along with several other states did not explicitly support or oppose the Proposal, but simply expressed the view that by permitting California to seek a waiver, Section 209 of the Clean Air Act unconstitutionally violates the equal sovereignty doctrine by affording preferential treatment to the State of California.[45] The comment thus concludes that "any agencies that issue such a waiver are therefore acting

[44] CAFE Preemption NPRM, 86 FR at 51352.
[45] State of Ohio et al., Docket No. NHTSA-2021-0030-0355 (June 11, 2021).

unconstitutionally."[46] NHTSA need not wade into the substance of the equal sovereignty doctrine in response to this comment. This rulemaking is conducted solely by NHTSA, and any EPA adjudication of a California waiver application under Section 209 constitutes a separate, independent proceeding.[47] Repealing the SAFE I Rule merely removes the impermissible layer of regulatory preemption from NHTSA's own regulations. The broad preemption framework codified by the SAFE I Rule applied equally to all states and repealing this framework likewise refreshes the preemption analysis for the entire country. Accordingly, repealing the SAFE I Rule does not extend differential treatment to any state or local jurisdiction.

In addition, several commenters raised a variety of issues relating to the administration of the CAFE program, which do not inform the legal bases pertinent to today's repeal of the SAFE I Rule. These range from comments advocating for a particular stringency of any fuel economy standards later promulgated by NHTSA[48] to requesting a new interpretation of 49 U.S.C. 32902 in order to more expansively consider electric vehicles in the standard setting analysis.[49] While such commenters are encouraged to raise such issues in connection with future NHTSA rulemakings setting CAFE standards, this particular rulemaking does not touch on the standard setting analysis.

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[46] *Id.*
[47] *Supra* n.5.
[48] Consumer Reports, Docket No. NHTSA-2021-0030-0224 (June 11, 2021); Allergy & Asthma Network et al., Docket No. NHTSA-2021-0030-0299 (June 4, 2021).
[49] Rivian, Docket No. NHTSA-2021-0030-0413 (June 11, 2021).

Finally, NHTSA received over four hundred comments from individual commenters who expressed perspectives on the Proposal. The vast majority of these comments from individuals did not speak to the particular legal issues implicated in this rulemaking, but raised broader policy issues instead. A large number of these comments expressed opposition to the rulemaking. While submitted individually, by and large, these opposition comments appeared to be form comments or part of an unspecified letter writing campaign, as they frequently employed verbatim language. Specifically, an overwhelming number of the comments started with the exact same phrase: "California should not be deciding what kind of cars the rest of the country can buy, and here is why…"[50] While the reasons provided after this opening clause varied somewhat, they all pertained to substantive policy issues surrounding motor vehicle regulations rather than the narrow legal grounds necessitating a repeal of the SAFE I Rule. Frequent examples of the substantive policy concerns raised in these comments include: skepticism towards climate change and related environmental issues; objections to vehicle electrification; concerns about consumer choice in the availability of motor vehicles; and vehicle price concerns. Most of these comments also appeared directed more to a restoration of California's waiver for the Advanced Clean Cars program under the Clean Air Act, which, as both NHTSA and EPA have explained, is a separate proceeding from this rulemaking.[51] Finally, quite a few comments

[50] *See, e.g.*, Comment from Thomas Houghton, NHTSA-2021-0030-0028 (June 3, 2021).
[51] *Supra* n.5.

failed to raise any substantive policy concerns at all, but simply expressed political hostility towards a variety of subjects, especially including the State of California and the EPA.[52]

Apart from these form comments, several individual commenters expressed support for the Proposal. Their comments also focused on substantive policy issues or matters more connected to a California waiver under the Clean Air Act. Examples of such comments include expressions of hope that the Proposal would enable states to set stronger pollution control standards or beliefs that the proposed rule offered potential health-related benefits and opportunities to mitigate climate change.

Overall, the concerns expressed by these individual commenters were not about the merits of NHTSA returning to its longstanding approach to EPCA preemption, but rather about substantive issues connected to hypothetical state programs or policy goals which the commenters felt could possibly arise at some point in the future. For instance, a number of commenters suggested that a repeal of the SAFE I Rule would result in the proliferation of electric vehicles, and therefore expressed various concerns with vehicle electrification, such as an inability to satisfy unique or specific vehicle needs (*e.g.*, work functions), poor performance,

[52] To the extent these commenters associated this rulemaking with the EPA's reconsideration of California's waiver under the Clean Air Act or otherwise raised vague allegations that EPA was actually controlling this rulemaking, NHTSA reiterates again that both the NPRM and final rule were issued solely by NHTSA. Unlike the SAFE I and SAFE II Rules, this is not a joint rulemaking with EPA (or any other agency). *See also supra* n.5 (explaining that the EPA is conducting a separate, independent proceeding to reconsider its portions of the SAFE I Rule).

an insufficient electric grid, increased costs of electric vehicles, or misgivings about battery sourcing. Other commenters expressed broader policy concerns, such as advocating for carbon energy or arguing that air quality mitigation measures are matters of personal choice that should not be subject to regulation. Such substantive policy concerns, however, are beyond the scope of this rulemaking and NHTSA therefore does not address them here.[53] This rulemaking merely entails a narrow legal focus on the proper and prudent exercise of NHTSA's authority. The Agency's final rule neither promulgates Federal standards nor revives any standards of states or local jurisdictions. In fact, this final rule does not even change the scope of EPCA preemption under Section 32919, as NHTSA has repeatedly acknowledged that the self-executing statutory language controls such a scope and remains enacted, in full and unchanged, irrespective of the SAFE I Rule or this rulemaking.

[53] This also applies to comments filed by institutions or entities which based opposition or support for the Proposal on substantive policy grounds. *See, e.g.*, Sierra Club Massachusetts, Docket No. NHTSA-2021-0030-0326 (June 11, 2021) (raising generalized climate concerns); Allergy & Asthma Network et al., Docket No. NHTSA-2021-0030-0299 (June 4, 2021) (raising generalized health concerns arising from the climate crisis); The particular substance of any state or local policy does not control this repeal. Likewise, a repeal of the SAFE I Rule takes no position on how particular technologies may bear upon an EPCA preemption analysis. As such, this rulemaking is technologically neutral and does not seek to promote or discourage any specific vehicle technologies or emissions reductions strategies. Comments that endorse or criticize particular technologies, which were especially concerned with vehicle electrification, do not factor into the Agency's narrow legal determination in this repeal. *See, e.g.*, American Fuel & Petrochemical Manufacturers, Docket No. NHTSA-2021-0030-0425 (June 11, 2021) ("oppos[ing] technology-specific mandates, including zero emission vehicle (ZEV) mandates" by arguing that they "interfere with consumers' choices and are contrary to law"); *See also* Zero Emission Transportation Association, Docket No. NHTSA-2021-0030-0397 (June 11, 2021) (supporting policies that "increase the pace of zero emission vehicle deployment that are critical to decarbonizing the transportation sector").

Finally, even though many of the individual commenters expressly opposed the Proposal, NHTSA notes that many of these same comments frequently invoked reasons that actually support the rationale for the rulemaking. By far the most common theme developed in the individual comments opposing the Proposal was a concern for states' rights and skepticism of any approach that imposed an overgeneralized restriction on the ability of local jurisdictions to respond to the diverse needs of their respective communities.

These commentors opposed the Proposal based on a faulty assumption that NHTSA's rulemaking proposed to delegate the authority to California to set legally binding standards on the rest of the United States.[54] Of course, neither the Proposal nor today's repeal delegates any authority to California or elsewhere. This rulemaking does not even take a substantive position on the status of any individual program of a state or local jurisdiction. Instead, repealing the SAFE I Rule merely repeals an impermissible layer of prescriptive preemption requirements, which the Agency was not authorized to promulgate, and which improperly ignore legally relevant preemption considerations. Through such a repeal, NHTSA also removes unnecessary and inappropriate restrictions on potential policy flexibility and innovation at the state and local levels as it relates to motor vehicle emissions regulations. This additional flexibility at state and local levels may even address this theme expressed in many of these individual comments, which

[54] *See, e.g.*, Mark Franck, Docket No. NHTSA-2021-0030-0043 (June 3, 2021) ("California should not be deciding what kind of cars the rest of the country can buy. This damaging new rule, would allow California to make special regulations that the rest of us would be required to follow.").

consistently opposed measures that applied an overbroad or one-size-fits-all approach to state and local concerns.

B. NHTSA is finalizing its repeal of the SAFE I Rule in its entirety

After evaluating the public's input regarding the Proposal and further assessing the Agency's concerns regarding the SAFE I Rule, NHTSA is finalizing its proposed approach of repealing the SAFE I Rule in its entirety, including both the regulatory text and the other pronouncements that the Agency made in the document about EPCA preemption. The Agency concludes that this approach is both legally required and appropriate for several distinct reasons. First, as described further in Section II.B.i., the Agency lacked the authority to promulgate regulations on preemption, as the SAFE I Rule attempted to do. Second, as described in Section II.B.ii., regardless of whether NHTSA actually had authority for the SAFE I Rule, the Rule was still promulgated without regard for legally relevant and important considerations that should have informed the preemption analysis. Instead of accounting for those issues before fundamentally altering relied-upon federalism interests, the SAFE I Rule instituted a rigid and categorical preemption framework without regard for whether a narrower approach was available. Third, irrespective of a lack of authority or the Rule's overly broad scope, the SAFE I Rule still warrants repeal in order to mitigate the unnecessary complexity and potential confusion the SAFE I Rule injected into the EPCA preemption framework. By repealing this erroneous framework and refocusing the preemption analysis on the original statutory language, this final

rule also provides space for the Agency to more carefully and appropriately incorporate those considerations into any future action that may become necessary with respect to EPCA preemption.

In all of these matters, the Agency remains mindful that EPCA does not require NHTSA to speak substantively on EPCA preemption, and certainly not through the promulgation of legislative rules. Under the unambiguous language of EPCA, the Agency could indefinitely remain silent as to Section 32919 without running afoul of any congressional directive or statutory mandate. As such, even if the SAFE I Rule's supporters have policy preferences for wanting the Rule to remain, there is indisputably no statutory requirement for the Rule. Thus, upon reconsideration, NHTSA concludes that a rule of this kind, which suffers from legal deficiencies and was imprudent for the Agency to issue, is particularly appropriate for repeal.

i. NHTSA is finalizing its proposal to repeal the SAFE I Rule in full due to a lack of authority for the original rulemaking.

a. Section 32919 did not authorize NHTSA to dictate preemption in the manner attempted by the SAFE I Rule.

NHTSA concludes that a repeal of the SAFE I Rule is legally required because the Agency lacked the requisite authority to codify the standalone regulations promulgated by the SAFE I Rule. The Agency maintains the Proposal's view that in promulgating the SAFE I Rule, NHTSA attempted to exercise a legislative rulemaking function by establishing binding, express preemption requirements, which sought to control, rather than advise, the public (including states

and local jurisdictions). In order to set these regulatory mandates, Congress would have had to first provide authority to NHTSA to act in such a manner. However, the Agency has determined that Congress did not intend for Section 32919 to provide NHTSA authority to institute additional express preemption terms, or to codify the scope of EPCA preemption through legislative rulemaking.

1. The SAFE I Rule codified legislative rules, which sought to impose standalone preemption requirements.

Before describing the limitations on NHTSA's authority, the Agency first confirms the Proposal's understanding of the SAFE I Rule as codifying legislative rules, which sought to institute binding preemption requirements. NHTSA recognizes that although numerous commenters agreed with the Proposal on this issue, several commenters opposing the Proposal contested either the legislative status of the SAFE I Rule or whether the distinction even matters for this reconsideration. To be clear, NHTSA considers a repeal of the SAFE I Rule both appropriate and necessary for the reasons described throughout this final rule, irrespective of whether one considers the Rule to be legislative, interpretative, or any other form of agency statement. Nevertheless, NHTSA still views the SAFE I Rule as displaying the hallmarks of a legislative regulatory action. As such, the Agency starts the authority discussion with this issue.

In this respect, the Agency distinguishes between a legislative rule, "which is a rule that is intended to have and does have the force of law," and an interpretative rule, which "does not

have the force of law and is not binding on anyone."[55] For this reason, legal scholars have often noted that while interpretative rules may provide guidance to the public or "persuad[e a] court that the agency's interpretation is correct,"[56] they ultimately lack a binding effect, serving only to "advise the public."[57] As such, an interpretative rule "does not contain new substance of its own" but is simply a conduit for understanding a pre-existing obligation already established by the statute under interpretation.[58] In contrast, legislative rules have long been understood as imposing binding obligations that "affect[] individual rights and obligations."[59] Further, "the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes."[60] Consequently, for NHTSA to have validly promulgated legislative rules in the SAFE I Rule, Congress must have first provided the authority to the agency to do so.

[55] *Nat'l Latino Media Coal. v. F.C.C.*, 816 F.2d 785, 787–88 (D.C. Cir. 1987) (explaining further that "A valid legislative rule is binding upon all persons, and on the courts, to the same extent as a congressional statute. When Congress delegates rulemaking authority to an agency, and the agency adopts legislative rules, the agency stands in the place of Congress and makes law.").
[56] *See* Richard J. Pierce, Jr. & Kristin E. Hickman, Administrative Law Treatise §4.5 (6th Edition, 2020-1 Cum. Supp.) ("The agency's interpretative rule serves only the function of potentially persuading the court that the agency's interpretation is correct…Correspondingly, members of the public may choose for practical reasons to comply with an interpretative rule.").
[57] *See* Attorney General's Manual on the Administrative Procedure Act (1947) at 30 n.3.
[58] *Nat'l Latino Media Coal.*, 816 F.2d at 788.
[59] *See Morton v. Ruiz*, 415 U.S. 199, 232 (1974).
[60] *See Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979).

Within this backdrop, NHTSA views the SAFE I Rule as clearly intending to establish binding preemption requirements, which affirmatively prohibited programs of states and local jurisdictions. As described further below, both the regulatory text and the manner in which NHTSA contemporaneously described its rulemaking lead to the conclusion that the SAFE I Rule was not an effort to inform, but an effort to issue binding, prescriptive requirements with the force and effect of law. This conclusion is supported by multiple facets of the rulemaking, many of which were illustrated through the comments.

Several commenters to the Proposal disagreed that the SAFE I Rule was a legislative rule or that the distinction between a legislative and interpretive rule mattered. Although the Agency responds more specifically to such detailed concerns below, NHTSA nevertheless considers the legislative status of the SAFE I Rule ultimately a straightforward outgrowth of the regulatory background and applicable law. While courts and legal scholars have set forth numerous multi-part tests or thresholds for trying to find the demarcation point between interpretative and legislative rules, they all overwhelmingly seek to answer a question much different, and frequently more complicated, than that presented in this rulemaking. In the typical fact pattern, encountered by many courts, an agency seeks to characterize its own action as interpretative and valid absent the undertaking of notice-and-comment procedures, while challengers (often the regulated entities most affected by the action) argue that the rule alters their substantive

obligations and necessitates notice-and-comment procedures before promulgation.[61] As such, these multifaceted judicial doctrines seek to aid a reviewing court in reconciling the contradictory positions between the regulators and the regulated, in order to accurately understand how extensively the agency's action actually attempted to affect the rights and obligations of the regulated parties.

None of these circumstances apply to the SAFE I Rule or this Proposal. In the Proposal, NHTSA, as the agency that promulgated the regulations in question in the SAFE I Rule (after notice-and-comment), expressed its *own* concern that it had issued legislative rules in excess of its authority, and acknowledged that the rules attempted to impose substantive restrictions on regulated entities—namely, states and local jurisdictions.[62] In turn, the state and local governments that submitted comments overwhelmingly agreed with the Agency's characterization of its own rule. This sentiment was exemplified by a comment from California's South Coast Air Quality Management District, which directly expressed that "[t]he Preemption Rule has every indicium of being a legislative rule, which purported to change the legal rights and obligations of states by its action."[63] As described in greater detail in Section II.B.ii. of this final rule, these commenters provided tangible examples of actual hardships those states feared

[61] *See, e.g.*, *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165 (7th Cir. 1996).
[62] CAFE Preemption NPRM, 86 FR at 25985 ("The Agency has tentatively determined that these regulations are legislative rules, which seek to preempt state regulations in more specific terms than the express preemption provision already present in EPCA.").
[63] South Coast Air Quality Management District, Docket No. NHTSA-2021-0030-0446 (June 11, 2021).

would ensue from the extent to which the SAFE I Rule disrupted their state regulatory agendas and curtailed their previously understood federalism rights. These concerns make clear that, by and large, states and local jurisdictions considered the SAFE I Rule as more than simply interpretative guidance on an EPCA preemption restriction that already applied to them, but as a new regulatory measure that would serve to invalidate existing state programs and ones those entities hoped to formulate in the future.[64]

This is an understandable expectation, as both NHTSA and EPA also contemporaneously treated the SAFE I Rule as binding and effectuating change. The SAFE I Rule even expressly described the rulemaking action as "*effectuating* Congress's goal."[65] Similarly, commenters emphasizing this point also referenced language from the final rule preamble of the SAFE I Rule, in which the Agencies recognized that "'certain States may need to work with EPA to revise their [State Implementation Plans] in light of this final action" to remove purportedly preempted standards.[66] In the SAFE I joint agency action, EPA also characterized NHTSA's preemption regulations as determinative, noting that "in light of NHTSA's determinations" on EPCA

[64] State of California et al., Docket No. NHTSA-2021-0030-0403 (describing the SAFE I Rule's disruption of state programs and reliance interests in established regulatory approaches).
[65] NHTSA, EPA, Withdrawal of Waiver; Final Rule, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310, 51316 (Sept. 27, 2019) (emphasis added).
[66] South Coast Air Quality Management District, Docket No. NHTSA-2021-0030-0446 (June 11, 2021) (quoting NHTSA, EPA, Withdrawal of Waiver; Final Rule, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310, 51324 (Sept. 27, 2019)).

preemption, EPA's grant of a waiver for "California's program was invalid, null, and void."[67] These characterizations help to demonstrate that the regulated community and the public could reasonably have expected that NHTSA's SAFE I Rule regulations presented mandatory and legally effective requirements.

This view was echoed by many other commenters who supported this Proposal.[68] Even commenters who opposed the current Proposal and argued that the SAFE I Rule was merely interpretative (or contended the distinction failed to matter), still treated the SAFE I Rule as a regulatory linchpin that was critical to keeping states and local jurisdictions from pursuing regulatory programs that they would otherwise undertake. For example, one commenter likened the repeal of the SAFE I Rule to a "dereliction" of NHTSA's duty, akin to permitting states to run amok in "lawlessness" in the absence of regulations and removing the sole bulwark to "California's impending balkanization," all the while insisting that the "[t]he One National Program rules do not satisfy the intransitivity test for legislative rules" because their restrictions were present all along in Section 32919.[69] This concern, though, would only be valid if the SAFE I Rule were binding and not a mere interpretation. Thus, it becomes clear that, ultimately, all commenters—both supportive of and opposed to the Proposal—treat the SAFE I Rule as a

[67] NHTSA, EPA, Withdrawal of Waiver; Final Rule, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310, 51356 (Sept. 27, 2019).
[68] *See, e.g.*, Center for Biological Diversity et al., Docket No. NHTSA-2021-0030-0369 (June 11, 2021).
[69] Urban Air Initiative et al., Docket No. NHTSA-2021-0030-0423 (June 11, 2021).

sweeping measure, which was largely expected to bind regulated entities. In other words, as a legislative rule.

The SAFE I Rule, thus, was widely viewed as establishing new legal restrictions intended to broadly alter the pre-existing EPCA preemption landscape. As described in the Proposal, in the SAFE I Rule, NHTSA codified four provisions in the CFR, each of which purported to directly regulate the scope of preemption under EPCA. Specifically, NHTSA promulgated 49 CFR 531.7 and 533.7, both of which were nearly verbatim codifications of the statutory text, and an identical appendix B to both Parts 531 and 533, which included a description of certain state regulations also described as preempted. None of these provisions instituted any new compliance or enforcement standards relating to NHTSA's CAFE program. Instead, the provisions, by their own terms, solely sought to codify into NHTSA's regulations a binding framework to govern the scope of EPCA preemption.

As both the Proposal and many commenters pointed out, the imperative and mandatory language of the SAFE I Rule illustrates the degree to which the SAFE I Rule imposed demands upon regulated entities (and expected compliance) rather than helpfully advised them of a possible construction of pre-existing statutory language. As the Preamble to the SAFE I Final Rule described, these provisions sought to "ma[ke] explicit that state programs to limit or

prohibit tailpipe GHG emissions or establish ZEV mandates are preempted."[70] In announcing the SAFE I Rule, NHTSA repeatedly described the final rules in terms that appeared to confer upon them legally binding connotations. For instance, the Agency noted that through the final rule, "NHTSA intends to assert preemption"[71] and characterized the regulations as "implementing"[72] a preemption requirement. Subpart "a" of each appendix B to parts 531 and 533 even labels the regulatory text as "Express Preemption" provisions, before proceeding to categorically assert, in mandatory terms, what types of state laws were preempted.[73]

A few commenters sought to diminish the importance of such mandatory language, contending, for instance, that "nothing" would have practically changed had the Agency employed more permissive or advisory language in the SAFE I Rule instead of the imperative language used throughout both the codified text and preamble.[74] This argument's supposition is undermined by the numerous comments from states and local jurisdictions—the entities to whom such language was primarily directed—who consistently made clear that they understood the

[70] NHTSA, EPA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310 (Sept. 27, 2019).
[71] *Id*. at 51317.
[72] *Id*. at 51318.
[73] *See, e.g.*, 49 CFR Part 533, app. B(a)(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.").
[74] Urban Air Initiative et al., Docket No. NHTSA-2021-0030-0423 (June 11, 2021) (rhetorically asking "If the Agency had done this, what would change in the real world compared to what the Agency actually did? In a word, nothing.").

Rule's regulations as constricting their activities rather than merely advising how Section 32919 may be applied at some indeterminate point in the future. Moreover, the Agency's own statements in the SAFE I Rule disprove this argument, as they reveal a definitive expectation that states would curb their actions in order to meet the newly demanded scope of preemption.[75]

More fundamentally though, discounting the importance of the Agency's own language in the precise rulemaking record in question too narrowly focuses the legislative rule inquiry. Even the cases cited by opposing commenters on this issue, such as *American Mining Congress v. Mine Safety & Health Administration*, expressly recognized that all of the avenues and tests for distinguishing between legislative and interpretative rules are ultimately just different ways of asking whether "the agency intended to exercise" a delegated legislative power to promulgate rules that impose binding obligations with "legal effect."[76] As noted above, this inquiry is much more straightforward in a situation, such as here, where the agency itself believes that this is the intent of the rule and undertook the notice-and-comment procedures required under the Administrative Procedure Act (APA) to issue legally binding regulations, without in any way implying that those steps were optional. For this reason, *American Mining Congress* underscored that despite any of the more complicated analyses that may apply when an agency disagrees on a

[75] *See supra* nn.66-67.

[76] 995 F.2d 1106, 1109 (D.C. Cir. 1993) ("Our own decisions have often used similar language, inquiring whether the disputed rule has 'the force of law'. We have said that a rule has such force only if Congress has delegated legislative power to the agency and if the agency intended to exercise that power in promulgating the rule.") (internal citations omitted).

rule's legislative status, the entire question is resolved if in the rulemaking the agency simply "choose[s] explicitly to invoke its general legislating authority."[77] In such a case, the rule should be "presumably treat[ed]…as an attempted exercise of legislative power."[78]

Here, the SAFE I Rule clearly—and explicitly—expressed an understanding that the new rules created legal obligations that would bind states and local jurisdictions, as described above. Moreover, even the mechanics of the SAFE I Rule's promulgation demonstrate NHTSA's awareness that it was codifying legislative rules that instituted legal requirements. Commenters defending the SAFE I Rule stressed that the rulemaking undertook all of the procedural steps required by the APA for a legislative (but not an interpretative) rule.[79] This procedural regularity only underscores the SAFE I Rule's intended legislative function, as it illustrates the lengths the Agency went to ensure that the regulations codified by the SAFE I Rule were procedurally defensible and binding.[80] Moreover, the SAFE I Rule was codified into NHTSA's own

[77] *Id.* at 1111.
[78] *Id.*
[79] *See, e.g.*, National Automobile Dealers Association, Docket No. NHTSA-2021-0030-0435 (June 10, 2021) ("the regulatory language set out in the SAFE I Rule was adopted in full compliance with all applicable procedural requirements.").
[80] *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007) (describing how an agency's use of "full notice-and-comment rulemaking procedures" suggested the agency intended to promulgate a legislative rule). To be clear, the mere fact that an Agency requests comment on an action before finalizing it is not itself dispositive evidence that an action is a legislative rule, as there are many strong policy reasons for agencies to seek public input on documents beyond when they are expressly required to do so by statute. However, in those instances, the agency will generally make clear that the document at issue is an interpretation, policy statement, or other sort of guidance document, which stands in significant contrast to the approach taken in the SAFE I rulemaking.

regulations in the Code of Federal Regulations (CFR)—a step that courts, including *American Mining Congress*, have often considered helpful in understanding the Agency's intent.[81] The Agency also does not view the requirements in the Appendices as somehow procedurally cured or automatically interpretations simply because they appear in appendices rather than separately numbered regulations. It is not uncommon for agencies, including NHTSA, to include regulatory requirements in appendices.[82] The appendices here continued that approach, with the facial language of the appendices codified in the CFR continuously invoking the same binding language described throughout this final rule.

Finally, a joint comment submitted by the Urban Air Initiative, among others, raised an issue that highlights one of the most telling aspects of the SAFE I Rule's legislative character.[83] Specifically, after arguing the Rule did not satisfy governing tests for legislative rules, the comment reached the ultimate conclusion that the legislative versus interpretative distinction was irrelevant to the SAFE I Rule's viability. The comment contended that, either way, the SAFE I

[81] *Am. Min. Cong.*, 995 F.2dat 1109 ("an agency seems likely to have intended a rule to be legislative if it has the rule published in the Code of Federal Regulations"). NHTSA recognizes that, as at least one commenter pointed out, some subsequent cases have deemed a rule interpretative even if published in the CFR. *See, e.g.*, *Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994). While such cases may indicate that a CFR publication is not dispositive of the issue, they do not eliminate the relevance of this step as a helpful piece of the larger puzzle of identifying the agency's intent to codify binding regulations.

[82] *See, e.g.*, 49 CFR Part 564, Appendices A-B (listing information required to be submitted to the Agency regarding certain replaceable light sources in motor vehicles).

[83] Urban Air Initiative et al., Docket No. NHTSA-2021-0030-0423 (June 11, 2021).

Rule was a valid outgrowth of NHTSA's interpretative authority in administering EPCA and the CAFE program. To reach this conclusion, the comment focused at length on the concept of the "force of law" and the intransitivity test for legislative rulemaking, stressing that the SAFE I Rule embodied NHTSA's interpretative authority because it simply defined a pre-existing and already enforceable obligation set by Section 32919. And, in that sense, even if the SAFE I Rule's interpretation was binding, such a result was permissible as long as the APA's notice and comment procedures were followed. At least one other comment similarly remarked that whether the SAFE I Rule is legislative or interpretative "may not make much of a difference as a practical matter."[84] The theme in such comments is a baseline assumption that the SAFE I Rule did not "itself impose[ ] federal regulatory preemption" because, they stress, Section 32919 already imposed a self-executing preemption requirement.[85]

Ultimately, the Agency believes such comments erroneously comingled the substantive question about the scope of EPCA's preemption requirements with the unrelated question of whether the SAFE I Rule's regulations sought to codify prescriptive requirements that implemented Section 32919 in a legislative manner. The Urban Air Initiative's joint comment characterized these questions as one and the same, arguing that as long as the substance of Section 32919 supported the preemption requirements promulgated in the SAFE I Rule, the

[84] National Automobile Dealers Association, Docket No. NHTSA-2021-0030-0435 (June 10, 2021).
[85] *See id.*

legislative versus interpretative distinction was "irrelevant" because either way NHTSA was simply elucidating requirements that already existed under EPCA.[86] However, blending the substance and form in this way ignores a longstanding recognition that whether legislative rules validly prescribe conduct in a binding way is a distinct issue from whether the requirements those rules impose are consistent with either the underlying statute or regulation.

Rather than comparing the substantive scope of the underlying statute and the agency's subsequent action, the legislative rule inquiry instead looks to the degree to which the standard announced by the agency went "beyond a process reasonably described as interpretation" by turning the original statutory standard into a rigid threshold that prescribed specific conduct.[87] In this sense, an agency performs a "legislative function" by applying a "value judgement[]" to a broader statutory framework and turning that judgment into a static requirement, which imposes a rigid threshold for compliance.[88] In such situations, the rule announced by the agency is legislative in that it forms a standalone requirement, which is no longer tied "to the animating standard" of the statute, but "stand[s] free of the standard" as it is "self-contained" and "unbending."[89] Examples of these types of legislative rules span from a set of investment conditions fashioned from a general statutory standard of "reasonable costs"[90] to an agency's

[86] *See* Urban Air Initiative et al., Docket No. NHTSA-2021-0030-0423 (June 11, 2021).
[87] *See Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996).
[88] *Id.*
[89] *Id.* at 171.
[90] *See Cath. Health Initiatives v. Sebelius*, 617 F.3d 490, 496 (D.C. Cir. 2010).

mathematical analysis that turned a statutory standard into a requirement that a fence meet specific dimensions.[91] While the nature or type of rule resulting from the legislative undertaking may vary, the focus of the inquiry is on the transformation of a statutory standard into a set of specifically enumerated rules that prescribe conduct.

Importantly, this legislative rule inquiry is wholly distinct from the question about whether the legislative rules would be a permissible reading of the underlying statute or regulation. In fact, courts conducting these analyses often expressly make clear that the legislative rule determination does not require them to reach the question of whether those rules would have been subsumed within the respective scopes of the statutes or any other existing regulations that the agencies had already promulgated. For instance, through this legislative rule inquiry "[w]e may assume, without deciding, that the [requirements] are an extension" of the statute and "consistent" with existing regulatory provisions.[92] Even so, "neither assumption leads to the conclusion that the [requirements] represent an interpretation."[93] Instead, what matters is whether the agency performs merely an act of interpretation or instead operates in an essentially legislative capacity by crystallizing a broader statutory standard into specific prescriptive requirements.

[91] *See generally Hoctor*, 82 F.3d 165.
[92] *Id.*
[93] *Id.*

Applying this same framework, even assuming for purposes of discussion (like those courts) that the SAFE I Rule's regulations imposed a substantive obligation that was consistent with the "related to" standard in Section 32919, the regulations still undeniably prescribed conduct in a way that was legislative rather than interpretative. Specifically, the SAFE I Rule's regulations turned the baseline standard of Section 32919, "related to," into an entire list of specifically enumerated conduct that created a prescriptive threshold for EPCA preemption.

Under Section 32919, "a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under [Chapter 329]."[94] This statutory framework contains a general standard by which to evaluate the application of EPCA preemption: "related to." In the SAFE I Rule, NHTSA applied a "value judgment"[95] to this statutory standard by undertaking what the Rule called a "scientific" and "mathematical" evaluation of fuel economy and emissions concepts.[96] Through this endeavor, the SAFE I Rule fashioned a set of highly prescriptive requirements that precisely and rigidly dictated when a state or local jurisdiction's program "related to" fuel economy standards for purposes of EPCA.

[94] 49 U.S.C. § 32919(a).
[95] *Hoctor*, 82 F.3d at 170.
[96] NHTSA, EPA, Withdrawal of Waiver; Final Rule, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310, 51319-20 (Sept. 27, 2019) ("The foundational factual analysis involves the scientific relationship between automobile fuel economy and automobile tailpipe emissions of carbon dioxide. NHTSA discussed this scientific relationship in detail.").

For the question of whether the rule was legislative or interpretive, it is wholly irrelevant to determine whether those prescriptive requirements were reasonable understandings of the "related to" statutory standard. All that matters for the legislative rule analysis is that, once codified, the regulations from the SAFE I Rule served as standalone standards for EPCA preemption. The SAFE I Rule extrapolated from the original statutory standard and articulated express prohibitions which, once codified, were intended to and capable of fully controlling the preemption analysis in lieu of the original statutory language.[97]

For example, Appendix B to Parts 531 and 533 expressly declares the preemption of "any law or regulation of a State or a political subdivision of a State" *solely* based on the fact that the program in question "ha[s] the direct or substantial effect of regulating or prohibiting tailpipe carbon dioxide emissions from automobiles."[98] A similar standard is repeated multiple times in the SAFE I Rule's regulations, with subsection (a)(E)(2) also flatly preempting "any law or regulation" that "regulates or prohibits tailpipe carbon dioxide emissions automobiles,"[99] and subsection (b) codifying identical categorical thresholds for "implied preemption."[100] These categorical thresholds represent NHTSA's "scientific" and "mathematical" judgment in the SAFE I Rule as to how EPCA's animating "related to" standard would look as a prescriptive

[97] *See* 49 CFR Part 531, Appendix B(a)(E)(3).
[98] *Id.*
[99] 49 CFR 531.7(a)(E)(2).
[100] 49 CFR 531.7(b).

requirement. But in the SAFE I Rule, NHTSA went beyond just providing guidance about how NHTSA's views on the subject should inform a state or local jurisdiction who wished to understand how their program might fit within EPCA's "related to" standard. Instead, NHTSA announced those positions in the form of regulations of general applicability that formed their own regulatory standards. These new regulations were "self-contained" and "unbending" in that any programs that satisfied the strict regulatory text were now labeled as conclusively preempted by NHTSA. And, this approach prevented a more careful analysis of whether it is possible that any state or local standard that met the static preemption threshold imposed by these regulations may not actually "relate to" fuel economy for any particular reason (such as perhaps the fact-specific variables foreclosed from consideration as described below in Section II.B.ii.). In this sense, once in place, the SAFE I Rule's regulations were intended to functionally replace the EPCA preemption language in any analysis of whether a particular program was preempted, without a need to reference the original statutory text or underlying caselaw.[101] The SAFE I Rule even acknowledges the standalone nature of the new regulations, explaining that the codified

[101] NHTSA stresses that it is not necessary to substantively determine whether "related to" could be properly interpreted to include these concepts in order to reach this point, nor does the Agency make such a determination here. What matters is that, once codified, the regulation now forms the operative standard, which purports to be legally binding and capable of standalone application. In that sense, the regulation functions as a legislative rule, which requires legislative rulemaking authority to promulgate, no matter how proper or improper the substantive content of the rule may be.

"regulations are *operable* without regard to any specific Federal standards and requirements…or other parts of the Code of Federal Regulations."[102]

While Section II.B.ii. below explains how this inflexible standard inappropriately precludes individualized considerations, the self-contained nature of the standard also demonstrates how the SAFE I Rule's regulations operate as prohibitions that turn a broader statutory standard into a set of rules that states and local jurisdictions must follow. This process of fashioning a set of specific and prescriptive requirements out of an underlying statutory standard involves a legislative function of the agency and the rules that emerged from this process are legislative in nature. And the law is clear that an agency may prescribe conduct and issue such legislative rules only if provided the authority to do so by Congress.[103] EPCA provides NHTSA with no such authority.

2. EPCA did not authorize NHTSA to expressly establish new EPCA preemption requirements.

Once the SAFE I Rule's regulations are properly understood as seeking to impose binding legal requirements, it becomes clear that the Rule is premised on the need for NHTSA to possess the requisite authority to validly set such mandates. The Proposal generated a number of

[102] NHTSA, EPA, Withdrawal of Waiver; Final Rule, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310, 51315 (Sept. 27, 2019) (explaining how the SAFE I Rule was a standalone rulemaking action that did not need to accompany a CAFE standards rulemaking) (emphasis added).
[103] *See, e.g.*, *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986).

comments on this authority issue. A large number of those comments agreed with the Proposal's concerns about a lack of authority for the rulemaking, while several commenters defended the legitimacy of the Rule. But while these comments may have disagreed on the existence of authority or the extent to which NHTSA's authorities extended, they did not generally dispute the Proposal's recognition of the fundamental principle that an agency must possess authority to issue legislative rules.

As the Proposal explained, the regulatory authority of federal agencies extends only insofar as Congress permits.[104] Consequently, an agency "may act only when and how Congress lets [it]."[105] These restrictions extend to all aspects of an agency's regulatory activity—including a rulemaking and ultimately derive from Congress.[106] As such, the matters upon which an agency may promulgate rules imbued with the force and effect of law depend upon the extent to which the Agency has the appropriate statutory authority.[107]

Ultimately, as the Proposal expressed, since an agency lacks plenary authority, the delegation of one power to an agency does not necessarily include other powers, even if they are

[104] *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994) (en banc) (stressing that "[a]gencies owe their capacity to act to the delegation of authority, either express or implied, from the legislature").
[105] *Cent. United Life Ins. Co. v. Burwell*, 827 F.3d 70, 73 (D.C. Cir. 2016).
[106] *Id.*
[107] *See, e.g.*, *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (determining that a Department of Labor regulation exceeded the scope of authority delegated by a statute the agency administered).

related.[108] This applies even when the authority is analogous. For instance, the D.C. Circuit has rejected an agency's argument "that it possesses plenary authority," holding instead "that the fact that the Board is empowered" in a particular circumstance does not "mean[] the Board therefore enjoys such power in every instance" in which a similar question arises.[109] Accordingly, construing an agency's authority requires a close examination of the precise power delegated by Congress and how such authority may differ, even if slightly, from other authority that Congress may reserve.

The need for sufficient authority does not fade when an agency seeks to promulgate regulations expressly dictating preemption. In fact, as the Proposal expressed, the legitimacy of an agency's exercise of preemption power through legislative rulemaking is principally a question of the extent of authority delegated to the agency. As such, "in a situation where state law is claimed to be pre-empted by Federal regulation, a narrow focus on Congress' intent to supersede state law [is] misdirected."[110] Instead, when considering an agency's preemptive authority, "the inquiry becomes whether the federal agency has properly exercised its own delegated authority rather than simply whether Congress has properly exercised the legislative power."[111] An agency must draw preemption authority from definitive sources, as the governing

[108] *Ry. Labor Executives' Ass'n.*, 29 F.3d at 670 (en banc).
[109] *Id.*
[110] *City of New York v. F.C.C.*, 486 U.S. 57, 64 (1988).
[111] *Id.*

framework "does not create preemption authority out of thin air."[112] As the Supreme Court has made clear:

> a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency.[113]

In response to the Proposal, many commenters repeatedly expressed a concern that NHTSA lacked the authority for the SAFE I Rule.[114] In most cases, these comments echoed rationales expressed in the Proposal for why such authority was lacking.[115] Accordingly, many

[112] *See, e.g.*, *Mozilla Corp. v. FCC*, 940 F.3d 1, 78 (D.C. Cir. 2019) (determining that neither express nor ancillary authority nor other doctrines, such as the impossibility exception, could justify the FCC's assertion of preemption authority for a particular action).

[113] *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374.

[114] Center for Biological Diversity et al., Docket No. NHTSA-2021-0030-0369 (June 11, 2021); State of California et al., Docket No. NHTSA-2021-0030-0403 (June 11, 2021); South Coast Air Quality Management District, Docket No. NHTSA-2021-0030-0446; National Association of Clean Air Agencies (NACAA), Docket No. NHTSA-2021-0030-0140 (June 10, 2021); Maine Department of Environmental Protection, Docket No. NHTSA-2021-0030-0249 (June 10, 2021); Tesla, Inc. Docket No. NHTSA-2021-0030-0398 (June 11, 2021); Nevada Division of Environmental Protection, Docket No. NHTSA-2021-0030-0362 (June 11, 2021).

[115] A few comments go further and suggest that NHTSA not only lacks legislative authority with respect to EPCA preemption, but interpretative authority as well. *See, e.g.*, Northeast States for Coordinated Air Use Management, Docket No. NHTSA-2021-0030-0300 (June 11, 2021) (noting that "the agency lacks statutory authority to define the scope of EPCA preemption through legislative *or interpretative rules*") (emphasis added). In response, NHTSA stresses that it continues to believe that the Agency may offer interpretations or guidance as to its views. To be sure, NHTSA does not agree with other commenters who argue that this interpretative authority equates to the ability to issue binding interpretations. *See* Urban Air Initiative et al., Docket No. NHTSA-2021-0030-0423 (June 11, 2021). But the Agency nevertheless maintains the view expressed in the Proposal that NHTSA may properly announce

of them also read Section 32919 as silent on any role for NHTSA in further dictating the scope of EPCA preemption,[116] understood Section 32919's self-executing nature as actually foreclosing regulations that dictate additional express preemption requirements,[117] and viewed general delegations of authority to the Secretary of Transportation insufficient to support such a sweeping act of preemption.[118]

These comments reinforce the Proposal's substantial doubts about NHTSA's authority to promulgate the SAFE I Rules, which the Agency crystalizes in this final rule into a firm conclusion that the requisite authority does not exist. The lack of legal authority is most clearly illustrated by the inadequacy of the two grounds articulated by the SAFE I Rule (and comments who supported that position here) for the proposition that NHTSA enjoys authority to promulgate the regulations: (1) the general rulemaking authority of the Secretary of Transportation; and (2) more generalized inferences from the spirit of EPCA. The Agency finalizes its view that neither of these grounds suffices.

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interpretative views about matters of EPCA preemption if so desired. *See* CAFE Preemption NPRM, 86 FR at 25988 ("While NHTSA still retains interpretative authority to set forth its advisory views on whether a state regulation impermissibly conflicts with Federal law, such authority does not support the power to codify binding legislative rules on the matter.").

[116] *See, e.g.*, Center for Biological Diversity et al., Docket No. NHTSA-2021-0030-0369 (June 11, 2021) (stressing that Section 32919 "does not mention the Secretary or contemplate Federal regulations 'to carry out' congressional intent to preempt State and local laws.").

[117] *See, e.g.*, National Coalition for Advanced Transportation, Docket No. NHTSA-2021-0030-0310 (June 11, 2021).

[118] *See, e.g.*, Emmett Institute on Climate Change and the Environment, Docket No. NHTSA-2021-0030-0218 (June 10, 2021) ("NHTSA also lacked the ancillary authority to adopt the 2019 Rule.").

a. No direct statutory authority enables NHTSA to promulgate the SAFE I Rule.

First, NHTSA finalizes the view expressed in the Proposal that no direct statutory source exists for the Agency to derive authority to conduct the SAFE I rulemaking. In this respect, NHTSA focuses, in particular, on the two statutory provisions that commenters supporting the SAFE I Rule especially relied upon to argue that such authority existed: 49 U.S.C. 322 and 49 U.S.C. 32919. Neither of these provisions enables a legislative rulemaking action to establish new binding preemption requirements.

This analysis starts with Section 322 because that is the only source of statutory authority invoked in the SAFE I Rule. Notably, even though EPCA speaks directly to the fuel economy preemption issue in Section 32919, in the SAFE I rulemaking, NHTSA did not invoke Section 32919 to claim the authority to issue preemption regulations.[119] Instead, NHTSA claimed authority based on the Secretary of Transportation's "general powers" under Section 322 to "carry out" all responsibilities across the entire Department of Transportation. NHTSA argued at the time that this authority was sufficient because the Agency could not carry out its CAFE standard-setting responsibilities in the face of state regulation that undermined its authority.[120] In the SAFE I Final Rule's most direct discussion of the issue of authority to promulgate

[119] *See generally* NHTSA, EPA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310, 51320 (Sept. 27, 2019).
[120] *See, e.g.*, *id.* at 51317.

regulations concerning preemption, NHTSA linked the perceived conflict between EPCA's purposes and state regulation to the general delegation of authority to the Secretary to carry out his duties. Specifically, after describing Section 322 as an express authorization for the Secretary of Transportation "to prescribe regulations to carry out her duties and powers," and noting that Chapter 329 of Title 49 delegated the Secretary's authority to NHTSA for EPCA purposes, the Agency concluded in the SAFE I Rule that it "ha[d] clear authority to issue this regulation under 49 U.S.C. 32901 through 32903 to effectuate a national automobile fuel economy program unimpeded by prohibited State and local requirements." [121] This is because in the SAFE I Rule the Agency characterized that rulemaking as simply "carry[ing] out" the preemption scope of Section 32919.[122]

NHTSA concludes that the general authority for the Secretary to "carry out" his responsibilities across the entire Department of Transportation cannot supplant the otherwise strong indication that legally binding regulations on EPCA preemption exceed the scope of the Agency's authority. Nothing in the comments undermines the Proposal's straightforward recognition that Section 322 contains statutory language of broad applicability that extends well beyond the CAFE program and, indeed, well beyond NHTSA. It continues to seem especially peculiar to derive preemption authority from Section 322 when EPCA already contains an

[121] *Id.* at 51320.
[122] *Id.*

express preemption provision, which does not provide NHTSA with a role in further defining that preemption with the force and effect of law. Since Congress already crafted a specific provision to describe EPCA preemption in Section 32919, the more general terms of Section 322 would seem of much clearer applicability if Section 32919 had otherwise delegated NHTSA certain authorities or responsibilities to carry out. But as discussed below, Congress did not, in EPCA, appear to charge NHTSA with any authority or responsibility with respect to preemption regulations. Construing Section 322's general terms to independently provide NHTSA with the authority to issue legislative rules on EPCA preemption that override Section 32919's notable silence as to any role for NHTSA would require an extraordinarily expansive reading of Section 322, which neither Section 322 nor EPCA could support.

Moreover, inserting Section 322 into EPCA in such a manner would require a strained reading of EPCA, which contradicts the specific approach Congress consistently employed throughout EPCA to provide authority to the various agencies targeted by the statute. Unlike some other enactments, which are primarily aimed at enabling a particular agency or creating a specific program, EPCA sought to establish an interagency framework for energy independence, which spanned a host of agencies and their respective jurisdictions. For instance, at various points, Congress directs portions of EPCA to a variety of agencies, including but not limited to the Department of Transportation, the Environmental Protection Agency, the Department of

Justice, the Federal Trade Commission, the Federal Maritime Commission,[123] and the Federal Power Commission.[124] Consistent with this approach, the facial language of EPCA tends to clearly state when and where Congress intended to galvanize an agency into acting on a particular provision. For instance, even just taking a few non-exhaustive examples from the original language of the specific section of EPCA dedicated to automotive fuel economy:

- Section 501(1) specifies that "[t]he Secretary may prescribe such rules as may be necessary to implement this paragraph," which concerns the definitions of an automobile.[125]
- Section 501(2) links the term passenger automobile to that "which the Secretary determines by rule."[126]
- Section 502 describes the circumstances, in detail, by which "the Secretary shall prescribe, by rule, average fuel economy standards."[127]
- Section 505(a)(3) requires that "the Secretary shall prescribe rules setting forth the form and content of the reports required under" the Section.[128]

[123] *See generally* The Energy Policy and Conservation Act of 1975, Public Law 94–163, 89 Stat. 871.
[124] *Id.*
[125] *Id*. § 501(1) ("The term 'automobile' means…").
[126] *Id.* § 501(2) ("The term 'passenger automobile' means…").
[127] *Id.* § 502 ("Average Fuel Economy Standards Applicable to Each Manufacturer").
[128] *Id.* § 505(a)(3).

- Section 505(b)(1) describes the specific actions that the Secretary of Transportation and the EPA Administrator may take, such as conducting hearings, "for the purpose of carrying out the provision of this part."[129]
- Section 506(a)(3) requires that "the form and content" of labeling requirements "shall be prescribed by the EPA Administrator by rule."[130]
- Section 508(a)(3)(D) permits that "the Secretary may prescribe rules for purposes of carrying the provisions of this paragraph," which pertains to civil penalties.[131]

The remainder of EPCA is replete with similar examples of Congress specifically—*and expressly*—speaking to the ability or need for the agencies to implement its provisions through a variety of regulatory actions. In contrast, as noted by both the Proposal and certain commenters, Section 32919 (originally Section 509 of EPCA) is notably silent as to any role of the agency in administering—much less defining—a preemption scheme. This is despite other preemption provisions in EPCA continuing Congress' general trend throughout the statute of more specifically enumerating the role of the agency when contemplating further agency implementation. For instance, as the Proposal noted, the structures of other parts of EPCA expressly charge an agency to administer preemption through regulations, and no such charge

[129] *Id.* § 505(b)(1).
[130] *Id.* § 506(a)(3).
[131] *Id.* § 508(a)(3)(D).

exists for NHTSA. For example, a precursor to the Department of Energy, the Federal Energy Administration, was expressly directed elsewhere in EPCA to "prescribe . . . rule[s]" that preempt state and local appliance energy conservation standards.[132]

This is also consistent with the manner in which Congress has provided preemption authority to the Department of Transportation in other contexts. The Proposal identified several of such examples, recognizing that, other DOT statutes expressly provide a regulatory, or even adjudicatory, role for the Department in the preemption analysis. For instance, in the transportation of hazardous materials context, 49 U.S.C. 5125 directs the Secretary to adjudicate applications on whether a particular state standard is ''substantially the same'' as Federal law and, as such, exempted from statutory preemption.[133] Similarly, 49 U.S.C. 31141 establishes a very detailed role for DOT in reviewing and preempting state law pertaining to commercial motor vehicle safety.[134] Many of the seminal cases in the Supreme Court's preemption

[132] *See* 42 U.S.C. 6297.
[133] *See* 49 U.S.C. 5125(d) (The Secretary has delegated this responsibility to another DOT operating administration, the Pipeline and Hazardous Materials Safety Administration (PHMSA)).
[134] See 49 U.S.C. 31141 (expressly stating that ''[a] State may not enforce a State law or regulation on commercial motor vehicle safety that the Secretary of Transportation decides under this section may not be enforced'' before enumerating multiple subsections that define an adjudicatory role for the DOT, complete with preemption standards and procedures). The Secretary has delegated this responsibility to another DOT operating administration, the Federal Motor Carrier Safety Administration (FMCSA).

jurisprudence also concerned statutory schemes that expressly delegated preemption authorities to the agencies in question.[135]

A few comments disputed the salience of these other preemption examples, with a joint comment submitted by CEI especially delving into the particulars of these preemption schemes. After analyzing each of these preemption statutes in turn, CEI concluded that those statutory preemption provisions in which Congress explicitly prescribed an agency's role all "have one thing in common:" a limited preemption scope that necessitates an agency's subsequent involvement, oftentimes through adjudication, to "fine tune the scope of preemption."[136] CEI's joint comment stressed that, in contrast, Section 32919's silence as to any role for NHTSA was simply "a reflection of the preemption's absoluteness."[137] In doing so though, CEI's comment demonstrates a critical difference in Section 32919 and these other statutory preemption provisions. In those other statutory preemption provisions analyzed by CEI's comment, Congress indisputably enumerated a preemption framework in which the agency in question played an active role in legally determining how statutory preemption applied to particular states and programs. In contrast, Section 32919 enumerates no such role for DOT or NHTSA, nor does it

[135] For example, in a set of cases evaluating the preemption of certain state tort law relating to medical device product liability, the Supreme Court analyzed U.S. Food and Drug Administration (FDA) regulations that specifically defined when preemption occurred under the applicable statute, the Medical Device Amendments (MDA). *See generally Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (plurality opinion); *Riegel v. Medtronic, Inc*., 552 U.S. 312 (2008). *See also* 21 U.S.C. 360k; 21 CFR 808.1.
[136] Competitive Enterprise Institute et al., Docket No. NHTSA-2021-0030-0411 (June 11, 2021).
[137] *Id.*

even leave room for subsequent implementation by the Agency. Instead, the self-executing terms of Section 32919 demonstrate that Congress intended the provision to operate without any ensuing requirements or legal determinations imposed by the Agency. Through its codification of new prescriptive requirements on EPCA preemption, the SAFE I Rule involved NHTSA taking the type of subsequent agency action not intended by Congress. Reading Section 32919 to permit NHTSA to promulgate binding regulations on EPCA requires an acceptance that NHTSA may authoritatively determine the reach of the self-executing (and legally self-sufficient) obligations stemming from the statute. But as CEI's comment highlights, Section 32919 seems to clearly *not* want the Agency to "fine tune" the legal mechanics of EPCA's preemptive scope.[138] But that is exactly what the power to issue legislative rules under Section 32919 would allow.

CEI's comment also argues that the examples from those other statutory provisions cannot inform this rulemaking because in those enactments Congress contemplated an adjudicatory role for the agencies rather than the rulemaking action undertaken in the SAFE I Rule. NHTSA does not believe this distinction negates the comparative value of those provisions. Of course, the SAFE I Rule was a generally applicable rule, not an adjudication or even simply an administrative enforcement action against any particular party. Even so, the preemption statutes described both in the NPRM and herein remain relevant comparisons even

[138] *Id.*

when they provide adjudicatory rather than rulemaking roles for an agency. In either case, the Agency is still exercising a core administrative decision-making function to implement the preemption statute in a legally binding way—adjudication just does that on a case-by-case basis whereas a rulemaking does that all at once.[139] In both cases, the question remains whether Congress intended the agency to further implement the statutory preemption scheme through legally enforceable agency action. The other statutory examples demonstrate that when Congress so intends agency implementation, the statutes in question facially articulate that role clearly and discernably in the text.

To the extent the differences in rulemaking and adjudication are pertinent to today's rulemaking, such differences only further support NHTSA's conclusions. For instance, CEI's comment stresses that these other statutory examples only articulate a role for agencies because "subsequent regulatory adjudication" is needed to implement their preemption frameworks (in contrast to Section 32919, which CEI characterizes as "clear").[140] However, even assuming CEI's premise is true, this only further supports the Proposal's conclusion by suggesting that adjudication—*not rulemaking*—was Congress' preferred method to statutorily engraft an agency into the legal process of formulating the scope of an express preemption provision. If so, the SAFE I Rule's attempt to use rulemaking to legally affect EPCA's preemptive scope appears

[139] *See, e.g. SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (discussing overlap between the adjudicatory and rulemaking functions of an agency).
[140] *See* Competitive Enterprise Institute et al., Docket No. NHTSA-2021-0030-0411 (June 11, 2021).

even further from the scheme intended by Congress. Ultimately, no matter how these provisions are read, it is undeniable that Section 32919 stands apart from other statutory preemption schemes in which the agency is charged with a more active role in setting the scope of preemption in a legally binding way.

Commenters' other efforts to explain away Section 32919's silence are similarly unavailing. In particular, CEI's joint comment proffers two "alternative explanations" for the statute's silence. In the first, the comment argues that in enacting EPCA, Congress was simply naïve, unable "in 1975 to anticipate the brazenness of 21st century 'climate ambition,'" so presumably unaware of what CEI deems an eventual need for NHTSA to legally intercede on EPCA preemption.[141] However, this fails to account for the fact that the preemption provision of EPCA has been the subject of litigation for decades and, thus, questions about its scope are not new, even if the specific aspects of this issue change over time. Despite this, Congress has not materially changed the statutory language governing EPCA preemption, with the current language in Section 32919 remaining substantially the same as the language originally enacted in Section 509 of EPCA. Further, even if the recent actions by California and other states are somehow different than earlier preemption questions, it would not change what authority EPCA, as it is currently enacted, provides NHTSA.

[141] Competitive Enterprise Institute et al., Docket No. NHTSA-2021-0030-0411 (June 11, 2021).

Moreover, CEI's comment suggests that Congress perhaps intentionally eschewed a more precise description of delegated authority, preferring instead to tacitly provide authority through silence to avoid "foster[ing] confusion and uncertainty." This position is both counterintuitive and disproved by EPCA's express text. First, it strains credulity to read EPCA's silence as Congress' concerted effort to still provide authority to the agency, but just in a more clear and unambiguous way than if it had done so expressly. As the rest of EPCA demonstrates, Congress understood how to carve out a legal role for an agency in a multitude of matters, including preemption, even when that role involved a complicated adjudicatory scheme. Moreover, since an agency's rulemaking actions must always fall within the scope of statutory authority, if Congress had any concerns about how that authority could be misapplied, it could have easily enacted language that set the parameters for any implementing agency regulations (as it did in Section 327 of EPCA).[142] As such, there is no reason to believe that Congress would have suddenly become wary of precisely describing such authority when it reached Section 32919. And a construction that requires such a leap does not offer the most reasonable reading of the statute.

Finally, at least one other commenter sought to diminish this contrast in statutory approaches by focusing not on the actual statutory language in question, but instead, on the legal

[142] *See* The Energy Policy and Conservation Act of 1975, Public Law 94–163, 89 Stat. 871, section 327(b), recodified as amended at 42 U.S.C. 6297(d).

doctrines underpinning administrative law. Specifically, a joint comment by the Urban Air Initiative argued at length that the Proposal's doubts about the delegation of statutory authority for the SAFE I Rule contradicted the Supreme Court's application of administrative law principles in *City of Arlington v. FCC.*[143] The comment presented *City of Arlington* for the proposition that since NHTSA administers the broader CAFE program and Section 32919 does not expressly prohibit the Agency from promulgating implementing regulations on EPCA preemption, the silence of Section 32919 should not serve as a barrier to NHTSA's SAFE I rulemaking authority.[144] As such, the comment concluded that the Proposal's approach would too finely parse an agency's authority on a provision-by-provision basis and undertake an unmanageably granular review of authority for federal administrative agencies.

NHTSA views this concern as unfounded and depending upon a protracted reading of *City of Arlington*. In *City of Arlington*, the Supreme Court reviewed a declaratory ruling by the Federal Communications Commission, which contained the agency's interpretation and subsequent implementation of its own regulatory jurisdiction under the Telecommunications Act of 1996.[145] The question presented in the case was "[w]hether ... a court should apply *Chevron* to ... an agency's determination of its own jurisdiction."[146] The Court ultimately held that *Chevron*

[143] Urban Air Initiative et al., Docket No. NHTSA-2021-0030-0423 (June 11, 2021) (discussing 569 U.S. 290 (2013)).
[144] *Id.*
[145] *See generally City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290 (2013).
[146] *Id.* at 295 (ellipses in original).

deference should apply because, at their core, all agency constructions of a statute present jurisdictional issues.[147] This is because, the majority reasoned, agencies are always bound by statute, which renders any departure from a statute's intended scope or meaning also a transcendence of the agency's jurisdiction.[148]

The Urban Air Initiative's joint comment contends that, in light of *City of Arlington*, the Proposal's focus on whether Section 32919 confers rulemaking authority is an "empty distraction" and demonstrative of an overly burdensome undertaking that too narrowly searches for questions of authority or agency jurisdiction.[149] Read properly though, *City of Arlington* actually underscored the appropriateness of the Agency's concern about its own authority. The Urban Air Initiative's comment advances *City of Arlington* to argue that NHTSA need not worry about its statutory authority because no special class of jurisdictional questions exists. But the *City of Arlington* majority made clear that this is only because *all* questions about an agency's actions are jurisdictional. At base, *City of Arlington's* holding illustrates the exact point repeated throughout this rulemaking: because agencies have no plenary jurisdiction, agencies' "power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires."[150]

[147] *Id.*
[148] *Id.* at 299-300.
[149] Urban Air Initiative et al., Docket No. NHTSA-2021-0030-0423 (June 11, 2021).
[150] *City of Arlington, Tex.*, 569 U.S. at 297–98.

As a result, any time the agency implements a statute the question "is always whether the agency has gone beyond what Congress has permitted it to do, there is no principled basis for carving out some arbitrary subset of such claims as 'jurisdictional.'"[151] This is even apparent when the Court's phrase of "empty distraction" is read in its full context: "The [jurisdictional] label is an *empty distraction* because every new application of a broad statutory term can be reframed as a questionable extension of the agency's jurisdiction."[152] Consequently, far from ignoring this precedent as the comment claims, NHTSA views this rulemaking as conducting the precise analysis contemplated by the Court—ensuring that its regulatory activities conform to their governing statutory authorities.[153]

Moreover, even the broader holding of *City of Arlington* supports NHTSA's conclusions in this rulemaking. The Court's ultimate holding in the case is that, because all questions are essentially jurisdictional, an agency should be entitled to *Chevron* deference when construing the scope of its statutory authority, even when those questions concern the subjects on which an

[151] *Id.*
[152] *Id.* at 300 (emphasis added).
[153] Similarly, the joint comment submitted by the Urban Air Initiative argues that because these issues are irrelevant, NHTSA is simply manufacturing issues to conceal the "political pretext" for a repeal of the SAFE I Rule. *See* Urban Air Initiative et al., Docket No. NHTSA-2021-0030-0423 (June 11, 2021). But this contradicts the authorities cited here, which encourage an agency to closely assess its statutory authority, as NHTSA is doing in this rulemaking. These commenters may disagree with NHTSA's ultimate conclusions in this rulemaking, but dismissing the concerns surrounding the SAFE I Rule as merely "pretextual" ignores the litany of legitimate issues articulated in this rulemaking, as well as the substantial number of thoughtful comments expressing additional concerns about the SAFE I Rule.

agency may regulate.[154] The *Chevron* doctrine is, of course, a multi-dimensional analysis, and thus deference to a reasonable interpretation only arises in the first place if the statutory language is ambiguous.[155] Here, NHTSA views the lack of rulemaking authority as a clear and unambiguous reading of Section 32919, for all of the reasons described herein. However, even if Section 32919 were considered to be ambiguous on the existence of authority, as several commenters contended, the *City of Arlington* framework stressed by those commenters still supports extending deference to NHTSA for its determination in this repeal that the Agency lacked authority to promulgate the SAFE I Rule. In fact, if such an ambiguity were deemed to exist, that is the precise type of determination for which *City of Arlington* made clear deference should apply: "[t]he question here is whether a court must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority (that is, its jurisdiction)."[156]

Similarly, *Chevron* also does not support a claim that the SAFE I Rule was tacitly authorized in order "to fill any gap left" by Congress in Section 32919's statutory scheme.[157] *Chevron* and its progeny recognize that, in some instances, statutory ambiguities or "gaps" in

[154] *City of Arlington, Tex.*, 569 U.S. at 297–98.
[155] *See generally Chevron, U.S.A., Inc.*, 467 U.S. 837.
[156] *City of Arlington, Tex.*, 569 U.S. at 296-97.
[157] *See* NHTSA, EPA, Withdrawal of Waiver; Final Rule, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310, 51351 (Sept. 27, 2019) (quoting *Chevron*, 467 U.S. at 843).

statutory frameworks indicate that Congress contemplated an agency acting in order to resolve such ambiguities.[158] In these situations, an incomplete statutory scheme raises the possibility that Congress "implicitly or explicitly" intended the agency to step in and undertake rulemaking to provide the missing pieces and enable the statute's administration.[159] However, as described throughout this reconsideration, EPCA and Section 32919 clearly demonstrate that Congress did not intend for NHTSA to further implement or administer Section 32919.

This is evident because, as the Proposal recognized, both the Agency and courts have repeatedly understood Section 32919 as self-executing and capable of direct application to state regulatory activity.[160] Specifically, such a direct application involves the consideration of whether the state regulation in question "relate[s] to" fuel economy standards established elsewhere in Chapter 329.[161] The statute does not require any supplemental agency regulations to implement this standard, nor does the text and structure of the statute appear to provide NHTSA any special legislative role in dictating the scope of Section 32919's preemption. This view is consistent with NHTSA's longstanding reading of Section 32919. For instance, even the

[158] *See, e.g.*, *Chevron*, 467 U.S. at 843.
[159] *Id.*
[160] *See, e.g., Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007) (undertaking a detailed analysis of Section 32919 to determine whether state law was preempted under the express language of the statute).
[161] *See Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1175 (E.D. Cal. 2007), as corrected (Mar. 26, 2008) (conducting such an analysis before concluding that preemption did not exist ''[g]iven the narrow scope the court must accord EPCA's 'related to' language'').

Preamble to the SAFE I Final Rule acknowledged that the EPCA preemption provision of Section 32919 was "self-executing," asserting that "state or local requirements related to fuel economy standards are void ab initio"— by operation of statute not regulation.[162] Likewise, in the NEPA section of the SAFE I Rule, NHTSA expressly disclaimed any discretion to alter the preemption paradigm established by Section 32919 due to the self-sufficiency of the statute, stressing that "[a]ny 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."[163] As such, the Agency again characterized any "preempted standards [as] void ab initio" due to the non-discretionary and independent application of Section 32919.[164]

The self-executing nature of Section 32919 formed one of the most widely agreed-upon propositions in the Proposal. Commenters on all sides of the issue expressly confirmed their own understanding of Section 32919 as self-executing and capable of direct enforcement and application against preempted programs. For instance, commenters in support of the Proposal expressly agreed that "[i]n the absence of the Preemption Rule, any state law or regulation 'relating to fuel economy standards' can be challenged in a proper case, allowing for full evaluation of both the state law and the express statutory preemption in Section 32919,"[165] that

[162] NHTSA, EPA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310, 51325 (Sept. 27, 2019).
[163] *Id*. at 51353–54.
[164] *Id.*
[165] South Coast Air Quality Management District, Docket No. NHTSA-2021-0030-0446 (June 11, 2021).

"implementing EPCA Section 32919" does not require any NHTSA regulations,[166] and that "[c]ourts have likewise treated the EPCA preemption language as self-executing as they have applied this language to particular circumstances to determine whether a state or local government action is or is not preempted."[167] Similarly, commenters that otherwise more neutrally commented on other aspects of the Proposal still explicitly endorsed Section 32919's self-executing status.[168] And commenters opposing the Proposal nonetheless still stressed that they "agree that the statute is self-executing and that any state regulation that is 'related to fuel economy' is preempted and void ab initio."[169] For this reason, even opposition commenters stated that "[c]onsequently, the SAFE I Rule's regulatory language is not essential to effectuate" EPCA preemption.[170]

Although commenters widely agreed on Section 32919's self-executing status, a small number of comments opposing the Proposal tried to argue that this status did not preclude the SAFE I Rule. For instance, a joint comment submitted by CEI argued that Section 32919 still

[166] Tesla, Inc. Docket No. NHTSA-2021-0030-0398 (June 11, 2021).
[167] National Coalition for Advanced Transportation, Docket No. NHTSA-2021-0030-0310 (June 11, 2021).
[168] Alliance for Automotive Innovation, Docket No. NHTSA-2021-0030-0400 (June 11, 2021) (Expressing that any offending local laws are "automatically preempted under the terms of the statute. Federal courts can apply EPCA's preemption provision to any such law or regulation.").
[169] American Fuel & Petrochemical Manufacturers, Docket No. NHTSA-2021-0030-0425 (June 11, 2021).
[170] National Automobile Dealers Association, Docket No. NHTSA-2021-0030-0435 (June 10, 2021). *See also* Urban Air Initiative et al., Docket No. NHTSA-2021-0030-0423 (June 11, 2021).

"has no practical effect unless someone interprets and implements it."[171] This misses the central point of the issue though. Since Section 32919 is self-executing, a regulation is not needed to implement the preemption provision, and, moreover, nothing in Section 32919 provides any authority to issue a binding rule on the scope of preemption. In that respect, Section 32919 fundamentally differs from other EPCA statutory provisions, such as Section 32902, which sets a general CAFE framework that must be implemented by NHTSA periodically "prescrib[ing] by regulation" the actual CAFE standards that govern particular model years.[172] EPCA is replete with other examples of those types of statutes requiring regulatory implementation.[173] In contrast, Section 32919 contains all of the elements necessary for implementation within the four corners of its statutory language.[174] This is not just theoretical, but evident from the numerous times Section 32919 has directly supported a private right of action seeking to enforce its preemption provisions in Federal court.[175]

[171] Competitive Enterprise Institute et al., Docket No. NHTSA-2021-0030-0411 (June 11, 2021).
[172] *See* 49 U.S.C. 32902(a).
[173] *See supra* nn.125-131.
[174] A joint comment submitted by the Urban Air Initiative cites this point as evidence that the SAFE I Rule was a permissible interpretation because Section 32919 does not leave room for a regulation to create newly enforceable requirements. *See supra* nn.84-85. This aspect of the comment is fully addressed in an earlier portion of the final rule that explains how this argument ignores the plain language of the regulations codified in the SAFE I Rule.
[175] *See Cent. Valley Chrysler-Jeep, Inc.*, 529 F. Supp. 2d at 1175; *Green Mountain Chrysler Plymouth Dodge Jeep*, 508 F. Supp. at 295; *Ophir v. City of Boston*, 647 F. Supp. 2d 86, 91–92 (D. Mass. 2009).

To the extent that CEI means that Section 32919 has no practical effect unless it is *enforced*, as explained further in the next section, by promulgating regulations of general applicability, the SAFE I Rule was an act of rulemaking not enforcement. As such, whether Section 32919 needs to be enforced in a particular case has no bearing on whether NHTSA enjoys rulemaking authority to codify a regulation of general applicability.

Ultimately, the self-executing nature of Section 32919 demonstrates that Congress did not establish a rulemaking role for NHTSA in EPCA preemption. Instead, Congress enacted a statutory provision that operates fully on its own, without any discernable responsibility for the Agency in further implementing the scope of Section 32919 through regulations.

b. The requisite rulemaking authority cannot be generally inferred from EPCA.

Both the SAFE I Rule and commenters to the Proposal defending that Rule also argued that the spirit of EPCA hints at the need for such rulemaking authority. NHTSA continues to find this argument unavailing and, as such, is finalizing the Proposal's view that generalized inferences drawn from EPCA cannot sustain the provisions codified in the SAFE I Rule. Moreover, NHTSA views many of the themes and inferences that commenters invoked for this proposition inapposite, as they mischaracterize the nature of the SAFE I Rule. As such, nothing from these purported inferences changes NHTSA's conclusion that the SAFE I Rule was an *ultra vires* rule that must be repealed.

The SAFE I Rule sought to justify the rulemaking on predominantly policy grounds, characterizing the express preemption measure as necessary to fulfill other CAFE responsibilities delegated to the Agency. In particular, the SAFE I Rule argued that the regulation was needed to resolve a perceived irreconcilable conflict between state GHG emissions regulations and ZEV mandates and EPCA's delegation of authority to NHTSA to set national fuel economy standards.[176] The SAFE I Rule thus rationalized the regulations by emphasizing that "Congress's intent to provide for uniform national fuel economy standards is frustrated when State and local actors regulate in this area."[177]

In particular, the SAFE I Rule suggested that the rulemaking was essential to guard against states or local jurisdictions undermining the CAFE program. For instance, the Agency repeatedly expressed that the regulations targeted "State requirements that *impermissibly interfere* with [the Agency's] statutory role to set nationally applicable standards,"[178] that implementing the provisions was necessary to foreclose state and local requirements that "*conflict* with NHTSA's ability to set nationally applicable standards,"[179] and that the action was

[176] NHTSA, EPA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310, 51319 (Sept. 27, 2019).
[177] *Id.* at 51313.
[178] *Id.* at 51317 (emphasis added).
[179] *Id.* at 51319 (emphasis added).

necessary because "Congress's intent to provide for uniform national fuel economy standards is *frustrated* when State and local actors regulate in this area."[180]

A large number of the comments supporting the SAFE I Rule expressed this same idea. This theme is illustrated, for example, by a joint comment from CEI, which stresses that without the SAFE I Rule, California (through CARB) would be positioned to "balkanize auto markets unless it gets its way" in dictating motor vehicle emissions and fuel economy standards.[181] Like the SAFE I Rule, such commenters focused on the need for the provision "to avoid potential conflicts with EPCA's national fuel economy standards,"[182] and provided extensive analysis purporting to show how particular programs are poised to "undermine CAFE's flexible fleet-average standards" unless the SAFE I Rule's prohibitions remain in place.[183] Some commenters opposing a repeal even carried this theme to the point of describing the SAFE I Rule as akin to

[180] *Id.* at 51313 (emphasis added).
[181] Competitive Enterprise Institute et al., Docket No. NHTSA-2021-0030-0411 (June 11, 2021).
[182] National Automobile Dealers Association, Docket No. NHTSA-2021-0030-0435 (June 10, 2021).
[183] Urban Air Initiative et al., Docket No. NHTSA-2021-0030-0423 (June 11, 2021) (labeling an entire section of the comment "State electric automobile quotas restrict manufacturer compliance choices and undermine CAFE's flexible fleet-average standards.").

an enforcement action, necessary for NHTSA to police EPCA's congressional purpose in the face of "lawless" states and local jurisdictions.[184] [185]

The idea that the SAFE I Rule is necessary to prevent states and local jurisdictions from frustrating EPCA or NHTSA's national CAFE program is inconsistent with a properly applied preemption framework. In the absence of the SAFE I Rule, two fundamental preemption mechanisms still exist to guard against state or local programs that sufficiently conflict with CAFE to render EPCA's purposes a nullity.[186] First, as described throughout this final rule, a repeal of the SAFE I Rule does not affect the statutory express preemption provision in Section 32919. This self-executing statutory provision is fully capable of enforcement against offending state and local programs in the absence of any regulations purporting to further implement its scope. In fact, before the SAFE I Rule, this provision had provided this function for years

[184] *See* Urban Air Initiative et al., Docket No. NHTSA-2021-0030-0423 (June 11, 2021). *See also* American Fuel & Petrochemical Manufacturers, Docket No. NHTSA-2021-0030-0425 (June 11, 2021); Competitive Enterprise Institute et al., Docket No. NHTSA-2021-0030-0411 (June 11, 2021).

[185] The SAFE I Rule was not an enforcement action, and NHTSA's portion of the Rule was not (unlike EPA's portion) even an adjudication. Instead, as described throughout this final rule, the SAFE I Rule codified rules of general applicability, which instituted preemption requirements for all states so long as the rule remained in effect. As such, even if those commenters' arguments explain the background for *why* NHTSA tried to undertake the SAFE I Rule, they cannot justify *how* NHTSA acted through a legislative rulemaking of general applicability. For that, it is necessary to instead focus on the issues of rulemaking authority that form so much of this final rule.

[186] Through this, NHTSA stresses that it takes no position in this rulemaking on whether EPCA preemption either expressly or impliedly preempts the particular state and local programs identified by such commenters. The point here is that these mechanisms persist to weigh such commenters' concerns, not that their substantive concerns are substantiated.

without implementing regulations. Here, Section 32919's plain language illustrates how Congress' preemptive scheme is immediately executable upon NHTSA promulgating the *substantive law* (national fuel economy standards) rather than any express preemption provisions. At most, the statute merely refers to the substantive tasks of the agency to establish "fuel economy standard[s]" and "requirements" as set forth elsewhere in Chapter 329.[187] Such references only connote the core duties borne by the agency to administer the substance of the fuel economy program, such as by setting "maximum feasible average fuel economy" standards under Section 32902 or establishing fuel economy labeling requirements under Section 32908. These responsibilities are within the Agency's traditional substantive regulatory functions, which draw from NHTSA's technical automobile expertise rather than any special agency authority over federalism.

As such, it is not necessary for NHTSA to codify new express preemption provisions in order to "carry out" EPCA. All NHTSA needs to do is fulfill the substantive task enumerated in Section 32919: ensuring "an average fuel economy standard prescribed under this chapter is in effect."[188] Once such a standard is in place, Section 32919's self-executing standard is fully capable of safeguarding Congress' purpose in EPCA. Moreover, as explained in Section II.B.iii. of this final rule, the familiar "related to" standard in Section 32919 may even be clearer to apply

[187] See 49 U.S.C. 32919(a)–(b).
[188] *See* 49 U.S.C. 32919(a).

and understand without the convoluted layer of the SAFE I Rule. Accordingly, even assuming the concerns raised by such commenters are accurate, they are fully redressable by the statutory express preemption language in Section 32919, which remains untouched by this rulemaking.

More fundamentally though, even after today's repeal of the SAFE I Rule, judicial concepts of implied preemption will remain available to perform their traditional function of guarding against state law that sufficiently interferes with the supremacy of federal law. In fact, the concepts used by the SAFE I Rule (and commenters defending it) to justify rulemaking authority were actually more appropriately applied to an implied preemption analysis instead.[189] The terminology repeatedly employed throughout the SAFE I Rule—"frustrates,"[190] "conflicts,"[191] and "interferes"[192]—mirrors the standards often arising in implied preemption. Implied preemption is a judicial doctrine principally applied by courts when adjudicating

[189] For instance, the Supreme Court has expressly clarified that when its precedent preempts state laws "when they conflict with or interfere with federal authority over the same activity," such an opinion "is best read as a conflict pre-emption case." *See Oneok, Inc. v. Learjet, Inc*., 575 U.S. 373, 389 (2015) (discussing *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373 (1988)).
[190] *City of New York*, 486 U.S. at 64 ("The statutorily authorized regulations of an agency will pre-empt any state or local law that *conflicts* with such regulations or frustrates the purposes thereof") (emphasis added).
[191] *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 576 (2009) ("This Court has recognized that an agency regulation with the force of law can pre-empt *conflicting* state requirements") (emphasis added).
[192] *See, e.g.*, *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1051 (7th Cir. 2013) (describing how under the doctrine of conflict preemption, state law may be preempted "if it *interferes*" with federal law) (emphasis added).

challenges to particular state programs.[193] The judicial standards for implied preemption remain available to presiding courts irrespective of the presence of the SAFE I Rule. Therefore, if state and local jurisdictions endanger EPCA to the degree claimed by those commenters, there is no reason to believe that Article III courts could not evaluate those claims through the lens of implied preemption, as has been the case throughout the long history of both EPCA and all other federal law.[194]

Moreover, as a judicial doctrine intended for application in a particular case, principles of implied preemption do not support NHTSA claiming authority to conduct a rulemaking of general applicability.[195] Instead, this rulemaking act of promulgating new prescriptive preemption requirements, which are expressly codified in law, involves a separate act of rulemaking authority to impose express preemption through regulations. NHTSA's rulemaking

[193] *See, e.g.*, *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (explaining that implied conflict preemption may exist in particular situations "where it is impossible for a private party to comply with both state and federal requirements or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.") (internal quotations omitted). *See also, e.g.*, *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663 (1993) ("Where a state statute conflicts with, or frustrates, federal law, the former must give way.").

[194] Commenters opposing a repeal even appeared to recognize as much, as several argued that state and local programs prohibited by the SAFE I Rule were also impliedly preempted. *See, e.g.*, American Fuel & Petrochemical Manufacturers, Docket No. NHTSA-2021-0030-0425 (June 11, 2021) (arguing that such programs "are impliedly preempted because they 'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" in EPCA) (internal citations omitted).

[195] Judicial applications of implied and express preemption illustrate how they are separate concepts, which are applied regimentally by courts rather than as a monolithic preemption analysis. *See, e.g.*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000).

authority to do so is governed by the principles already discussed above in Section II.B.i—not the judicial concepts that govern whether a Federal court should deem a state program impliedly preempted by the supremacy of existing federal law. Therefore, the concepts of implied preemption invoked by NHTSA to justify the SAFE I Rule were misapplied. They exist to enable a court to determine whether a state program conflicts with *existing federal law*, not to empower NHTSA to *make more federal law*, as the Agency claimed in the SAFE I Rule. Accordingly, since NHTSA has already applied the proper rulemaking authority framework in Section II.B.i. above and determined that such authority was lacking for the SAFE I Rule, judicial concepts of implied preemption cannot cure this deficit of authority. Moreover, they do not need to, because an implied preemption review remains available irrespective of the fate of the SAFE I Rule.

ii. NHTSA continues to consider a repeal of the SAFE I Rule appropriate even if the Agency had discretion to conduct the original rulemaking.

In addition, even if the Agency either had sufficient authority to issue the SAFE I Rule as a legislative rule or, alternatively, if the prior Rule was simply an interpretation, the Agency nevertheless continues to consider a repeal justified by other considerations as well. Specifically, the SAFE I Rule purported to preempt an entire segment of emissions regulations from state and local jurisdictions without fully considering a number of variables pertinent to the preemption determination. By ignoring these factors, the Rule was still legally flawed because it ignored legally relevant considerations that should have informed both the nature and scope of the

Agency's preemption determination. Likewise, in overlooking such important considerations, the SAFE I Rule also improvidently imposed preemption in absolute terms when a more narrowly tailored approach was available instead.

a. The categorical scope of preemption in the SAFE I Rule inappropriately ignored important interests of states and local jurisdictions.

In the Proposal, the Agency expressed a concern that the categorical preemption views announced in the SAFE I Rule were insufficiently tailored to account for state federalism interests because they labeled an entire segment of state and local regulation as preempted, irrespective of the precise contours of any particular programs, regulations, or technological developments that may arise. This alarm especially arose from the SAFE I Rule's declaration of preemption through terms that were incontrovertible or absolute in a way that would not account for the nuanced and careful consideration of program-specific facts called for in preemption analyses. The comments to this Proposal substantiated these concerns. In particular, the majority of states and local jurisdictions who commented on the Proposal provided tangible examples of the types of nuances and federalism hardships that the SAFE I Rule failed to consider.

NHTSA continues to consider the federalism concerns in this arena as constituting substantial interests of states and local jurisdictions, who oftentimes seek to address pivotal matters of public health and welfare through the programs impinged by the SAFE I Rule. In this respect, the Agency remains mindful that an "administrative interpretation [which] alters the

federal-state framework by permitting federal encroachment upon a traditional state power" merits particularly careful consideration to fully account for the significant federalism interests of states.[196] Likewise, Executive Order 13132 underscores the importance of considering federalism interests, stressing that "[t]he national government should be deferential to the States when taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government."[197] Nevertheless, by imposing a categorical and rigid approach to preemption, the SAFE I Rule prematurely discarded such federalism considerations despite the potential for more narrowly tailored approaches instead. As such, the SAFE I Rule both impermissibly ignored legally relevant variables of state programs and imprudently adopted a broader approach than necessary in instituting immutable preemption requirements.

For instance, in the Proposal, the Agency expressed a concern that in a number of cases, the policies preempted by the SAFE I Rule also served as components of the states' compliance with air pollution mitigation requirements delegated to states under the Federal Clean Air Act.[198] This issue formed one of the more common refrains in comments from states and local jurisdictions subject to the SAFE I Rule's preemption determination, who stressed that the prior

[196] *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001).
[197] Executive Order 13132, Federalism, Sec. 1(a) (Aug. 4, 1999).
[198] CAFE Preemption NPRM, 86 FR at 25989.

rulemaking failed to consider—or even acknowledge—their reliance interests in motor vehicle emissions regulations as a critical component in achieving National Ambient Air Quality Standards (NAAQS). NAAQS levels are set by the EPA for six separate ubiquitous air pollutants, and states are required to achieve and maintain them under federal law. A survey of the comments indicates that feedback on the ways in which the SAFE I Rule could undermine compliance with the NAAQS was overwhelming. For example, a comment by the National Association of Clean Air Agencies, a group of 115 local air agencies spanning 41 states, the District of Columbia, and four territories, stressed that programs prohibited by the SAFE I Rule "enable long-term planning and yield critical emission reductions that will contribute significantly to states' abilities to meet their statutory obligations to attain and maintain the health-based [NAAQS] for criteria pollutants."[199] Separate comments submitted by the Ozone Transport Commission Mobile Sources Committee, a body comprised of 12 states and the District of Columbia, as well as the Nevada Division of Environmental Protection, and the District of Columbia Department of Energy and Environment, reiterated this point as well.[200] Maine's Department of Environmental Protection likewise commented to reiterate that these particular reliance interests are not new but rather have existed since the inception of such state

[199] National Association of Clean Air Agencies (NACAA), Docket No. NHTSA-2021-0030-0140 (June 10, 2021).
[200] Ozone Transport Commission, Docket No. NHTSA-2021-0030-0139 (June 10, 2021); Nevada Division of Environmental Protection, Docket No. NHTSA-2021-0030-0362 (June 11, 2021); District of Columbia Department of Energy and Environment, Docket No. NHTSA-2021-0030-0412 (June 11, 2021).

programs, noting that "the [California low emission vehicle] program was initially created to help attain and maintain the health-based [NAAQS] for criteria pollutants."[201]

Commenters made clear that these reliance interests were tied to programs in place at the time of the SAFE I Rule's promulgation. For instance, California's South Coast Air Quality Management District described how the SAFE I Rule invalidated "state pollution control standards which have been previously approved into State Implementation Plans (SIPs)."[202] The State of California's comment described this reliance in depth, noting that California's preempted regulatory programs arose from what the State described as its longstanding understanding of EPCA prior to the SAFE I Rule, which resulted in "weighty state interests, developed over the course of decades of implementing these state laws."[203] This prolonged reliance on the regulatory framework in place well before the SAFE I Rule led California to invest substantial resources in the development of affected state programs, as well as "base long-term state planning" on the continuation of these programs into the future.[204]

In addition, states and local jurisdictions similarly feared that by losing the state regulatory programs on which they had relied, the jurisdictions faced substantial detrimental

[201] Maine Department of Environmental Protection, Docket No. NHTSA-2021-0030-0249 (June 10, 2021).
[202] South Coast Air Quality Management District, Docket No. NHTSA-2021-0030-0446 (June 11, 2021).
[203] State of California et al., Docket No. NHTSA-2021-0030-0403, (June 11, 2021) (this comment also expressed that the SAFE I Rule "declared preempted long-standing laws that protect public health and welfare and exercise core state police powers carefully preserved by Congress in the Clean Air Act.") (citing Cal. Code Regs. tit. 13, § 1960.1(g)(2) (1991)).
[204] State of California et al., Docket No. NHTSA-2021-0030-0403 (June 11, 2021).

consequences if they failed to meet required NAAQS levels. For example, a comment from a collective of municipal entities stressed that "vehicle emissions impact air quality and a community's ability to meet required ozone levels. Falling outside of required ozone levels can have negative impacts on cities, potentially disqualifying them from federal funding opportunities for highway and transit infrastructure."[205] The Connecticut Department of Transportation commented similarly, noting that undermining state programs in this area was particularly harmful to state interests, as satisfying NAAQS requirements was already a difficult endeavor, which only became harder after the SAFE I Rule.[206] The Agency also received comments about this issue from the electricity industry, which expressed unease that by undermining established frameworks for NAAQS compliance, the SAFE I Rule could disrupt regulatory schemes in other industries as well.[207]

In the SAFE I Rule, NHTSA expressly "reject[ed] the notion that California has valid reliance interests" in preexisting state regulations and programs, largely because the Rule labeled those programs broadly preempted under the framework announced in the rulemaking.[208] Upon reconsideration, the Agency views its original logic in this respect as circular, amounting to a

[205] National League of Cities et al., Docket No. NHTSA-2021-0030-0421 (June 11, 2021).
[206] *See* Connecticut Department of Transportation, Docket No. NHTSA-2021-0030-0330 (June 11, 2021).
[207] *See* Edison Electric Institute, Docket No. NHTSA-2021-0030-0396 (June 11, 2021) (expressing a concern that "NHTSA's broad preemption codification in SAFE I would compel states to shift the emissions reductions they need for NAAQS attainment from automobiles to stationary sources, including electric power generators.").
[208] CAFE Preemption NPRM, 86 FR at 51327.

conclusion that NHTSA need not consider whether the breadth of its new regulations adequately considered particular issues, such as federalism or reliance interests, because those interests were already preempted according to the scope articulated by the SAFE I Rule. However, as the comments to the current proposal demonstrate, numerous states and local jurisdictions continue to harbor deep concerns about the SAFE I Rule's sweeping prohibition of programs on which they relied to accomplish important state regulatory priorities—required by federal law that was not altered in the SAFE I Rule—and promote the health and welfare of their citizens. Accordingly, NHTSA concludes that the SAFE I Rule inappropriately instituted an absolute preemption scheme that foreclosed any consideration for whether a more narrowly tailored approach was available instead.

A few commenters that objected to the Proposal touched upon federalism issues, which the Agency do not believe persuasively argue for continuing the approach in the SAFE I Rule. First, the American Fuel & Petrochemical Manufacturers (AFPM) stated that "it [was] impractical to provide informed comment" on the extent of federalism at stake in the Proposal because the Proposal spoke about preemption broadly rather than by reference to the status of specific state or local programs.[209] At base, this comment implies that NHTSA may not conduct an informed reconsideration of the SAFE I Rule without simultaneously announcing new

[209] American Fuel & Petrochemical Manufacturers, Docket No. NHTSA-2021-0030-0425 (June 11, 2021).

substantive positions on how EPCA preemption applies to particular programs. However, the Agency already outlined the reasons such a view was unavailing in Section II.A. of this notice. Moreover, this comment illustrates the advantages of a more nuanced approach to the preemption issue than what had been taken in the SAFE I rulemaking, as the issue may vary based on the particular program at issue. In that respect, this comment underscores the exact point that NHTSA has raised throughout this rulemaking: the idea that a categorical and preemptive prohibition of state programs is not an opportune way to deal with EPCA preemption because the precise variables that inform the analysis likely differ for each case and potentially factor into the accuracy of the individual preemption analyses. AFPM's comment assumes such unknown variables and "vagaries" support retaining the SAFE I Rule, because absent specific context about a particular program it is impossible to conduct the full preemption analysis. But it was the SAFE I Rule that originally imposed preemption at a categorical level, without regard for the context-specific inquiries needed to conduct the full preemption analysis. As such, AFPM's emphasis on the need to understand the specifics of the programs affected by a preemption discussion only illustrates one of the critical deficiencies of the SAFE I Rule's preemption analysis, which this repeal rectifies.

AFPM's comment also concludes that states have a diminished federalism interests in this area because "Congress has clear authority to regulate mobile sources that move in interstate commerce" and "EPCA expressly and clearly establishes that federal law preempts state laws

'related to' fuel economy."[210] However, this argument simply begs the substantive question of which programs Congress intended to preempt under EPCA. As explained throughout this final rule, the Agency believes that the categorical approach taken in the SAFE I Rule is flawed on this question, as it ignores the potentially varying characteristics of existing or even still-undefined future programs and the degree to which those diverse attributes may bear upon the EPCA preemption inquiry.

Similarly, comments such as AFPM's seek to minimize the SAFE I Rule's effect on federalism interests by stressing that the "SAFE I Rule has no impact on states' abilities to adopt emissions regulations that are not related to fuel economy, or to establish vehicle registration fees, taxes and other" such policies.[211] Even if true, this argument still presumes that the SAFE I Rule established a clear delineation between programs prohibited under its regulations and those that survived. However, as described further in Section II.B.iii. of this final rule, the SAFE I Rule did not so clearly define the contours of preemption. Instead, it only introduced new undefined standards into the preemption discourse. Beyond this, it is insufficient to say that a rulemaking that categorically forecloses some important federalism interests is acceptable because at least it did not eliminate all federalism interests. As evidenced by the comments (many of which are set forth above), commenting states and local jurisdictions almost uniformly emphasized the

[210] *Id.*
[211] *Id.*

importance of the regulatory agendas they believe were foreclosed by the SAFE I Rule's preemptive scope, including regulatory programs that helped jurisdictions attain the federal Clean Air Act's NAAQS. These are substantial and legitimate interests that should not be overbroadly discarded, particularly through categorical prohibitions that unnecessarily foreclose opportunities to more carefully account for those federalism interests in particularized contexts.

These federalism interests are especially illustrated by the degree to which many of the state and local programs in question seek to address critical matters of health and welfare within local communities. The Proposal outlined a concern that a categorical preemption scope inappropriately foreclosed potential opportunities to address localized health and safety hazards facing states and communities by preventing local governments from identifying solutions needed for their individual citizens. This concern arose from the Proposal's recognition that states have indicated that the standards at issue were developed to protect the states' residents from dangerous air pollution and the states' natural resources from the threats posed by climate change. The comments to this Proposal continued to reiterate a prevailing concern that the SAFE I Rule inappropriately and unnecessarily deprived states and local jurisdictions of an important regulatory tool to address hazards facing their local communities.

Commenters opposing a repeal contested this point, arguing instead that "the self-described purposes" of any individual state program are irrelevant to the EPCA preemption analysis, which is solely concerned with the relationship between the state regulation in question

and fuel consumption.[212] However, the position of these commenters does not properly account for the full scope of the SAFE I Rule. These commenters direct their views to the individualized application of EPCA preemption to particular state or local programs, arguing that no single purpose of an individual program can override whether EPCA preempts that program. But the SAFE I Rule was a rule of general applicability, not an adjudication of an individual program. As such, the SAFE I Rule did not limit its analysis to the preemption of a particular state program or narrow band of state regulation. Instead, the SAFE I Rule grouped an entire segment of possible state regulation, motor vehicle greenhouse gas emissions, and codified a regulation of general applicability that preempted all possible initiatives currently regulating in this segment or which may be devised in the future. This is a much broader act and one not required by Section 32919, which does not command NHTSA to issue any regulations, much less anticipatory regulations that prospectively foreclose entire regulatory topics. When evaluating whether such an unnecessarily broad scope was an appropriate approach, it is both relevant and prudent to consider in the aggregate what possible other purposes those preempted measures may have pursued. And when this inquiry indicates, as it has here, that preemptively prohibited programs are likely aimed at protecting the health and welfare of state populations, the Agency is right to

[212] National Automobile Dealers Association, Docket No. NHTSA-2021-0030-0435 (June 10, 2021).

ask whether a more narrowly tailored approach could have left more room for those objectives or at least deferred the total foreclosure of them until those programs were ripe for consideration.

In contrast, the SAFE I Rule prohibited all state policies in a vacuum, without any knowledge of even the most fundamental questions about those policies, such as whose regulations are at issue, what motor vehicle technologies are being regulated, which compliance paths may be available, or what technological or policy breakthroughs may occur in the future to alter the preemption analysis. Comments to the Proposal indicate that, when a more thorough and nuanced consideration of preemption is permitted, programs enveloped by the sweeping scope of the SAFE I Rule potentially relate to important goals of protecting health and welfare of local populations.

For instance, the State of California commented, noting that affected state programs were originally devised as a means of mitigating unique environmental challenges facing the state: "California's greenhouse gas standards were first adopted 16 years ago in response to the prospect of disruptions in the states' water supply, increases in 'catastrophic wildfires,' damage to the State's extensive coastline and ocean ecosystems, aggravation of existing and severe air quality problems and related adverse health impacts, and more."[213] Even commenters opposing the Proposal acknowledged that the state programs at issue initially arose from an effort to

[213] State of California et al., Docket No. NHTSA-2021-0030-0403 (June 11, 2021) (citing 2002 Cal. Stat. c. 200 (A.B. 1493) (Digest)).

enable states to address unique environmental challenges facing their communities.[214] Other commenters likewise raised concerns about localized health hazards from motor vehicle emissions, with a comment on behalf of a collective of medical associations stressing that local conditions from such emissions can "form unhealthy ozone and particle pollution, which can lead to premature death, hospitalizations, missed days of work and school, asthma attacks and a host of other health problems."[215] Commenters also raised environmental justice concerns, describing these pollution hazards as not borne uniformly across the country, but instead particularly manifested in minority and low-income communities. For instance, the Bay Area Air Quality Management District commented to stress that the policy flexibility foreclosed by the SAFE I Rule was "critical to protecting communities that suffer more from localized air pollution than others" and especially essential "to address disparate air pollution impacts that can harm local communities, particularly low income and communities of color in the San Francisco

[214] *See* Urban Air Initiative et al., Docket No. NHTSA-2021-0030-0423 (June 11, 2021) (describing the Section 209 waiver process under the Clean Air Act by explaining that "Congress justified this waiver exception based on California's 'unique' smog (ground-level ozone) problems, caused by California-specific conditions such as the 'numerous thermal inversions that occur within that state because of its geography and prevailing wind patterns.'") (quoting California State Motor Vehicle Pollution Control Standards: Waiver of Federal Preemption Notice of Decision, 49 Fed. Reg. 18887, 18890 (May 3, 1984) (which itself cited 113 Cong. Reg. 30,948, (Nov. 2, 1967))).

[215] Allergy & Asthma Network et al., Docket No. NHTSA-2021-0030-0299 (June 4, 2021). *See also* Sierra Club Connecticut Chapter, Docket No. NHTSA-2021-0030-0378 (June 11, 2021) (expressing concern about localized ozone pollution in Connecticut and associated asthma risks), Sierra Club Toiyabe Chapter, Docket No. NHTSA-2021-0030-0161 (June 10, 2021).

Bay Area."[216] Likewise, in summarizing health risks from enhanced motor vehicle emissions, the medical associations' comment identified these problems as "disproportionately impact[ing] communities located near highways, ports, warehouses and other places where traffic is concentrated – which are more likely to be low-income or communities of color."[217]

Despite such a diverse array of challenges, commenting states and local jurisdictions consistently agreed that the inflexibility of the SAFE I Rule's broad preemption determination foreclosed opportunities for them to develop innovative policy solutions to the unique issues they faced that were still consistent with Federal law. This need to allow for more innovative policy flexibility than permitted by the expansive terms in the SAFE I Rule but still potentially allowed under the more general terms of EPCA was echoed expressly by multiple commenters, such as the Connecticut Department of Transportation,[218] a collection of municipal entities,[219] and the National Coalition for Advanced Transportation, who feared that the SAFE I Rule "inappropriately and unnecessarily dampen[ed] policy innovation at the state and local levels and

[216] Bay Area Air Quality Management District, Docket No. NHTSA-2021-0030-0371 (June 11, 2021).
[217] Allergy & Asthma Network et al., Docket No. NHTSA-2021-0030-0299 (June 4, 2021).
[218] Connecticut Department of Transportation, Docket No. NHTSA-2021-0030-0330 (June 11, 2021) (pointing to several past policy initiatives to demonstrate that "[o]ur agencies are working together to find innovative state air quality and transportation solutions to improve air quality and take action on climate change").
[219] National League of Cities et al., Docket No. NHTSA-2021-0030-0421 (June 11, 2021) ("The Notice of Proposed Rulemaking (NPRM) expresses concern that in labeling 'an entire segment of state and local regulation as preempted,' the SAFE I Rule 'unnecessarily and inappropriately restricts potential policy innovation at the State and local level.' We agree.").

investments across the country."[220] Several industry groups likewise commented to caution against unnecessarily restricting policy innovation at the present stage, in particular, as both the automotive and energy industries are in the midst of widespread transformations with the advent of new electrification technologies and approaches.[221] Precluding states from pursuing innovative opportunities to address such important matters of health and welfare demonstrates the degree to which the SAFE I Rule broadly undermined the federalism interests of such jurisdictions without regard for whether a more narrowly tailored consideration of EPCA preemption was available instead.

Finally, commenters that opposed the Proposal (and thus were supportive of the SAFE I Rule) argued that this latest rulemaking was a change in position by the Agency, in an effort to single it out as a departure from precedent. These commenters that opposed the Proposal, such as NADA and CEI, sought to minimize any significance of the SAFE I Rule's unprecedented

[220] Zero Emission Transportation Association, Docket No. NHTSA-2021-0030-0397 (June 11, 2021) ("Repealing these regulations is a critical step toward ensuring federal and state GHG vehicle emissions standards can support the rapid transition to electric vehicle production that will spur American manufacturing, innovation, and competitiveness in the global market…"); National Coalition for Advanced Transportation, Docket No. NHTSA-2021-0030-0310 (June 11, 2021) ("comes at a critical time when States and local governments are working to reduce harmful GHG and other emissions and many different stakeholders, including NCAT members, are investing in the development and deployment of electric vehicles and related infrastructure across the country"); Edison Electric Institute, Docket No. NHTSA-2021-0030-0396 (June 11, 2021) ("EEI's member companies are in the middle of a profound, long-term transformation in how electricity is generated, transmitted, and used").

[221] Zero Emission Transportation Association, Docket No. NHTSA-2021-0030-0397 (June 11, 2021); National Coalition for Advanced Transportation, Docket No. NHTSA-2021-0030-0310 (June 11, 2021).

exertion of preemption authority, with CEI's joint comment noting in particular that "unprecedented violations call for unprecedented corrections."[222] These comments suggest that actions like the SAFE I Rule had never been necessary in the past because, they argue, no state or local jurisdiction had ever sought to contravene EPCA to the extent of California's Advanced Clean Car program.[223] But although the preambles to the SAFE I rulemaking discussed California's Advanced Clear Car Program at length, NHTSA's portion of the notice, (unlike EPA's portion) still was not an individualized adjudication of California's Advanced Clean Car Program. Instead, it was a rulemaking action to establish regulations that set a generally applicable definition of "related to" as it appears in Section 32919. The SAFE I Rule characterized this definition as binding not just on California's existing programs, but on any state and local efforts that fell within the text included in the appendices now or in the future. Moreover, unlike any other "non-regulatory preamble language"[224] NHTSA may have issued in the past, the SAFE I Rule codified the new preemption standards into regulatory text. In this respect, the SAFE I Rule far surpassed any of NHTSA's prior positions on EPCA preemption and introduced new codified requirements implementing statutory language that had been

[222] Competitive Enterprise Institute et al., Docket No. NHTSA-2021-0030-0411 (June 11, 2021).
[223] *See, e.g.*, National Automobile Dealers Association, Docket No. NHTSA-2021-0030-0435 (June 10, 2021); Competitive Enterprise Institute et al., Docket No. NHTSA-2021-0030-0411 (June 11, 2021), Urban Air Initiative et al., Docket No. NHTSA-2021-0030-0423 (June 11, 2021).
[224] National Automobile Dealers Association, Docket No. NHTSA-2021-0030-0435 (June 10, 2021).

enacted nearly 50 years earlier.[225] The express preemption statute that the SAFE I Rule sought to define for the first time has existed for the entirety of the CAFE program, as EPCA's original enactment included text substantially similar to the current language in Section 32919. And California's Advanced Clean Car program was not the first time, over the course of EPCA's long history, that a state or local jurisdiction instituted a program that some challenged as preempted under EPCA. In fact, at least one of those other programs had even resulted in a Federal court order deeming it preempted by Section 32919.[226] Moreover, even California's initiatives were not new at the time of the SAFE I Rule. As California's comment to this Proposal explained, "California's zero-emission-vehicle standards [were] first adopted more than three decades ago" and its "greenhouse gas standards were first adopted 16 years ago."[227]

Thus, until 2019, the self-executing express preemption provisions in the governing fuel economy statute, Section 32919, had always provided the sole codified language on CAFE

[225] The wording of this provision was slightly modified in a recodification of EPCA in 1994. Overall though, both contemporaneous legislative sources and courts considering fuel economy matters have stressed that "the 1994 recodification was intended to "revise[ ], codif[y], and enact[ ]" the law "without substantive change." *Green Mountain Chrysler Plymouth Dodge Jeep*, 508 F. Supp. 2d at 346 (quoting Pub. L. 103–272, 108 Stat. 745, 745 (1994); H.R. Rep. No. 103–180, at 1 (1994), reprinted in 1994 U.S.C.C.A.N. 818, 818; S. Rep. No. 103–265, at 1 (1994)).

[226] *Compare Ophir*, 647 F. Supp. 2d at 91–92 ("The Court declares instead that the hybrid requirement of Rule 403 is expressly preempted by the EPCA, and the city and [Police Commissioner] are permanently enjoined from enforcing it."), *with Cent. Valley Chrysler-Jeep, Inc.*, 529 F. Supp. 2d at 1175 (holding that California's regulation of motor vehicle greenhouse gas emissions were not preempted under Section 32919).

[227] State of California et al., Docket No. NHTSA-2021-0030-0403 (citing Cal. Code Regs. title 13, § 1960.1(g)(2) (1991)).

preemption. Since this statutory language is self-executing, Federal courts, as well as Federal agencies, states, and local governments, had come to understand the fundamental operation of CAFE preemption and applied it on a case-by-case basis, resulting in the development of a significant body of case law, without the need for any corresponding regulations from NHTSA. As such, the SAFE I Rule was neither the natural evolution of NHTSA's prior positions nor an expected outgrowth of the regulatory landscape. Thus, to the extent this rulemaking is a change in position, it is simply a course correction that returns the Agency's regulations to the same state in which they existed for approximately 44 of the 46 years of EPCA's lifespan prior to the SAFE I Rule.

Commenters that opposed the Proposal argued that this history of regulatory silence is irrelevant, pointing, for instance, to Supreme Court cases upholding agencies who promulgated regulations long after the enactment of the antecedent statutory language.[228] This argument, though, oversimplifies NHTSA's position and the applicable legal standards. The Agency agrees that a statute's long pendency does not foreclose the opportunity to promulgate otherwise appropriate regulations that seek to apply the statute for the first time. But that does not mean the SAFE I Rule's unprecedented departure from longstanding practice is, as commenters contend,

[228] *See* Urban Air Initiative et al., Docket No. NHTSA-2021-0030-0423 (June 11, 2021) (citing *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735 (1996) (upholding a regulation first promulgated by the Comptroller of the Currency "more than 100 years after the enactment" of the statutory language to which it was directed).

"of little consequence."[229] Such comments erroneously reduce the standard into an all-or-nothing proposition: suggesting the lack of prior regulations must either independently sink the rulemaking or have no bearing on the analysis at all. However, the very same Supreme Court jurisprudence cited by these comments makes clear that the proper inquiry is more nuanced. In particular, the cases emphasize that although "the mere fact that an agency interpretation contradicts a prior agency position is not fatal," such unprecedented diversions must still "take account of legitimate reliance" interests connected to the prior positions.[230] Within this more comprehensive framework, the problem with the SAFE I Rule was not simply that it sought to promulgate regulations on Section 32919 for the first time—but that it did so without regard for many of the legally relevant considerations, such as reliance interests, that should have informed whether the Agency should have taken such a broadly applicable view of preemption.

In the Proposal, the Agency expressed concern that the SAFE I Rule improperly neglected to consider the nuances of the federalism interests affected by the rule.[231] The commenting state and local governments subject to such preemption overwhelmingly agreed, commenting that this concern was particularly illustrated by the failure of the SAFE I Rule to account for the state and local jurisdictions' reliance interests in the purportedly preempted programs. Their comments substantiated this claim, pointing to numerous important policy goals

[229] National Automobile Dealers Association, Docket No. NHTSA-2021-0030-0435 (June 10, 2021).
[230] *Smiley*, 517 U.S. at 742.
[231] *See* CAFE Preemption NPRM, 86 FR at 25989.

or Federal statutory obligations that relied upon those programs. These reliance interests are largely unsurprising, as NHTSA had never previously issued regulations on EPCA preemption for the entirety of the CAFE program up to the point of the SAFE I Rule or had otherwise itself attempted to preempt those programs. Nevertheless, the SAFE I Rule still failed to meaningfully discuss these reliance interests. Instead, the Rule instituted a sweeping prohibition that foreclosed opportunities to more narrowly consider programs in a particularized setting. Consequently, a full repeal of the SAFE I Rule addresses this legal deficit and thereby restores the proper foundation upon which the Agency may more appropriately consider this issue in any future settings.

Finally, NHTSA believes it is worth making clear that repealing the SAFE I Rule does not itself undermine any reliance interests. In this respect, the Agency is mindful that neither states, nor local jurisdictions, the entities potentially subject to any preemption, nor motor vehicle manufacturers, the entities producing the vehicles potentially subject to any state or local regulation, articulated a reliance interest in the SAFE I Rule in their comments to this Proposal.[232] To the contrary, numerous states and local jurisdictions supported the Proposal and

[232] As for automobile manufacturers, three motor vehicle manufacturers, Ford, Tesla, and Rivian, directly commented on the Proposal. Each of these comments expressly supported the Proposal. Ford Motor Company, Docket No. NHTSA-2021-0030-0002 (Apr. 28, 2011) ("Ford supports NHTSA's proposal to restore a "clean slate" by repealing the SAFE I rule and preamble statements regarding preemption."), Tesla, Inc. Docket No. NHTSA-2021-0030-0398 (June 11, 2021) ("Tesla supports NHTSA's proposal and the full repeal of the SAFE Rule Part 1"), Rivian, Docket No. NHTSA-2021-0030-0413 (June 11,

expressly clarified that they have not relied on the framework of the SAFE I Rule due to its brief tenure and uncertainty surrounding its legal validity. For example, a comment submitted by the State of California along with a collection of other states and local jurisdictions emphasized that "no cognizable reliance interests in the Preemption Rule counsel against repeal. Besides being unclear, the Preemption Rule has faced litigation for all but a few hours of its 21-month existence, preventing any reasonable reliance interests from accruing during that time."[233] Therefore, other than the reliance interests *restored* by repealing the SAFE I Rule,[234] NHTSA has not identified any reasonable reliance interests that may caution against this rulemaking.

b. The rigid framework of the SAFE I Rule also left no room to account for other important preemption variables.

The substantial federalism and reliance interests discussed above support a narrowly tailored preemption analysis that considers preemption on a particularized basis rather than through sweeping proclamations that categorically eliminate the interests. Addressing EPCA preemption in a more particularized setting also promotes a more thorough and informed

2021) ("Rivian supports NHTSA's conclusion that their portion of the SAFE I rule must be repealed"). Other motor vehicle manufacturers submitted comments through their industry organizations. None of these comments opposed the Proposal either. *See* Zero Emission Transportation Association, Docket No. NHTSA-2021-0030-0397 (June 11, 2021), National Coalition for Advanced Transportation, Docket No. NHTSA-2021-0030-0310 (June 11, 2021), Alliance for Automotive Innovation, Docket No. NHTSA-2021-0030-0400 (June 11, 2021).

[233] State of California et al., Docket No. NHTSA-2021-0030-0403 (June 11, 2021).

[234] *See* National League of Cities et al., Docket No. NHTSA-2021-0030-0421 (June 11, 2021) (noting that a repeal of the SAFE I Rule "would in turn restore the conditions on which those local governments relied in setting their climate goals.").

preemption assessment of any specific state or local programs at issue. This is because the nature of the EPCA preemption analysis frequently requires an understanding of fact-specific variables or diverse characteristics of the programs in question, such as the relevant technologies, compliance paths, and particular activities pertinent to those programs. Forming abstract or generally applicable EPCA preemption conclusions precludes an understanding of those program-specific attributes and, like the SAFE I Rule, results in a sweeping proclamation that cannot possibly account for the diverse array of programs (some of which likely have not even been formulated yet) potentially affected by the analysis. For instance, in order to announce a generally applicable scope for EPCA preemption, the SAFE I Rule drew assumptions about compliance technologies and program characteristics that would regulate GHG emissions from motor vehicles or involve ZEV mandates in the near-term. In turn, the Rule extrapolated those assumptions to the entire realm of regulatory possibilities, both now and in the future. The SAFE I Rule's rigid and generally applicable scope foreclosed any opportunity to evaluate specific programs based on a comprehensive understanding of their actual characteristics rather than on generalized assumptions about how they operate. This left no space to defer a preemption assessment until the specific programs could be fully understood or consider whether actual differences in programs (both in the near-term or through technological developments that may occur in the future) could affect the application of EPCA's "related to" preemption standard.

Numerous commenters also identified multiple other considerations relating to potential state motor vehicle emissions regulations that would be foreclosed for consideration by the sweeping rigidity of the SAFE I Rule. By rigidly restricting policy developments and precluding avenues for innovation, the SAFE I Rule ultimately implemented a rigid and permanent prohibition based on, at most, a limited understanding of a particular snapshot of the regulatory landscape. Comments further underscored a concern that the regulatory landscape upon which the SAFE I Rule imposed is dynamic and evolving. This view was particularly developed in a comment from the South Coast Air Quality Management District, which criticized the SAFE I Rule for neglecting to "consider how pollution control technology changes over time," "fail[ing] to acknowledge that some technologies may not have any measurable relationship with fuel economy standards at all," and ignoring that "state-set standards may be met by means other than increasing fuel economy."[235] Ultimately, such concerns echo the Proposal's misgivings that the SAFE I Rule rigidly applied preemption irrespective of the precise contours and legally relevant characteristics of any particular programs, regulations, or technological developments that may arise. In doing so, the SAFE I Rule instituted an inflexible preemption framework, which necessarily could not accommodate the litany of fact-specific variables and nuances that

[235] South Coast Air Quality Management District, Docket No. NHTSA-2021-0030-0446 (June 11, 2021) (supporting such positions through a citation to "*Green Mountain Chrysler Plymouth Dodge Jeep*, 508 F.Supp. 2d at 381 (discussing meeting GHG standards through preventing leakage of air conditioner refrigerants)").

typically bear upon a preemption analysis, which, the Agency stresses, could still determine that any particular program is preempted. However, preempting all programs that fit within the broad categories established in the SAFE I Rule fails to acknowledge that the specific contours of any particular program remain crucial to the analysis.

A few comments that opposed the Proposal disagreed with this concern, such as a comment from NADA that argued the "physics and chemistry involved with fuel economy and GHG emissions standards" are intrinsically intertwined such that a regulation of one regulates the other.[236] In this respect, NADA's comment largely mirrors the reasoning of the SAFE I Rule in preempting all motor vehicle GHG standards. However, as discussed throughout this rulemaking, the Agency here is not taking a generally applicable position on this issue, as NHTSA continues to believe that such statements simply ignore the details of particular programs. Ultimately, such statements make factual determinations about detailed scientific and technical issues in the abstract —without any regard for the actual technical details of the particular programs or technologies that bear upon those specific conclusions. In doing so, such statements of general applicability cannot possibly account for whether variables, which are presently unknown (and some of which may depend upon programs or technologies not even in

[236] National Automobile Dealers Association, Docket No. NHTSA-2021-0030-0435 (June 10, 2021). *See also* Urban Air Initiative et al., Docket No. NHTSA-2021-0030-0423 (June 11, 2021).

existence yet), may affect the relevant technical analysis or substantive accuracy of the preemption determination.

Ultimately, if NADA or any other parties oppose the state and local programs that the SAFE I Rule sought to preempt, they remain free to challenge those programs in Federal court, as they have been able to do since the inception of those programs. The repeal of the SAFE I Rule does not change that ability or the underlying "related to" standard in Section 32919. To the extent NADA considers this point a process flaw, NHTSA responds that NADA's focus is too narrow, as the Agency has explained above that there exists no need to replace its positions on preemption in the SAFE I Rule with new generally applicable positions. The SAFE I Rule sought to preempt, in a generally applicable manner, all state and local GHG emissions regulations for motor vehicles. Continuing this approach from the SAFE I Rule would improperly only focus upon a snapshot of the regulatory landscape: the *current* manner in which *currently* available technology reduces emissions based. This unduly limited perspective is evident even from the face of such comments, such as a joint comment from CEI asserting that "[t]he two types of standards will remain mathematically convertible *as long as affordable and practical onboard carbon capture technologies do not exist*."[237] Therefore, even assuming the framework espoused by the SAFE I Rule and commenters defending the Rule, the relationship between the

[237] Competitive Enterprise Institute et al., Docket No. NHTSA-2021-0030-0411 (June 11, 2021) (emphasis added).

regulations that would have been preempted under SAFE I Rule and fuel economy still only exists as a potentially impermanent state of affairs, subject to change as technology or legal standards evolve. As such, it was not appropriate for the SAFE I Rule to try and confine these dynamic regulatory subjects to a static and one-size-fits-all prohibition.

In light of the foregoing, upon reconsideration, NHTSA finalizes its view that the SAFE I Rule's categorical scope was an inappropriate approach. The preemption framework established by the Rule necessarily could not account for legally relevant considerations and, in any event, imprudently and unnecessarily imposed preemption in absolute terms, foreclosing any outlet for a more narrowly tailored approach instead and precluding opportunities to account for program-specific variables that could affect the accuracy or nature of a preemption analysis.

iii. Restoring the focus to the governing statutory language promotes a properly applied EPCA preemption framework.

In light of the foregoing, NHTSA maintains the Proposal's concern that the Agency's preceding discourse on EPCA preemption paints a circuitous regulatory landscape, which convolutes the proper application of legal principles on important questions of preemption. Such confusion culminated in the SAFE I Rule, which as described throughout herein, misapplied the governing legal principles, articulated an impermissible legal role for the Agency, and failed to identify the legally relevant factors that bore on an EPCA preemption determination. In doing so, the SAFE I Rule also purported to synthesize a variety of Agency statements and positions that

predated that rulemaking. And, even though the SAFE I Rule represented a marked departure from the Agency's longstanding historical practice of not codifying express EPCA preemption requirements, the SAFE I Rule (including its preambles that accompanied the rulemaking) still attempted to envelop the Agency's historical discussions of EPCA preemption within its legally problematic preemption framework. Accordingly, NHTSA continues to believe that a repeal of the SAFE I Rule is justified in order to clarify the applicable preemption framework and restore the traditional focus on EPCA's longstanding statutory standards in Section 32919, which ultimately govern the preemption analysis. Moreover, because of the extent to which the SAFE I Rule inextricably comingled its analysis with a variety of prior Agency statements on the subject of EPCA preemption, in repealing the SAFE I Rule, the Agency also stresses that none of those preceding statements should be read as persisting Agency positions on the nature or scope of EPCA preemption. In doing so, NHTSA strives to disentangle any regulatory confusion wrought by the SAFE I Rule from the original statutory standards in Section 32919.

Accordingly, NHTSA is finalizing its proposed approach of refining the discourse on EPCA preemption by repealing the SAFE I Rule. The Agency considers this basis for a repeal applicable regardless of whether NHTSA possessed authority for the SAFE I rulemaking because, either way, the SAFE I Rule introduced confusion that undermined a properly scoped preemption analysis. In this respect, as described before, the Agency remains cognizant that Congress has not required NHTSA to speak substantively on EPCA preemption. Thus, anything

NHTSA says on this subject is, at most, elective and unnecessary for Section 32919 to function as Congress intended. Consequently, if NHTSA's regulations on EPCA preemption raise the possibility of confusion or otherwise convolute the discourse on the subject, it would be better to reset those statements entirely than allow them to linger.

a. Repealing the SAFE I Rule facilitates the direct application of longstanding statutory standards.

NHTSA finalizes the Proposal's view that a repeal of the SAFE I Rule helpfully elucidates the proper standards to apply when conducting an EPCA preemption analysis. This is not simply because the SAFE I Rule promulgated requirements for which no authority existed, as described above. Even apart from their unsustainable legal status, the SAFE I Rule also introduced entirely new and largely undefined concepts into the preemption analysis. In doing so, the SAFE I Rule diverted attention from the statutory standards of Section 32919, which were traditional standards long applied by regulated entities and courts. By layering additional uncharted and undefined regulatory standards on top of this longstanding statutory language, the SAFE I Rule introduced new uncertainty into the EPCA preemption regulatory landscape. As such, today's repeal of the Rule removes this superfluous layer thereby restoring the focus on the original statutory standards, which are capable of direct application.

On balance, the comments to the Proposal illustrated the degree to which a repeal of the SAFE I Rule promoted a clearer and more direct application of the governing statutory

preemption standards. Several commenters opposing a repeal expressed concern that this step would undo what they viewed as the SAFE I Rule's clarification of EPCA preemption. To reach this conclusion, such comments generally argued that by categorically preempting states and local jurisdictions, the SAFE I Rule established a clear brightline for preemption, whereas a repeal would fail to provide any guidance on the subject or potentially result in overlapping requirements.[238]

However, commenters by no means agreed on the proposition that the SAFE I Rule clarified the regulatory landscape. In fact, a large number of commenters supporting a repeal specifically expressed the opposite concern: that the SAFE I Rule introduced more uncertainty. Many of these commenters were states and local entities who especially need to understand the contours of EPCA preemption in order to formulate their own policies and assess their viability. Such commenters pointed to tangible examples of how aspects of the SAFE I Rule convoluted the EPCA preemption analysis by introducing new regulatory requirements and standards that produced more uncertainty than the underlying statutory standards in Section 32919.

Ultimately, NHTSA finalizes the Proposal's view that refocusing the governing preemption spotlight back on Section 32919's statutory terms is ideal because the SAFE I Rule

[238] *See, e.g.*, National Automobile Dealers Association, Docket No. NHTSA-2021-0030-0435 (June 10, 2021), Competitive Enterprise Institute et al., Docket No. NHTSA-2021-0030-0411 (June 11, 2021), American Fuel & Petrochemical Manufacturers, Docket No. NHTSA-2021-0030-0425 (June 11, 2021), Urban Air Initiative et al., Docket No. NHTSA-2021-0030-0423 (June 11, 2021).

did not elucidate the regulatory landscape, and in some cases, may have even added confusion by introducing unfamiliar and uncharted terms into the preemption analysis. Permitting the regulations of the SAFE I Rule to linger enhances the potential that these regulations may only add regulatory confusion to the statutory standards long in place under EPCA. As described throughout this final rule, EPCA preemption is governed by the express preemption provision in Section 32919, which has employed substantially the same language throughout the history of the CAFE program. Multiple commenters noted that the "related to" language enacted in Section 32919 has also been used by Congress in other enactments beyond EPCA and has the benefit of extensive jurisprudence analyzing the meaning of the term.[239] Moreover, Section 32919 itself has even been applied by several Federal courts, who have applied the provision to both preempt and not preempt state and local programs.[240] Therefore, the governing statutory standards in Section 32919 are familiar concepts that the public, including regulated entities, and adjudicators have frequently analyzed or considered over the span of EPCA's many years of existence.

[239] In fact, this point was emphasized even by commenters critical of the Proposal, as they sought to raise substantive arguments about how various state programs were preempted by EPCA under the "related to" standard. *See, e.g.*, Urban Air Initiative et al., Docket No. NHTSA-2021-0030-0423 (June 11, 2021) (seeking to apply Section 32919's "related to" terminology by reference to other jurisprudence interpreting similar language).

[240] *Compare Ophir*, 647 F. Supp. 2d at 91–92 ("The Court declares instead that the hybrid requirement of Rule 403 is expressly preempted by the EPCA, and the city and [Police Commissioner] are permanently enjoined from enforcing it."), *with Cent. Valley Chrysler-Jeep, Inc.*, 529 F. Supp. 2d at 1175 (holding that California's regulation of motor vehicle greenhouse gas emissions were not preempted under Section 32919).

In contrast, the unprecedented approach of the SAFE I Rule confused this framework and, as described above, purported to introduce new prescriptive standards into the preemption analysis by way of the codified regulations. The SAFE I Rule substituted this long-applied statutory standard for new regulatory phrases that lacked any jurisprudential history or further definition. The resulting ambiguity introduced many unknowns into the EPCA preemption landscape, such as what those new standards mean or how NHTSA may seek to construe its new standards in the future. In addition, because Section 32919 can also support a private right of action, in the past, private parties have undertaken litigation seeking to enforce the terms of EPCA preemption. As such, any new and potentially malleable standards promulgated by the SAFE I Rule also offer new opportunities for private litigants to advocate for novel applications of the SAFE I Rule's prescriptive preemption requirements in contexts even beyond the scope originally contemplated by the Agency. These factors introduce substantial uncertainties into a regulatory landscape that, before the SAFE I Rule, had been exclusively governed by the longstanding statutory language in Section 32919.

Many of the comments raised concerns associated with such uncertainties. For instance, a joint comment submitted by California along with numerous other states and local jurisdictions expressed concern that the new regulations from the SAFE I Rule introduced new—and undefined—legal standards into the preemption framework, pointing to new concepts or phrases

such as "direct or substantial effect" or "in-use" regulations.[241] Commenting states and local jurisdictions also feared that all of these unknowns actually complicated their long-term planning by making the EPCA preemption standard unpredictable.[242] For example, a group of municipal entities expressed uncertainty over whether these untested standards could even be stretched to apply to routine traffic measures in the future.[243] And another local jurisdiction noted that the ensuing litigation over the SAFE I Rule's validity introduced further disruptions into anticipated regulatory initiatives that were already in the process of development upon the promulgation of the Rule.[244] Ultimately, all of these comments underscore the Proposal's concern that the SAFE I Rule did not even achieve the clarity that it cited so frequently as the reason for the rulemaking. In fact, strong indications exist that the Rule actually amplified any ambiguities surrounding EPCA preemption by suddenly linking the preemption analysis to uncharted standards and

[241] State of California et al., Docket No. NHTSA-2021-0030-0403 (June 11, 2021).
[242] South Coast Air Quality Management District, Docket No. NHTSA-2021-0030-0446 (June 11, 2021) ("the Preemption Rule suffered from a notable lack of clarity and an incomplete analysis of standards. As the Proposed Repeal notes, the Preemption Rule inconsistently used language between the preamble and codified text, creating the risk of confusion as to the full scope of preemption being promulgated."). *See also* Connecticut Department of Transportation, Docket No. NHTSA-2021-0030-0330 (June 11, 2021) (stressing that a "repeal is necessary to provide certainty for transportation and air quality planning agencies, the public, and the original equipment manufacturers.").
[243] National League of Cities et al., Docket No. NHTSA-2021-0030-0421 (June 11, 2021).
[244] District of Columbia Department of Energy and Environment, Docket No. NHTSA-2021-0030-0412 (June 11, 2021) (noting that "the promulgation of SAFE I threw [the District's] process into turmoil."). *See also* CAFE Preemption NPRM, 86 FR at 25984 (noting that "The litigation has substantially divided the regulated industry and interested stakeholders, as the D.C. Circuit litigation encompasses ten consolidated petitions brought by a number of states, cities, and environmental organizations challenging the rule. On the other side of the litigation, several automakers, other states, and fuel and petrochemical manufacturers have intervened in support of the rule.").

unfamiliar concepts. As such, even setting aside the litany of other legal problems with the Rule discussed throughout this rulemaking, NHTSA views this repeal as a necessary and prudent step to unclutter the EPCA regulatory landscape.

Other aspects of the SAFE I Rule's regulatory text exacerbated the uncertainty surrounding the SAFE I Rule's unprecedented preemption framework. For instance, the Proposal highlighted that the codified text of the SAFE I Rule was potentially perplexing because Sections 531.7 and 533.7 merely parroted the statutory text in Section 32919. As such, the Proposal expressed a concern that the verbatim recitation of the statutory language in the CFR could even be confusing to some, who assume some subtle difference must exist in the statutory and regulatory provisions. One commenter defending the SAFE I Rule rejected this reasoning, arguing that "such concerns would be immediately dispelled upon comparing the statutory and regulatory text and realizing the provisions were identical."[245] The comment assumed this alignment would be naturally understood because the commenter asserted that "agencies routinely" parrot their statutes in such a manner.[246] But this assumption is not shared by all, with at least one prominent administrative law treatise expressly recognizing that "agencies rarely issue legislative rules that simply repeat the precise language of a statute."[247] Agencies may

[245] American Fuel & Petrochemical Manufacturers, Docket No. NHTSA-2021-0030-0425 (June 11, 2021).
[246] *Id.*
[247] Richard J. Pierce, Jr. & Kristin E. Hickman, Administrative Law Treatise §3.8 (6th Edition, 2020-1 Cum. Supp.).

often integrate portions of statutory language into their regulations, but to fully copy an entire statutory provision into their own regulations is a step further (and a step that the Supreme Court discourages, at least with regard to deference).[248] In this respect, the oddity of codifying into regulation multiple provisions that already exist verbatim and in full in a statute creates a peculiar regulatory maze for statutory standards otherwise capable of direct implementation. As one joint comment noted, the uncertain purpose of taking this superfluous step was exacerbated by the SAFE I "Rule's preamble [which] magnified the risk of confusion by stating that verbatim recitation of Section 32919 in the Code of Federal Regulations 'articulates NHTSA's views on the meaning' of that section."[249] This approach sends readers on a search for meaning, straining to find differences between the statute and their mirroring regulatory provisions or perhaps attempting to apply some sort of extra-textual analysis to construe one iteration of the text differently than the other. And even if, as AFPM's comment hypothesizes, a thoughtful reader may eventually reach the conclusion that no such differences actually exist because the provisions are identical, the entire circuitous endeavor serves no purpose because the statutory text already controlled the analysis and its regulatory copies do nothing to further illuminate that analysis.

[248] *See Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (refusing to extend deference to an agency regulation that merely parroted a statute).
[249] Center for Biological Diversity et al., Docket No. NHTSA-2021-0030-0369 (June 11, 2021) (quoting 84 FR at 51319).

In any event, whether or not such a parroting regulation is actually confusing need not be dispositive because, at the very least, such a parroting regulation is superfluous and unnecessary. As such, it is not unreasonable for NHTSA to conclude that the superfluous and potentially confusing provisions in Sections 531.7 and 533.7 should no longer remain codified and if they were to remain so, would only overcomplicate the EPCA preemption analysis. Accordingly, NHTSA finalizes its view that a repeal of the SAFE I Rule is independently warranted in order to restore the focus to EPCA's governing statutory standards and remove an unnecessary and potentially confusing layer of regulatory haze that risks obscuring the proper preemption analysis.

b. NHTSA reiterates that prior regulatory statements on the scope and nature of EPCA preemption no longer remain current views of the Agency.

Finally, NHTSA reiterates the Proposal's view that, to the extent prior rulemaking statements from the Agency discuss matters of EPCA preemption, they should not be read inconsistently with the reconsidered views that NHTSA now expresses in this final rule. Throughout the SAFE I rulemaking, NHTSA sought to portray the regulations as the culmination of the Agency's historical discourse on the subject of EPCA preemption. To be sure, as has been reiterated throughout this final rule, NHTSA does not view the SAFE I Rule as a natural or consistent outgrowth of its historical position of not promulgating preemption regulations under Section 32919. Nevertheless, the degree to which the SAFE I Rule sought to emmesh the

Agency's prior discussions of EPCA preemption, which appeared occasionally in preambles to substantive CAFE standard-setting rulemakings, within the flawed rationale of the SAFE I Rule warrants a clarification of the relationship of those prior statements to today's repeal.

In this respect, NHTSA fully agrees with several commenters who expressed that this clarification is not formally necessary because this final rule clearly contains the current views of the Agency and upon the repeal of the SAFE I Rule, "any preambular statements justifying or explaining the Preemption Rule's regulatory provisions or appendices will be a 'legal nullity.'"[250] NHTSA likewise agrees that this portion of the rulemaking is not a separate final agency action. Any such statements or discussions in the SAFE I rulemaking preambles simply accompanied the SAFE I regulations so upon the repeal of those regulations there is nothing further to formally undo. Likewise, NHTSA is not formally repealing any statements that preceded the SAFE I Rule in the sense that NHTSA is suggesting that the statements will be somehow stricken from past Federal Register publications (nor is the Agency even aware of a legal mechanism to do so).[251] But it is precisely because those statements will remain published

[250] State of California et al., Docket No. NHTSA-2021-0030-0403 (June 11, 2021) (quoting *NRDC v. EPA*, 559 F.3d 561, 565 (D.C. Cir. 2009)); Center for Biological Diversity et al., Docket No. NHTSA-2021-0030-0369 (June 11, 2021).

[251] In this respect, NHTSA particularly disagrees with commenters opposing the Proposal who mischaracterize the nature of the Agency's action in order to label the rulemaking "retroactive censorship" or "regulatory cancel culture." *See* Competitive Enterprise Institute et al., Docket No. NHTSA-2021-0030-0411 (June 11, 2021).

that NHTSA considers it prudent to, out of an abundance of caution, make crystal clear that they should not be read in isolation or taken out of context as views NHTSA continues to endorse.

Therefore, to the extent the Proposal referred to this clarification as a "repeal" or "clean slate," the Agency simply means that any statements NHTSA has made in past rulemaking discussions (in the SAFE I Rule or otherwise) that seek to impose a scope for EPCA preemption or suggest NHTSA has the authority to do so should no longer be read as current NHTSA positions.[252] In other words, no one should attempt to overly parse NHTSA's prior statements in order to argue, for example, that NHTSA somehow left a portion of the SAFE I Rule analysis untouched and continues to hold those views. NHTSA continues to consider this precautionary step worthwhile. In doing so, NHTSA makes clear that no prior statements should continue to clutter the EPCA preemption analysis. This promotes a clearer and more precise discourse on EPCA preemption, which is easier to follow because of the manner in which the SAFE I Rule's preambulatory discussion of EPCA preemption comingled core legal concepts and purported to draw from prior Agency positions. As explained in the preceding section, the SAFE I Rule was repeatedly imprecise in the way it described several fundamental legal principles, such as

[252] In addition to the SAFE I Rule, the Proposal specifically identified several other Preamble statements as containing such statements: DOT, NHTSA, Light Truck Average Fuel Economy Standards Model Years 2005–07, Final Rule, 68 FR 16868, 16895 (Apr. 7, 2003) (describing NHTSA's views on EPCA preemption in the preamble to a final rule setting CAFE standards); DOT, NHTSA, Average Fuel Economy Standards for Light Trucks Model Years 2008–2011; Final Rule, 71 FR 17566, 17654 (Apr. 6, 2006) (describing NHTSA's views of EPCA preemption in the preamble to a final rule setting CAFE standards).

rulemaking authority, the nature of preemption, and the effect of regulations. This results in a legally confusing discussion about how EPCA preemption operates, how the legal framework should apply, and how NHTSA's views on preemption should factor into any such analysis. Irrespective of the substantive conclusions reached through such a rulemaking, this confusing landscape created by the SAFE I rulemaking record unnecessarily convolutes the EPCA preemption discourse and provides a difficult legal footprint for any members of the public or adjudicatory body to follow. Accordingly, renewing the focus on Section 32919's original language through this final rule restores a more direct and straightforward application of EPCA's familiar and longstanding statutory preemption terms.

III. Rulemaking Analyses and Notices

1. Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures

NHTSA has considered the impact of this rulemaking action under Executive Order 12866, Executive Order 13563, and the Department of Transportation's regulatory policies and procedures. Only one commenter raised any of these issues during the comment process. This commenter argued that the Proposal conflicted with Executive Order 12866 because the NPRM "failed to evaluate whether the action is a significant regulatory action."[253] However, this

[253] American Fuel & Petrochemical Manufacturers, Docket No. NHTSA-2021-0030-0425 (June 11, 2021).

comment is not correct, as this rulemaking document has been considered a "significant regulatory action" under Executive Order 12866, but has not been designated as "economically significant," as it would not directly reinstate any state programs or otherwise affect the self-executing statutory preemption framework in 49 U.S.C. 32919.

The same commenter also argued that NHTSA failed to comply with Executive Order 12866 because the Proposal did not "assess all costs and benefits of its proposed action and available regulatory alternatives."[254] The Agency addressed this comment in Section II.A. of this notice.

2. Executive Order 13990

Executive Order 13990, ''Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis'' (86 FR 7037, Jan. 25, 2021), directed the immediate review of ''The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program,'' 84 FR 51310 (September 27, 2019), by April 2021." The Proposal followed the review directed in this Executive Order and this Final Rule concludes the review. As noted in the Proposal and reiterated again today, the Agency continues to deliberate further about the complex substantive issues surrounding EPCA preemption and may elect to undertake further action in the future, if warranted, to exercise NHTSA's interpretative and policymaking

[254] *Id.*

discretion with respect to such issues. Nevertheless, as the Agency's review under Executive Order 13990 identified other independent and dispositive problems with the SAFE I Rule, these grounds suffice for NHTSA to conclude its reconsideration of the Rule by repealing the SAFE I Rule in full.

3. Executive Order 14008

Executive Order 14008, "Tackling the Climate Crisis at Home and Abroad" (86 FR 7619) expressly recognizes that "[t]he United States and the world face a profound climate crisis." Accordingly, the Order describes a multitude of domestic and foreign policy measures designed to promote "climate considerations" as "an essential element of United States foreign policy and national security."[255]

One commenter opposing the Proposal and defending the SAFE I Rule argued that by repealing the SAFE I Rule without a technical analysis of any impacts of state electric vehicle mandates on "low-income car buyers," NHTSA failed to comply with the environmental justice provisions of Executive Order 14008.[256] In response, first and foremost, the Agency stresses that the substantive climate considerations described in the Order do not change the principally legal justifications for the repeal of the SAFE I Rule. As described throughout this Final Rule, a repeal of the SAFE I Rule is necessitated by the multiple legal deficits with the Rule, including a lack

[255] *Id.*
[256] *See* American Fuel & Petrochemical Manufacturers, Docket No. NHTSA-2021-0030-0425 (June 11, 2021).

of NHTSA rulemaking authority and the Agency's failure to adequately consider legally relevant considerations prior to promulgating the preemption regulations. These legal problems leave the Agency with no discretion but to repeal the Rule.

Moreover, NHTSA notes that both the nature and application of this rulemaking are consistent with the climate and environmental justice goals expressed in Executive Order 14008. While NHTSA's repeal does not depend upon substantive issues, as described throughout, the Agency notes that commenters delving into the substantive issues surrounding the SAFE I Rule widely viewed the original rule as undermining efforts to "address[] climate change and improv[e] equity."[257] Moreover, as explained in Section II.B.ii. above, repealing the SAFE I Rule enables any future preemption analyses to occur at a more nuanced level compared to the categorical and rigid prohibition instituted by the repealed regulations. In this sense, repealing the SAFE I Rule facilitates future opportunities to better incorporate climate and environmental justice considerations into future substantive applications or interpretations of EPCA preemption.

Finally, Executive Order 14008 makes clear that pursuing environmental justice often entails understanding policies from the perspective of local communities, "to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities" from those policies.[258] This rulemaking has

[257] *See, e.g.*, Consumer Reports, Docket No. NHTSA-2021-0030-0224 (June 11, 2021).
[258] Executive Order 14008, *Tackling the Climate Crisis at Home and Abroad*, 86 Fed. Reg. 7619 (Feb. 1, 2021).

repeatedly described the extent to which repealing the SAFE I Rule will remove improper restrictions on states and local jurisdictions, thereby facilitating their development of innovative policies tailored to address the challenges facing their local communities.[259] In doing so, repealing the SAFE I Rule increases the potential that environmental justice may be served as those jurisdictions are often in the best situation to both quickly identify the unique challenges facing disadvantaged local communities and understand the steps necessary to mitigate them.

4. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of proposed rulemaking or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). No regulatory flexibility analysis is required, however, if the head of an agency certifies the proposal will not have a significant economic impact on a substantial number of small entities.

NHTSA has considered the impacts of this document under the Regulatory Flexibility Act and certifies that this rulemaking will not have a significant economic impact on a

[259] *See supra* nn.216-217 (describing commenters who specifically raised environmental justice concerns connected to this very issue).

substantial number of small entities. The following provides the factual basis for this certification under 5 U.S.C. 605(b). This final rule only concerns the question of preemption; the action does not set CAFE or emissions standards themselves. The preemption regulations repealed in this action have no direct effect on any private entities, regardless of size, because the rules do not regulate private entities. Further, unlike the SAFE I Rule, this rulemaking takes no position on whether any particular State or local law is preempted and has no impact, let alone a significant impact, on any small government jurisdiction. Thus, NHTSA confirms in this final rule that this rule would have no significant impact on any small entities.

5. Executive Order 13132 (Federalism)

Executive Order 13132 requires NHTSA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications."[260] "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."[261] Executive Order 13132 imposes additional consultation requirements on two types of regulations that have

[260] Executive Order 13132, *Federalism*, Sec. 1(a) (Aug. 4, 1999).
[261] *Id.* at Sec. 1(a).

federalism implications: (1) a regulation that imposes substantial direct compliance costs, and that is not required by statute; and (2) a regulation that preempts State law.[262]

While this final rule concerns matters of preemption, it does not entail either type of regulation covered by Executive Order 13132's consultation requirements. Rather, the action in this final rule merely repeals regulations and positions that sought to preempt State law. Thus, this final rule does not implicate the consultation procedures that Executive Order 13132 imposes on agency regulations that would either preempt state law or impose substantial direct compliance costs on states.

6. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, requires agencies to prepare a written assessment of the cost, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually. Because this rulemaking does not include a Federal mandate, no unfunded mandate assessment was prepared.

7. National Environmental Policy Act

The National Environmental Policy Act of 1969)[263] directs that Federal agencies proposing "major Federal actions significantly affecting the quality of the human environment"

[262] *Id.* at Sec. 6(b), (c).
[263] 42 U.S.C. 4321–4347.

must, "to the fullest extent possible," prepare "a detailed statement" on the environmental impacts of the proposed action (including alternatives to the proposed action).[264] However, there are some instances where NEPA does not apply to a particular proposed action.

In the Proposal, NHTSA emphasized that one consideration is whether the action is a non-discretionary action to which NEPA may not apply.[265] In this Final Rule, NHTSA has concluded that the SAFE I Rule was legally flawed for several reasons. Principally, Congress did not provide legislative rulemaking authority to the Agency with regard to 49 U.S.C. 32919. To the extent that the SAFE I Rule purported to dictate or proclaim EPCA preemption with the force of law, the Agency determined through this rulemaking that such actions exceed the Congressional grant of authority to NHTSA under EPCA. Accordingly, the Agency believes that the only legally appropriate course of action is to realign its regulatory activities to their properly authorized scope by removing the regulatory language and appendices from the Code of Federal Regulations and repealing the corresponding analysis of particular state programs in the SAFE I Rule. In addition, this Final Rule concluded that the SAFE I Rule failed to adequately consider a litany of context-dependent variables that bear upon the preemption analysis—including legally

[264] 42 U.S.C. 4332.

[265] *See Dept. of Transp. v. Public Citizen*, 541 U.S. 752, 768-69 (2014) (holding that the agency need not prepare an environmental impact statement (EIS) in addition to an environmental assessment (EA) and stating, "Since FMCSA has no ability categorically to prevent the cross-border operations of Mexican motor carriers, the environmental impact of the cross-border operations would have no effect on FMCSA's decisionmaking—FMCSA simply lacks the power to act on whatever information might be contained in the EIS.").

relevant considerations such as the longstanding reliance interests undermined by the preemption imposed by the SAFE I Rule. Overlooking these considerations also renders the SAFE I Rule legally invalid and in need of repeal. Courts have long held that NEPA does not apply to nondiscretionary actions by Federal agencies.[266] Based on the conclusion in this final rule that the legal deficits in the SAFE I Rule compel the Agency to repeal it, NHTSA maintains the position that NEPA does not apply to this action.

This is consistent with the position described in the Proposal, which also considered NEPA inapplicable due to the legally required nature of the repeal. Only two comments even raised NEPA issues, with one supporting the Agency's position and the other challenging it. Notably, the supporting comment was submitted on behalf of twelve public interest organizations, many of which consisted of environmental interest organizations. This joint comment expressly agreed with NHTSA that "if NHTSA definitively concludes that the Preemption Rule exceeds its statutory authority, it need not analyze the environmental impacts of a repeal under the National Environmental Policy Act."[267] This comment further recognized that since the Agency's repeal is compelled by law, any attendant NEPA evaluation is unnecessary

[266] *See, e.g., Public Citizen*, 541 U.S. 752; *Milo Cmty. Hosp. v. Weinberger*, 525 F.2d 144 (1st Cir. 1975); *State of South Dakota v. Andrus*, 614 F.2d 1190 (8th Cir. 1980); *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144 (D.C. Cir. 2001); *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995).
[267] Center for Biological Diversity et al., Docket No. NHTSA-2021-0030-0369 (June 11, 2021).

because "the agency 'lacks the power to act on whatever information' it might gather in a NEPA analysis."[268] This matches the framework described in this Final Rule.

The sole comment opposing the Proposal's approach to NEPA was a joint comment submitted by the Urban Air Initiative. This comment argued that a repeal of the SAFE I Rule was a major action that required an environmental impact statement.[269] In support of this argument, the comment tried to link the rulemaking to a variety of environmental impacts, such as changes to motor vehicle fuel economy from increased battery pack weight, as well as toxicity from electric automobile batteries.[270] However, even this comment predicates NHTSA's NEPA obligation on the rulemaking qualifying "as a discretionary action."[271] As described throughout this final rule, NHTSA's repeal of the SAFE I Rule is nondiscretionary due to the need to remedy the legal deficits with the Rule. Nothing in this comment changes this traditional understanding of NEPA's operation. Moreover, in labeling this repeal an action subject to NEPA, these commenters fail to explain why this conclusion, if true, would not also apply to the SAFE I Rule, which is what originally set in motion such a sweeping preemption scope. In doing so, the comment strenuously defends the viability of the SAFE I Rule without recognizing that

[268] *Id.* (quoting *Public Citizen*, 541 U.S. at 768–69).
[269] Urban Air Initiative et al., Docket No. NHTSA-2021-0030-0423 (June 11, 2021).
[270] *Id.*
[271] *Id.*

this very same argument would render the SAFE I Rule violative of NEPA and only provide another reason that the Rule is legally invalid and in need of repeal.[272]

Moreover, as in the Proposal, the Agency also reiterates that the Supreme Court has characterized an express preemption statute's scope as a legal matter of statutory construction, in which "the purpose of Congress is the ultimate touchstone of pre-emption analysis."[273] In turn, "Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it."[274] This particularly applies "[i]f the statute contains an express pre-emption clause[. Then] the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent."[275]

In light of this background, as both this rulemaking and the SAFE I Rule itself consistently made clear, the statutory text of Section 32919 ultimately governs express preemption through self-executing terms. The SAFE I Rule even relied on this to conclude that NEPA was not required for that rulemaking because NHTSA could not change the scope of EPCA preemption. As described in this rulemaking, the SAFE I Rule was confused and

[272] The Proposal recognized the potential for this contradiction as well, noting that if NHTSA did, in fact, have authority to establish the scope of preemption with the force and effect of law, and if the Agency inappropriately failed to incorporate environmental considerations into its decision in the SAFE I Rule, then a repeal which restores the scope to the *status quo ante* would rectify this overstep.
[273] *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992).
[274] *Lohr*, 518 U.S. at 485–86 (plurality opinion).
[275] *CSX Transp., Inc.*, 507 U.S. at 664.

contradictory in this respect because, *if valid*, the regulations codified by the SAFE I Rule would have actually imposed prescriptive preemption requirements. Nevertheless, the SAFE I Rule still accurately assessed that under a properly scoped application of Section 32919, preemption "is not the result of the exercise of Agency discretion, but rather reflects the operation and application of the Federal statute."[276]

The express preemption provision of Section 32919 remains enacted, in full and unchanged, irrespective of the SAFE I Rule or this final rule. As almost all commenters agreed, this provision is self-executing and governing of the EPCA preemption issue irrespective of any Agency regulations that purport to do so as well. Therefore, in repealing the SAFE I Rule, NHTSA is not actually changing the scope of EPCA preemption. To be sure, a repeal will remove the SAFE I Rule, which facially imposed binding requirements. But those requirements themselves were invalid because NHTSA's regulations were never capable of modifying the scope of EPCA's self-executing terms, even if they purported to do so. Accordingly, under Section 32919's constant language, the actual scope of EPCA preemption is the same today as it was yesterday when the regulations remained codified, as well as the same as it was in 2018 before those rules were ever promulgated. Therefore, this final rule likewise does not change the

[276] NHTSA, EPA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310, 51353-54 (Sept. 27, 2019).

statutorily set scope of express preemption and, as such, the Agency does not consider this rule to result in any environmental impact that may arise from such preemption.[277]

8. Executive Order 12988 (Civil Justice Reform)

Pursuant to Executive Order 12988, ''Civil Justice Reform,''[278] NHTSA has determined that this final rule does not have any retroactive effect.

9. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980, NHTSA states that there are no requirements for information collection associated with this rulemaking action.

10. Privacy Act

In accordance with 5 U.S.C. 553(c), NHTSA solicited comments from the public to better inform the rulemaking process. These comments are posted, without edit, to www.regulations.gov, as described in DOT's system of records notice, DOT/ALL–14 FDMS, accessible through www.transportation.gov/privacy.

11. Congressional Review Act

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, also known as the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this action as not a "major rule," as defined by 5 U.S.C. 804(2).

[277] This view was also expressly supported by commenting public interest organizations. *See* Center for Biological Diversity et al., Docket No. NHTSA-2021-0030-0369 (June 11, 2021).
[278] 61 FR 4729 (Feb. 7, 1996).

NHTSA will submit a rule report to each House of the Congress and to the Comptroller General of the United States.

List of Subjects in 49 CFR Parts 531 and 533

Fuel economy.

Regulatory Text

For the reasons stated in the preamble, the National Highway Traffic Safety Administration amends 49 CFR parts 531 and 533 as set forth below.

PART 531—PASSENGER AUTOMOBILE AVERAGE FUEL ECONOMY STANDARDS

1. The authority citation for part 531 continues to read as follows:

Authority: 49 U.S.C. 32902; delegation of authority at 49 CFR 1.95.

§ 531.7 [Removed]

2. Remove § 531.7.

Appendix B [Removed]

3. Remove appendix B to part 531.

PART 533—LIGHT TRUCK FUEL ECONOMY STANDARDS

4. The authority citation for part 533 continues to read as follows:

Authority: 49 U.S.C. 32902; delegation of authority at 49 CFR 1.95.

§ 533.7 [Removed]

5. Remove § 533.7.

Appendix B [Removed]

6. Remove appendix B to part 533.

Issued on December 21, 2021, in Washington, D.C., under authority delegated in 49 CFR 1.81, 1.95, and 501.5.

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Steven S. Cliff,
Deputy Administrator.

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