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: Notice of Proposed Rulemaking.

SUMMARY: This notice proposes to repeal The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 FR 51310 (Sept. 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. Specifically, this notice proposes to repeal the regulatory text and appendices contained in 49 CFR Parts 531 and 533, which were originally intended to more specifically define the preemptive effect of 49 U.S.C. 32919 on actions of states or political subdivisions of states that limit or prohibit tailpipe Greenhouse Gas (GHG) Emissions or establish Zero Emissions Vehicle (ZEV) mandates. In addition, this document proposes to repeal and withdraw the interpretative statements made by the Agency in the SAFE I Rule preamble, including those regarding the preemption of particular

state GHG standards or ZEV mandates. NHTSA tentatively believes that the NHTSA provisions of the SAFE I Rule exceeded the Agency's authority, and that repealing those provisions will ensure that the public is not confused regarding the effect and rescission of the positions taken in the SAFE I Rule. In so doing, NHTSA is restoring the Agency's previous approach to EPCA preemption, and reaffirming that the statutory text of Section 32919, rather than the Agency's regulations, defines the preemption analysis.

DATES: *Comments:* Comments must be received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments to the docket number identified in the heading of this document by any of the following methods:

- Federal eRulemaking Portal: Go to http://www.regulations.gov. Follow the online instructions for submitting comments.
- Mail: Docket Management Facility, M-30, U.S. Department of Transportation, West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- Hand Delivery or Courier: U.S. Department of Transportation, West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m. Eastern time, Monday through Friday, except Federal holidays.
- Fax: 202-493-2251

The Acting Administrator of the National Highway Traffic Safety Administration, Steven S. Cliff, Ph.D., signed the following Proposed Rule on April 22, 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 Proposed Rule, it is not the official version of the Proposed 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.

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.

SUPPLEMENTARY INFORMATION:

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5. National Environmental Policy Act

6. Executive Order 12988 (Civil Justice Reform)

7. Paperwork Reduction Act

8. Privacy Act

A. Public Participation

NHTSA requests comment on all aspects of this proposed rule. This section describes how you can participate in this process.

(1) How do I prepare and submit comments?

Your comments must be written. To ensure that your comments are correctly filed in the docket, please include the docket number NHTSA-2021-0030 in your comments. If you are submitting comments electronically as a PDF (Adobe) file, we ask that the documents submitted be scanned using the Optical Character Recognition (OCR) process, thus allowing NHTSA to search and copy certain portions of your submissions.[1] Please note that pursuant to the Data Quality Act, in order for the substantive data to be relied upon and used by NHTSA, it must meet the information quality standards set forth in the Office of Management and Budget (OMB) and Department of Transportation (DOT) Data Quality Act guidelines. Accordingly, we encourage you to consult the guidelines in preparing your comments. OMB's guidelines may be accessed at

[1] OCR is the process of converting an image of text, such as a scanned paper document or electronic fax file, into computer-editable text.

https://www.whitehouse.gov/omb/information-regulatory-affairs/information-policy/. DOT's guidelines may be accessed at https://www.transportation.gov/dot-information-dissemination-quality-guidelines.

(2) Tips for Preparing Your Comments

When submitting comments, please remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register date and page number).
- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified in the DATES section above.

(3) How can I be sure that my comments were received?

If you submit your comments by mail and wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

(4) How do I submit confidential business information?

If you wish to submit any information under a claim of confidentiality, you should submit your complete submission, including the information you claim to be confidential business information (CBI), to the NHTSA Chief Counsel. When you send a comment containing CBI, you should include a cover letter setting forth the information specified in our CBI regulation.[2] In addition, you should submit a copy from which you have deleted the claimed CBI to the Docket by one of the methods set forth above.

To facilitate social distancing due to COVID-19, NHTSA is treating electronic submission as an acceptable method for submitting CBI to the Agency under 49 CFR Part 512. Any CBI submissions sent via email should be sent to an attorney in the Office of Chief Counsel at the address given above under FOR FURTHER INFORMATION CONTACT. Likewise, for CBI submissions via a secure file transfer application, an attorney in the Office of Chief Counsel

[2] *See* 49 CFR Part 512.

must be set to receive a notification when files are submitted and have access to retrieve the submitted files. At this time, regulated entities should not send a duplicate hardcopy of their electronic CBI submissions to DOT headquarters.

Please note that these modified submission procedures are only to facilitate continued operations while maintaining appropriate social distancing due to COVID-19. Regular procedures for Part 512 submissions will resume upon further notice, when NHTSA and regulated entities discontinue operating primarily in telework status.

If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the FOR FURTHER INFORMATION CONTACT section.

(5) How can I read the comments submitted by other people?

You may read the materials placed in the docket for this document (*e.g.*, the comments submitted in response to this document by other interested persons) at any time by going to http://www.regulations.gov. Follow the online instructions for accessing the dockets. You may also read the materials at the NHTSA Docket Management Facility by going to the street addresses given above under ADDRESSES.

B. Executive Summary

In September 2019, NHTSA and the Environmental Protection Agency (EPA) finalized a joint agency action relating to the state regulation of GHG emissions from motor vehicles and ZEV mandates. In that action, NHTSA codified numbered regulatory text that repeated the

existing statutory provisions and, in codified appendices, 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 made further statements throughout the rule's preamble that attempted to categorically label existing state regulations—particularly those from the State of California—as preempted under the codified regulations and associated statutory text. As part of the SAFE I action, EPA also revoked a waiver that EPA had previously extended to the State of California, under Section 209 of the Clean Air Act, to regulate motor vehicle emissions through GHG standards and a ZEV mandate.[3]

The SAFE I Rule represented the first time, in the nearly 50-year history of the CAFE program, that NHTSA had adopted regulations expressly defining the Agency's views on the scope of preemption of state laws that relate to fuel economy. Until 2019, the self-executing express preemption provisions in the governing fuel economy statute, 49 U.S.C. 32919, had always provided the sole codified language on CAFE preemption. Since this statutory language is self-executing, federal courts, as well as federal agencies, states, and local governments,[4] had come to understand the fundamental operation of CAFE preemption and applied it on a case-by-

[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.

[4] For ease of reference, unless otherwise distinguished herein, the varying levels of State regulatory entities encompassed by the phrase State or a political subdivision of a State are encapsulated in the term "States" as used in the remainder of this document.

case basis, resulting in the development of a significant body of case law, without the need for any corresponding regulations from NHTSA.

Nevertheless, NHTSA finalized the SAFE I Rule in 2019 to prevent what the Agency then perceived to be a risk of regulatory uncertainty and disharmony resulting from an overlap in state motor vehicle GHG emissions regulations and ZEV mandates and NHTSA's fuel economy standards. In an effort to foreclose such perceived instability, NHTSA promulgated regulations that attempted to preempt "any law or regulation of a State or a political subdivision of a State regulating or prohibiting tailpipe carbon dioxide emissions from automobiles,"[5] including state GHG standards and ZEV mandates. In the SAFE I Rule, the Agency described the authority for this sweeping act of preemption as primarily drawn from NHTSA's general mandate to establish national fuel economy standards, rather than from any particular delegation of rulemaking authority in Section 32919.[6] In the same notice, EPA withdrew California's then-existing waiver under the Clean Air Act, relying, in part, on NHTSA's conclusions that those programs were preempted by Section 32919. The final rule was immediately challenged in federal court by

[5] *See* 49 CFR Part 531 App. B (a)(2); 49 CFR Part 533 App. B (a)(2).
[6] *See* NHTSA, EPA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 Fed. Reg. 51310, 51312 (Sept. 27, 2019) ("To ensure that the fuel economy standards NHTSA adopts constitute the uniform national requirements that Congress intended, NHTSA must address the extent to which State and local laws and regulations are preempted by EPCA.").

numerous stakeholders, including California, many of whom argued that NHTSA exceeded its authority in promulgating the preemption regulations.[7]

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 and NHTSA to immediately review and consider suspending, revising, or rescinding the SAFE I Rule. Accordingly, NHTSA has conducted a comprehensive review of the SAFE I Rule and, in particular, the legality of and need for the regulations and positions that the Agency announced in the SAFE I Rule. As a result of this review, NHTSA now has substantial doubts about whether the SAFE I Rule was a proper exercise of the Agency's statutory authority with respect to CAFE preemption, particularly as to whether NHTSA had authority to define the scope of EPCA preemption through legislative rules, carrying the force and effect of law. Accordingly, in this document, NHTSA proposes to fully repeal and withdraw the codified regulations, 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, Appendices B to Parts 531 and 533, and the Preambles.

[7] *See generally Union of Concerned Scientists, et al. v. NHTSA, et al*., No. 19-1230 (D.C. Cir.) (on February 8, 2021, the D.C. Circuit granted the Agencies' motion to hold the case in abeyance in light of the reconsideration of the SAFE I action).

First, NHTSA has significant concerns that the regulations finalized in the SAFE I Rule likely exceeded the Agency's rulemaking authority under EPCA. In the final rule, NHTSA codified regulations in the Code of Federal Regulations, which attempted to categorically prohibit certain state programs by proclaiming them preempted under EPCA. However, neither EPCA's express preemption provision nor any other statutory source appears to permit NHTSA to adopt legislative rules implementing express preemption under EPCA. Although NHTSA's administration of EPCA enables the Agency to provide its interpretation of EPCA's preemption provisions, NHTSA appears to lack the authority to conclusively determine the scope or meaning of the EPCA preemption clauses with the force and effect of law. Therefore, NHTSA now has substantial doubts about whether the Agency possessed the authority to issue binding legislative rules on the issue of EPCA preemption. Accordingly, NHTSA proposes to withdraw the regulatory text finalized in the SAFE I Rule. This approach realigns NHTSA to its historical practice: for the entire history of the program until SAFE I was finalized, NHTSA had administered the CAFE program without codifying any such preemption regulations.

In addition, to the extent that the Preambles in the SAFE I Rule contained interpretative views that would not be repealed if the Agency rescinded the codified text, NHTSA is also proposing to withdraw those positions. The Agency believes that withdrawing and repealing these statements is appropriate to reaffirm the proper scope of NHTSA's preemption authority and to remove the uncertainty created by the SAFE I rule. Thus, the Agency proposes to

categorically repeal both the codified regulatory text and the interpretative views contained in the SAFE I rule.[8] Similarly, to the extent other NHTSA Preambles, which preceded the SAFE I Rule, also espoused views directly defining EPCA preemption under Section 32919 or the Agency's role in such preemption, NHTSA proposes to withdraw and repeal those statements as well.[9] If finalized, the Agency believes that this proposal would restore a clean slate for the Agency's position on EPCA preemption, which the Agency views as a necessary step to ensure that such prior statements do not overstate NHTSA's authority with respect to EPCA preemption issues.

[8] The Agency anticipates that many stakeholders may comment, urging the Agency to go further—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. When an agency determines that its past action transcends the legally permissible scope, the agency is obliged to realign its regulatory activities to its properly authorized scope posthaste. *See, e.g.*, *EME Homer City Generation, L.P. v. E.P.A.*, 795 F.3d 118, 134 (D.C. Cir. 2015) (noting the need for a corrective rulemaking following a determination that a prior rulemaking exceeded the agency's statutory authority). A repeal is the fastest way to do so and is appropriate in this context, as explained below. Reassessing the scope of preemption under EPCA and announcing new interpretative views regarding § 32919 entails a more substantive inquiry that necessitates additional consideration and deliberation. While NHTSA may decide to undertake such a deliberation in the future, the Agency's imminent concern is realigning its regulatory statements to their legally proper scope and removing the uncertainty caused by the SAFE I rule.

[9] For instance, NHTSA has particularly identified the Preambles cited at the end of this footnote as containing such statements. NHTSA seeks public comments on whether there are additional preamble statements that contain related statements, which should be included in this list. To be clear though, the Agency is proposing to withdraw all of such statements that may appear in prior NHTSA Preambles, regardless of whether they are expressly cited herein. *See, e.g.* DOT, NHTSA, Light Truck Average Fuel Economy Standards Model Years 2005-07, Final Rule, 68 Fed. Reg. 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 Fed. Reg. 17566, 17654 (Apr. 6, 2006) (describing NHTSA's views of EPCA preemption in the preamble to a final rule setting CAFE standards).

In addition, this approach will ensure that any overstated or legally tenuous statements from the SAFE I Rule do not impede NHTSA from carefully reassessing its substantive views on EPCA preemption and, if warranted, to subsequently announce those views in a new setting. Restoring a clean slate is critical because the Agency now has significant doubts about the accuracy and prudence of the substantive views espoused in the SAFE I rulemaking, including the validity of the preemption analysis and the manner in which it failed to account for a variety of considerations, including factual circumstances specific to policies that would be affected by the Rule and important federalism interests.

Finally, even if NHTSA had authority to issue binding legislative rules on preemption, NHTSA still proposes to fully repeal and withdraw both these regulations and any interpretative positions. After observing the SAFE I Rule's effect on interested stakeholders, ranging from states, regulated entities, and the public, and considering the temporally-limited and program-specific factual predicates underlying NHTSA's prior assertion of permanent and comprehensive preemption, NHTSA no longer believes that the Agency must or should expressly regulate preemption with the force and effect of law. As such, the Agency prefers for its codified regulations to return to a state of silence regarding EPCA preemption, particularly as the views on preemption expressed in the Appendices and preamble no longer necessarily reflect the views

of the Agency on these questions.[10] NHTSA may decide to issue interpretations or guidance at a later point, if warranted, after further consideration.

C. Statutory and Regulatory Background

In 1975, Congress enacted the Energy Policy and Conservation Act (EPCA), which among other goals, sought to "conserve energy supplies through energy conservation programs, and where necessary, the regulation of certain energy uses."[11] Congress included the "improved energy efficiency of motor vehicles" among the energy conservation and independence objectives specifically enumerated in the Act.[12] To facilitate the enhanced energy efficiency of motor vehicles, EPCA charged the DOT to "prescribe, by rule, average fuel economy standards" for various classifications of motor vehicles.[13]

In establishing a statutory framework for fuel economy regulation, Congress incorporated a provision into EPCA that expressly described the preemptive effect of resulting fuel economy standards and requirements.[14] 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

[10] As the codified text in Sections 531.7 and 533.7 simply repeats the statute, those provisions cannot be considered to convey any distinct meaning from the verbatim language of Section 32919.
[11] The Energy Policy and Conservation Act of 1975, Pub. L. 94–163, 89 Stat. 871, § 2(4) ("Statement of Purposes").
[12] *Id.* § 2(5) ("Statement of Purposes").
[13] *Id.* § 502(3) ("Average Fuel Economy Standards Applicable to Each Manufacturer").
[14] *Id.* § 509 ("Effect on State Law").

intended to "revise[ ], codif[y], and enact[ ]" the law "without substantive change."[15] As such, EPCA's original express preemption provision remains codified in substantially the same form in 49 U.S.C. 32919. The current provision states, in full:

> **(a) General.** When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.
>
> **(b) Requirements must be identical.** When a requirement under section 32908 of this title is in effect, a State or a political subdivision of a State may adopt or enforce a law or regulation on disclosure of fuel economy or fuel operating costs for an automobile covered by section 32908 only if the law or regulation is identical to that requirement.
>
> **(c) State and political subdivision automobiles.** A State or a political subdivision of a State may prescribe requirements for fuel economy for automobiles obtained for its own use.[16]

For nearly 50 years after EPCA's enactment, NHTSA's own regulations remained silent regarding the scope or effect of preemption established by Section 32919. The Agency has, on occasion, spoken directly on various aspects of the scope of EPCA preemption in an interpretative or advisory format—most commonly in preambles of CAFE standards

[15] *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 346 (D. Vt. 2007) (quoting Pub.L. No. 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)).
[16] 49 U.S.C. 32919.

rulemakings, as well as in briefings in litigation over specific state or local laws.[17] On multiple occasions throughout the Agency's history, NHTSA has also incorporated an assessment of state motor vehicle emissions programs—including those from California—into the substantive analysis of CAFE standards rulemakings. For instance, these assessments have often occurred through NHTSA's analysis of the regulatory landscape and existing automotive industry practices, which NHTSA considers when assessing the "maximum feasible" fuel economy that can be achieved by manufacturers.[18] However, until the SAFE I Rule, NHTSA's commentary on EPCA preemption occurred exclusively in an interpretative context, and the Agency had never established legally binding requirements on states through regulatory text.[19]

[17] *See, e.g.* DOT, NHTSA, Light Truck Average Fuel Economy Standards Model Years 2005-07, Final Rule, 68 Fed. Reg. 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 Fed. Reg. 17566, 17654 (Apr. 6, 2006) (describing NHTSA's views of EPCA preemption in the preamble to a final rule setting CAFE standards).

[18] *See, e.g.*, NHTSA, Part 533 Average Fuel Economy Standards for Nonpassenger Automobiles, Final Rule, 42 Fed. Reg. 13807, 13814 (Mar. 14, 1977); NHTSA, Light Truck Average Fuel Economy Standards Model Years 2005-2007, Final Rule, 68 Fed. Reg. 16868, 16895 (Apr. 7, 2003).

[19] NHTSA did, in 2008, propose language very similar to that in the SAFE I Rule. *See* NHTSA, Average Fuel Economy Standards, Passenger Cars and Light Trucks; Model Years 2011-2015, Notice of Proposed Rulemaking, 73 Fed. Reg. 24351 (May 2, 2008). However, NHTSA finalized only standards for model year 2011 through that rulemaking action and chose not to finalize the proposed text regarding preemption, explaining that NHTSA "will re-examine the issue of preemption in the content of its forthcoming rulemaking to establish Corporate Average Fuel Economy standards for 2012 and later model years." 74 FR 14196, 14200 (Mar. 30, 2009). NHTSA's subsequent joint rulemakings with EPA prior to the SAFE rule continued to defer substantive consideration of preemption due to the existence of the National Program that involved NHTSA, EPA, and California. *See* 75 FR 25324, 25546 (May 7, 2010); 77 Fed. Reg. 62624, 63147 (Oct. 15, 2012).

Thus, the SAFE I Rule represented the first Agency action to ever finalize and codify rules that purported to create a binding effect on the scope of EPCA preemption. The Agency initially proposed the preemption regulations finalized in the SAFE I Rule as part of the broader joint EPA and NHTSA rulemaking entitled, "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks."[20] As part of this proposal, EPA also "propos[ed] to withdraw the waiver granted to California in 2013 for the GHG and ZEV requirements of its Advanced Clean Cars program."[21] This proposed rule also encompassed NHTSA's proposed CAFE and EPA's proposed GHG emissions standards for model years 2021-2026 and various regulations regarding administrative aspects of the CAFE and GHG programs.[22] Subsequently, NHTSA and EPA decoupled the NHTSA preemption regulations and EPA's revocation of California's Clean Air Act waiver from the standards rulemaking. The Agencies jointly published the SAFE I Rule on September 27, 2019, with NHTSA finalizing the proposed preemption regulations, and EPA revoking California's waiver. The Agencies later jointly published a separate final rule that set CAFE and GHG emissions standards for model years 2021-2026 passenger cars and light trucks.[23]

[20] *See generally* NHTSA, EPA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, Notice of Proposed Rulemaking, 83 Fed. Reg. 42986 (Aug. 24, 2018).
[21] *Id.* at 42999.
[22] *Id.*
[23] NHTSA, EPA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, Final Rule, 85 Fed. Reg. 24174 (Apr. 30, 2020).

The preemption language promulgated by NHTSA in the SAFE I Rule appears in several locations in the CFR: 49 CFR 531.7, Appendix B to 49 CFR Part 531, 49 CFR 533.7, and Appendix B to 49 CFR Part 533. The provisions in 531.7 and 533.7, as well as in each Appendix B, mirror one another. The only distinction in the two sets of regulations is that Part 531 applies to passenger automobiles and Part 533 applies to light trucks. Moreover, the language in 531.7 and 533.7 uses nearly verbatim language as the express preemption statutory provision, 49 U.S.C. 32919.[24] Each Appendix B expressly codifies a prohibition on various state activities—particularly those regulating motor vehicle carbon dioxide emissions—that the Agency proclaimed were unlawful due to "express preemption" and "implied preemption."[25]

Following the promulgation of the SAFE I Rule, the actions of both NHTSA and EPA were challenged by a number of petitioners in both the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) and the United States District Court for the District of Columbia.[26] The litigation has substantially divided the regulated industry and interested

[24] Since the language in 49 CFR 531.7 and 533.7 merely parrots the applicable statutory text, NHTSA questions whether either provision even has a unique effect apart from Section 32919. *See Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) ("the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute"). Based upon the comments received on the SAFE I Rule, on further reflection, NHTSA's view is that this question merely augmented the uncertainty among stakeholders about the scope of EPCA preemption, and further demonstrates that this codification was unnecessary and unhelpful.
[25] *See* 49 CFR Part 531 App. B; 49 CFR Part 533 App B.
[26] *See generally Union of Concerned Scientists, et al. v. NHTSA, et al*., No. 19-1230 (D.C. Cir.). *See also California v. Chao*, No. 19-cv-2826-KBJ (D.D.C.) (filed Sept. 20, 2019).

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. In addition to the litigation, one public interest organization, the Chesapeake Bay Foundation, filed a petition for reconsideration with NHTSA following the SAFE I Rule's publication.[27] The Chesapeake Bay Foundation subsequently filed a petition for review in the D.C. Circuit, which challenges NHTSA's denial of this petition for reconsideration.[28] In light of the Agencies' reconsideration of the SAFE I action, the D.C. Circuit granted requests to hold both the consolidation litigation and Chesapeake Bay Foundation's subsequent lawsuit in abeyance.

On January 20, 2021, President Biden signed Executive Order 13990, which directed DOT and NHTSA to immediately undertake an assessment of the SAFE I Rule.[29] Specifically, Executive Order 13990 directed DOT and NHTSA to, "as appropriate and consistent with applicable law, consider suspending, revising, or rescinding" the SAFE I Rule.[30] For the SAFE I Rule, the Executive Order also instructed that the Agency, "as appropriate and consistent with

[27] *See generally* Chesapeake Bay Foundation, Petition for Reconsideration of NHTSA's Final Rule—The Safer Affordable Fuel Efficient (SAFE) Vehicles Rule Part One: One National Program (Nov. 8, 2019).
[28] *See generally Chesapeake Bay Foundation, Inc. v. NHTSA*, No. 20-2091 (D.C. Cir.).
[29] Executive Order 13990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, 86 Fed. Reg. 7037 (Jan. 25, 2021).
[30] *Id.* at Sec. 2.

applicable law, shall consider publishing for notice and comment a proposed rule suspending, revising, or rescinding the agency action . . . by April 2021."[31]

D. Reconsideration Authority

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. As a matter of law, "an Agency is entitled to change its interpretation of a statute."[32] Nonetheless, "[w]hen an Agency adopts a materially changed interpretation of a statute, it must in addition provide a 'reasoned analysis' supporting its decision to revise its interpretation."[33]

"Changing policy does not, on its own, trigger an especially 'demanding burden of justification.'"[34] Providing a reasoned explanation "would ordinarily demand that [the Agency]

[31] *Id.* at Sec. 2-2(ii).
[32] *Phoenix Hydro Corp. v. F.E.R.C.*, 775 F.2d 1187, 1191 (D.C. Cir. 1985).
[33] *Alabama Educ. Ass'n v. Chao*, 455 F.3d 386, 392 (D.C. Cir. 2006) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983)); *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.") (citations omitted).
[34] *See Mingo Logan Coal Co. v. E.P.A.*, 829 F.3d 710, 718 (D.C. Cir. 2016) (quoting *Ark Initiative v. Tidwell*, 816 F.3d 119, 127 (D.C. Cir. 2016)).

display awareness that it *is* changing position."[35] Beyond that, however, "[w]hen an agency changes its existing position, it 'need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.'"[36] While the Agency "must show that there are good reasons for the new policy," the Agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one."[37] "[I]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the Agency *believes* it to be better, which the conscious change of course adequately indicates."[38] For instance, "evolving notions" about the appropriate balance of varying policy considerations constitute sufficiently good reasons for a change in position.[39] Moreover, it is "well within an Agency's discretion" to change policy course even when no new facts have

[35] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis in original) ("An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.").
[36] *Encino Motorcars, LLC*, 136 S. Ct. at 2125-26 (quoting *Fox Television Stations, Inc.*, 556 U.S. at 515).
[37] *Fox Television Stations, Inc.*, 556 U.S. at 515 (emphasis in original).
[38] *Id.* (emphasis in original).
[39] *N. Am.'s Bldg. Trades Unions v. Occupational Safety & Health Admin.*, 878 F.3d 271, 303 (D.C. Cir. 2017) (quoting the agency's rule). To be sure, providing "a more detailed justification" is appropriate in some cases. *See Fox Television Stations, Inc.*, 556 U.S. at 515 (2009) ("Sometimes [the agency] must [provide a more detailed justification than what would suffice for a new policy created on a blank slate]—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account."). This is not one of those cases: NHTSA's reconsidered understanding of the governing legal framework does not "rest[] upon factual findings that contradict those which underlay its prior policy." Moreover, the reconsideration does not undermine "engendered serious reliance interests that must be taken into account.," The uncertainty associated with the SAFE I rulemaking, which is described further herein, has not created an environment in which any interested stakeholders could reasonably rely upon a framework that presupposed the continuance of the SAFE I Rule.

arisen: Agencies are permitted to conduct a "reevaluation of which policy would be better in light of the facts," without "rely[ing] on new facts."[40]

NHTSA views this need to reassess its stated positions as particularly appropriate and imperative when the issues either implicate the limits of the Agency's statutory authority or concern positions on critical policy issues that no longer necessarily reflect that agency's views. This is especially important in matters regarding the preemption of state law, given both the federalism interests at stake and because "agencies have no special authority to pronounce on pre-emption absent delegation by Congress."[41] NHTSA believes that upon tentatively determining that legal authority previously claimed likely does not exist, the most responsible and legally essential course of action is for the Agency to exercise its reconsideration authority to explore and, if necessary, rectify the potential overstep. This is the precise action that NHTSA proposes here.

E. Proposed Repeal of Regulations in the SAFE I Rule

After a comprehensive reconsideration of the SAFE I Rule, NHTSA now has substantial doubts about whether Congress provided the Agency with the authority necessary to engage in

[40] *Nat'l Ass'n of Home Builders v. E.P.A.*, 682 F.3d 1032, 1037-38 (D.C. Cir. 2012).
[41] *See Wyeth v. Levine*, 555 U.S. 555, 577 (2009).

legislative rulemaking[42] to define the scope of preemption in 49 U.S.C. 32919.[43] Ultimately, "agencies have no special authority to pronounce on preemption absent delegation by Congress."[44] Neither the language of Section 32919 nor the broader regulatory structure of Chapter 329 provide NHSTA with the authority to promulgate regulations with the force and effect of law on EPCA preemption. Moreover, contrary to the indications in the SAFE I Rule, NHTSA provisionally considers a general delegation of authority to the Secretary to "carry out" his "duties and powers" to be insufficient to support a legislative rulemaking that expressly administers preemption under Section 32919. Consequently, NHTSA now proposes to conclude that it likely overstepped its authority in issuing binding legislative rules on preemption.[45] Therefore, NHTSA proposes to repeal each of these provisions in full to ensure that its actions are unquestionably within the legally permissible boundaries of the Agency's authority. Repealing these rules would also restore the Agency's previous practice, in which NHTSA did not codify interpretations of EPCA preemption in regulations.

[42] As used in this document, the term "legislative rulemaking" refers to an agency's authority to promulgate regulations that carry the force and effect of law. *See, e.g.*, *Batterton v. Francis*, 432 U.S. 416, 425 (1977) (noting that when a federal agency promulgates a rule within the scope of its congressionally delegated authority, the agency "adopts regulations with legislative effect").

[43] NHTSA, EPA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 Fed. Reg. 51310, 51320 (Sept. 27, 2019).

[44] *Wyeth v. Levine*, 555 U.S. 555, 577 (2009).

[45] The Agency acknowledges that there may be some potential ambiguity as to whether the SAFE I Rule established binding legislative rules or interpretative rules, as the Agency described the effect of the rule in varying ways in that final rule, particularly in its preamble. As described below, NHTSA believes the SAFE I Rule was intended to be a legislative rule. However, to the extent it is considered an interpretative rule, NHTSA believes it would still be appropriate to rescind the rule for the reasons described in Part F, *infra*.

1. NHTSA is concerned that the SAFE I Rule's issuance of binding, legislative rules on EPCA preemption exceeded the Agency's authority.

The preemption analysis begins with consideration of the governing statute. However, while EPCA already contains an express preemption provision in Section 32919, the Appendices promulgated in the SAFE I Rule expressed, in more specific terms than Section 32919, precise types of state regulation that would be preempted—namely, state efforts to regulate carbon dioxide emissions from motor vehicles or to establish requirements for ZEVs.[46] These regulations purported to expressly prohibit the conduct in question through their force as federal regulations.

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. As noted above, Congress included an express preemption provision in EPCA in Section 32919. This statute expressly preempts state laws or regulations "related to fuel economy standards or average fuel economy standards for automobiles," "when an average fuel economy standard prescribed under [Chapter 329] is in effect."[47] Both the Agency and courts have repeatedly understood Section 32919 as self-executing and capable of direct application to

[46] *See* 49 CFR Part 531 App. B; 49 CFR Part 533 App. B.
[47] 49 U.S.C. 32919 (a).

state regulatory activity.[48] 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.[49] 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.

Accordingly, NHTSA tentatively believes that the SAFE I Rule, which codified additional binding standards for express EPCA preemption, represented an additional act of express preemption beyond the self-contained language of Section 32919. Through 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

[48] *See, e.g.*, *Green Mountain Chrysler Plymouth Dodge Jeep*, 508 F. Supp. at 295 (undertaking a detailed analysis of Section 32919 to determine whether state law was preempted under the express language of the statute).
[49] *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").

own terms, solely sought to codify into NHTSA's regulations a binding framework to govern the scope of EPCA preemption.

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."[50] 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"[51] and characterized the regulations as "implementing"[52] a preemption requirement. Subpart "a" of each Appendix B to Part 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.[53] Such a direct declaration of preemption, which purported to carry the force and effect of law, seeks to provide an authoritative interpretation of the language of Section 32919, and the regulations represented an act of legislative rulemaking that attempted to impose more specific, binding requirements on State and local governments. In order to properly engage in such legislative rulemaking, NHTSA must have adequate authority to do so from Congress.

[50] NHTSA, EPA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 Fed. Reg. 51310 (Sept. 27, 2019).
[51] *Id.* at 51317.
[52] *Id.* at 51318.
[53] *See, e.g.*, 49 CFR 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.").

However, after reconsidering the matter, NHTSA has substantial doubts about whether it has the requisite authority to validly promulgate such requirements.

2. Congress must have provided NHTSA with authority to engage in legislative rulemaking on matters of EPCA preemption if that rulemaking is to be valid.

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. This is because all rulemaking authority of an agency ultimately derives from Congress.[54] 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."[55] 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."[56] Consequently, an agency "may act only when and how Congress lets [it]."[57] This restriction extends to all aspects of an agency's regulatory activity—including a rulemaking. The matters upon which an agency may promulgate rules imbued with the force and effect of law are based on its delegated authority.[58]

[54] *Cent. United Life Ins. Co. v. Burwell*, 827 F.3d 70, 73 (D.C. Cir. 2016).
[55] *City of New York v. F.C.C.*, 486 U.S. 57, 64 (1988).
[56] *Id.*
[57] *Cent. United Life Ins. Co.*, 827 F.3d at 73.
[58] *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).

These limitations particularly apply with respect to matters of preemption. 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.[59]

Since an agency lacks plenary authority, the delegation of one power to an agency does not necessarily include other powers, even if they are related.[60] 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.[61] 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.

That is, in order for an agency to issue binding rules on preemption, the agency must have the authority to *directly regulate preemption itself*, rather than merely to establish the

[59] *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986).
[60] *Ry. Labor Executives' Ass'n.*, 29 F.3d at 670 (en banc).
[61] *Id.*

substantive law that leads to preemption.[62] Therefore, in evaluating an agency's authority to issue legislative rules on preemption, the proper question is whether Congress intended the agency to define, through its binding regulations, when a state law is preempted. Only if Congress has granted an agency that power does the agency have the authority to speak with the force of law directly on preemption. NHTSA's tentative conclusion, as described below, is that Congress does not appear to have granted NHTSA such authority, and that in light of this doubt, the Agency should not have issued such regulations in the first instance.

3. NHTSA has substantial doubts that EPCA authorizes NHTSA to issue legislative rules on preemption.

EPCA does not appear to expressly provide the authority to DOT or NHTSA to promulgate legislative rules implementing or defining the scope of the statute's preemption. Throughout its rulemakings over the long history of the CAFE program, NHTSA has consistently declined to construe either Section 32919 or any other provision of EPCA as expressly delegating DOT or NHTSA the authority to promulgate preemption regulations. This approach even extends to the SAFE I rulemaking, in which the Agency cited other statutory

[62] *See, e.g.*, *City of New York*, 486 U.S. at 64 (clarifying that "the correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action.").

provisions for its authority to issue the rules.[63] The Agency continues to hold this view of the statute.

Section 32919, the express preemption provision of EPCA, states that "a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards" as long as a federal fuel economy standard is in place.[64] Thus, this preemption provision offers the best evidence of any possible congressional intent to confer preemption rulemaking authority upon NHTSA. However, the provision is notably silent as to any role of the agency in administering—much less defining—a preemption scheme. 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.[65] 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. In the Agency's tentative view, it seems more reasonable to conclude that if

[63] *See* NHTSA, EPA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 Fed. Reg. 51310, 51320 (Sept. 27, 2019) (citing other statutory provisions applicable to DOT for the requisite rulemaking authority).
[64] 49 U.S.C. 32919.
[65] *See* 49 U.S.C. 32919(a)-(b).

Congress had intended to give NHTSA such direct regulatory authority over EPCA preemption, it would have done so explicitly, and likely within Section 32919 or at least in direct reference to preemption.

Thus, the Agency is now of the view that, under the language of Section 32919, the express preemption instituted by the statute is self-executing and self-contained. This is consistent with NHTSA's longstanding reading of Section 32919. For instance, even the Preamble to the SAFE I Final Rule acknowledged that the EPCA preemption provision of Section 32919 was "self-executing," and that "state or local requirements related to fuel economy standards are void *ab initio*"—by operation of statute not regulation.[66] Likewise, in the National Environmental Policy Act of 1969 (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:

> Any preemptive effect resulting from this final action is not the result of the exercise of Agency discretion, but rather reflects the operation and application of the Federal statute. NHTSA does not have authority to waive any aspect of EPCA preemption no matter the potential environmental impacts; rather, preempted standards are void *ab initio.* Courts have long held that NEPA does not apply to nondiscretionary actions by Federal agencies. As NHTSA lacks discretion over EPCA's preemptive effect, the Agency concludes that NEPA does not apply to this action.[67]

[66] NHTSA, EPA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 Fed. Reg. 51310, 51325 (Sept. 27, 2019).
[67] *Id.* at 51353-54.

Due to the express language of Section 32919, NHTSA continues to believe that the provisions of Section 32919 are self-executing. Consequently, the Agency has substantial doubts about the validity of its prior conclusion that Congress provided rulemaking authority to the Agency to further codify preemption requirements. In reaching this tentative conclusion, NHTSA notes that the structures of other parts of EPCA, as well as other federal statutes, expressly charge an agency to administer preemption through regulations, and no such charge 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-efficiency standards.[68] Likewise, 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.[69] 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.[70] Many of the seminal cases in the Supreme

[68] The Energy Policy and Conservation Act of 1975, Pub. L. 94–163, 89 Stat. 871, § 327(b), recodified as amended at 42 U.S.C. 6297(d).
[69] 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).
[70] *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

Court's preemption jurisprudence also concerned statutory schemes that expressly delegated preemption authorities to the agencies in question.[71]

As these other statutory provisions demonstrate, Congress understands how to incorporate legislative rulemaking authority for an agency expressly and directly into a statutory framework for preemption—and, in fact, exercised this prerogative elsewhere in EPCA. These responsibilities range from charging an agency to promulgate clarifying regulations on the applicability of preemption to instructing an agency to establish an administrative procedure to adjudicate exemptions of state law. Moreover, as 49 U.S.C. 31141 demonstrates, when Congress decides to incorporate an agency into the preemption determination process, the grant of authority is often not accomplished through an indeterminate delegation, but instead, through an intricate and comprehensive description of the agency's precise role in administering the preemption provision.

Within this statutory landscape, the total silence of Section 32919 as to any role for NHTSA in the implementation of preemption seems instructive. In this context, it now appears to

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).

[71] 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 Lohr*, 518 U.S. at 470 (plurality opinion); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008). *See also* 21 U.S.C. 360k; 21 CFR 808.1.

the Agency that construing Section 32919 to permit NHTSA to issue regulations with the force of law that regulate and define the scope of preemption, as the Agency did in the SAFE I Rule, would be akin to reading an entirely new subsection into the statutory provision. Congress' failure to explicitly provide DOT authority to define or otherwise regulate the scope of CAFE preemption—despite specifically incorporating an express preemption provision into EPCA in Section 32919—casts significant doubts upon the Agency's prior determination that NHTSA has legislative rulemaking authority in matters of fuel economy preemption. NHTSA requests comment on these provisional views.

Finally, contrary to the arguments made in the SAFE I Rule, NHTSA tentatively believes there is no other statutory source conferring legislative rulemaking authority on the Agency in matters of fuel economy preemption. In the SAFE I rulemaking, NHTSA did not claim that its authority to issue preemption regulations derived from Section 32919.[72] Instead, NHTSA concluded that its authority arose implicitly from EPCA, because the Agency argued that it could not carry out its CAFE standard-setting responsibilities in the face of state regulation that undermined its authority.[73] In the SAFE I Final Rule's most direct discussion of the issue of authority to promulgate regulations concerning preemption, NHTSA linked the perceived

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

conflict between EPCA's purposes and state regulation to the general delegation of authority to the Secretary to carry out his duties:

> Congress gave the Secretary of Transportation express authorization to prescribe regulations to carry out her duties and powers. 49 U.S.C. 322(a). NHTSA has delegated authority to carry out the Secretary's authority under Chapter 329 of Title 49, which encompasses EPCA's preemption provision, as well as EISA. NHTSA therefore has 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. As explained here, the statute is clear on the question of preemption, and NHTSA must carry it out.[74]

Upon reconsideration, NHTSA is concerned that this rationale was improper. Section 322 contains statutory language of broad applicability that extends well beyond the CAFE program and, indeed, well beyond NHTSA. In light of the preceding discussion, it seems especially peculiar to derive preemption authority from Section 322 when EPCA already contains an 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 above, 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

[74] *Id.* at 51320.

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.

Moreover, even apart from Section 322, general inferences drawn from the broad purposes of EPCA do not seem capable of contravening a clear reading of the express preemption provision in Section 32919. As described above, the SAFE I Rule argued that 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.[75] However, even assuming that is true, the statutory provision on preemption provides no role for NHTSA to speak on this issue with the force and effect of law. The Agency does not believe that a proper statutory reading permits this unambiguous silence in Section 32919 to be overridden by intangible inferences extrapolated from EPCA generally.[76]

[75] NHTSA, EPA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 Fed. Reg. 51310, 51319 (Sept. 27, 2019).

[76] Even if such a conflict existed, it would seem to only bear upon an implied (conflict) preemption analysis, not whether NHTSA had authority to promulgate binding regulations that expressly governed preemption. Express and implied preemption are district legal concepts. *See, e.g.*, *Geier v. Am. Honda Motor Co*., 529 U.S. 861, 872 (2000) (distinguishing between express and implied preemption). Accordingly, the SAFE I Rule's arguments for implied (conflict) preemption cannot be used to bootstrap authority to regulate through legislative rules that expressly codify mandatory preemption requirements.

Likewise, upon reconsideration, NHTSA does not consider any such general inferences as appropriately addressed through the categorical rulemaking actions of the SAFE I Rule. For example, a substantial portion of the SAFE I Rule drew from principles of implied conflict preemption, seeking to label state regulation as preempted due to an irreconcilable conflict with federal CAFE standards. Moreover, at most, the SAFE I Rule discussed compliance technologies specific to only one example of state standards and one example of federal standards.[77] Yet the SAFE I Rule sought to extrapolate upon such a limited analysis to justify a pronouncement of preemption for *any* state greenhouse gas standards or ZEV requirements. The Agency now recognizes that implied preemption, which arises primarily in a judicial context, involves principles that are most appropriately applied by reference to specific state programs, rather than in the abstract and categorical manner of the SAFE I Rule's regulations.[78] While NHTSA still retains interpretative authority to set forth its advisory views on whether a state regulation

[77] The terminology used throughout the SAFE I rulemaking analysis mirrors the standards used by courts to apply the judicial doctrine of implied (conflict) preemption. For instance, the SAFE I Preambles repeatedly invoked conflict preemption standards —"frustrates," "conflicts," and "interferes"—to label state programs preempted. *See 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); *See, e.g., Wyeth*, 555 U.S. at 576 ("This Court has recognized that an agency regulation with the force of law can pre-empt *conflicting* state requirements.") (emphasis added); *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).

[78] *See, e.g.*, *Wyeth*, 555 U.S. at 576 (noting that implied preemption principally applies after "the Court has performed its own conflict determination relying on the substance of state and federal law and not on agency proclamations of pre-emption.").

impermissibly conflicts with federal law, such authority does not support the power to codify binding legislative rules on the matter.

Thus, upon reconsideration, NHTSA has substantial doubts about its authority to issue legislative rules concerning EPCA preemption. Thus, the SAFE I Rule's effort to establish such rules likely exceeded the Agency's authority. For this reason, and for the additional reasons discussed herein, NHTSA is now of the view that the SAFE I Rule rests upon an infirm foundation and should be repealed. We seek comment on this tentative determination.

F. Proposed Repeal of Preemption Interpretations in the SAFE I Rule

In addition to the proposed repeals of the codified provisions promulgated in the SAFE I Rule, NHTSA also proposes to rescind the accompanying substantive analysis in the Preambles of the Proposed and Final SAFE I Rules—including positions on California's GHG and ZEV programs. Descriptions of California's GHG and ZEV regulations, as well as regulations of states adopting those regulations under Section 177 of the Clean Air Act, were repeatedly used throughout the SAFE I rulemaking analysis as illustrative of why the Agency decided to codify the express preemption text in Parts 531 and 533 and their accompanying Appendices. For example, after explaining the specific preemption regulations, the Agency noted that "[i]n the proposal, NHTSA described, *as an example*, California's ZEV mandate, which manufacturers

must comply with individually for each state adopting California's mandate."[79] Therefore, these substantive positions on state law were presented in the SAFE I rulemaking as exemplary of the need for regulations, and the finalized text sought to preempt these precise state programs. Consequently, NHTSA considers such examples and substantive positions as inextricably linked to the regulatory text and, as such, would also be rescinded upon the proposed removal of the regulations.

However, to be abundantly clear, NHTSA is also proposing in this document to repeal any interpretative positions regarding EPCA preemption that may be contained within the Preambles of the SAFE I NPRM and Final Rule regardless of whether they are linked to the codified text. This includes any views on whether particular state motor vehicle GHG emissions programs or ZEV mandates conflict with or "relate to" CAFE standards or are otherwise preempted by Section 32919. Given the Agency's concerns about the lack of legislative rulemaking authority on matters of EPCA preemption, any surviving substantive views on the topic would constitute, at most, interpretative rules.[80] As such, their repeal would not require the notice and comment procedures set forth in 5 U.S.C. 553. Nevertheless, an agency may find it useful and prudent to seek public comment on interpretations or other agency actions as a matter

[79] NHTSA, EPA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 Fed. Reg. 51310, 51314 (Sept. 27, 2019) (emphasis added).
[80] *See, e.g.*, *Am. Tort Reform Ass'n v. OSHA*, 738 F.3d 387, 394 (D.C. Cir. 2013). In addition, the following discussion and rationales would also apply to the codified text that NHTSA proposes to repeal above if that text were determined to be an interpretative rule rather than a legislative rule.

of good government, and NHTSA is doing so here. Due to the anticipated substantial public interest in this action, NHTSA's interest in gaining a broad array of perspectives on its change in course, and the well-established utility of notice and comment procedures, the Agency is still including a repeal of these interpretations as part of the proposal rather than immediately finalizing a repeal of these views in this document.

At this time, the Agency is not proposing to replace any such interpretations with further views on the relationship between state motor vehicle GHG emissions programs or ZEV mandates and EPCA preemption. Instead, the Agency is exercising its rulemaking authority under 5 U.S.C. 551 to propose simply repealing, rather than amending, any such interpretative positions or interpretative rules of the Agency. Several considerations incline the Agency to propose repealing such interpretations, rather than leave them undisturbed or amend them through this rulemaking.

1. Repealing the Interpretive Provisions Makes Clear that All Aspects of the SAFE I Rule have been Repealed

First, repealing the interpretations treats them consistently with the codified rules, which we are here proposing for repeal. While the Agency possesses authority to issue advisory, interpretative rules on matters pertaining to EPCA preemption, repealing and withdrawing the interpretative positions of the SAFE I rulemaking promotes clarity by ensuring that such views are withdrawn along with their accompanying regulatory text, rather than leaving an ambiguity

as to whether a particular statement or provision regarding EPCA preemption remains in effect. The ambiguity regarding the legal nature and effect of the codified text and positions announced in the SAFE I Rule would only amplify confusion if NHTSA proposed to repeal only parts of the rulemaking.

The lack of clarity regarding this distinction is pervasive in the SAFE I Rule, which often blurred the line between when the Agency was attempting to merely articulate views on preemption under Section 32919, which were merely advisory, and when NHTSA sought to categorically forbid state action through federal preemption. For example, the Preambles to the SAFE I Rule repeatedly labeled certain types of state GHG regulation and ZEV mandates as categorically preempted and prohibited, even if those programs were not expressly enumerated in the plain language of the finalized regulations. Specifically, the Preamble to the SAFE I final rule unequivocally stressed that "state programs to limit or prohibit tailpipe GHG emissions or establish ZEV mandates are preempted,"[81] and that the SAFE I Rule was a "final decision from the agencies that States do not have the authority to set GHG standards or establish ZEV mandates."[82] At the same time, the Preamble also contained other statements in which the Agency's position is described more as an interpretation of the scope of Section 32919. For

[81] *Id.* at 51311.
[82] *Id.*

instance, NHTSA articulated in the Preamble a "view…that ZEV mandates are preempted by EPCA"[83] The intermittent manner in which the Agency described the force of preemption in the Preamble intermingled any interpretative statements regarding Section 32919 with the more binding definitions of preemption the Agency sought to make in the Appendices. The Agency is also concerned that the manner in which the Preamble described the Agency's role with respect to EPCA preemption does not accurately reflect the limits to the Agency's preemption authority described in the preceding section.

2. Repealing all aspects of the SAFE I Rule provides the Agency with a clean slate on this issue

Further, repealing all aspects of the SAFE I Rule will restore the Agency to a clean slate to appropriately exercise its interpretative discretion on matters of EPCA preemption. In this respect, the Agency is 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.[84] Likewise, Executive Order 13132 recognizes the importance of considering federalism interests, stressing that "[t]he national government should be deferential to the States when

[83] *Id.* at 51314.
[84] *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001).

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.[85] Here, 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. In a number of cases, these policies also served as components of the states' compliance with air pollution mitigation requirements delegated to states under the federal Clean Air Act.

Upon reconsideration, NHTSA is concerned that the categorical preemption views announced in the SAFE I Rule were insufficiently tailored to account for these federalism interests because they label 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 is not to say that the Agency cannot approach the question of whether a particular state or local law is preempted without certain general principles or overarching views, either at the time it is considering a particular matter or in an advance advisory opinion, but it is entirely different to declare that such general views are incontrovertible or absolute in a way that does not account for the nuanced and careful consideration of program-specific facts called for in preemption analyses.

[85] Executive Order 13132, *Federalism*, Sec. 1(a) (Aug. 4, 1999).

Thus, the Agency believes that a clean slate would more appropriately enable a particularized consideration of how the specifics of state programs may "relate to" fuel economy standards under Section 32919. Such an approach would be more reflective of the importance of federalism concerns and of the kind of program-specific factual inquiry often involved in identifying whether a state program is preempted under the statute. This type of factual, case-specific approach is consistent with how courts generally consider both the application of express preemption provisions and, even more so, claims of implied conflict preemption. Such courts remain available to resolve issues that may arise in the context of applying EPCA preemption, such as in legal challenges to particular state programs. In fact, should such a legal challenge arise, this narrower approach affords a better opportunity to provide to the presiding court, if appropriate, a more tailored and relevant perspective on the Agency's view of whether the state law at issue is preempted. To the extent NHTSA sets forth any such advisory views of how EPCA preemption may affect state programs, considering those programs in a more specific and narrow context also enables the Agency to more fully leverage its automotive expertise in understanding the particular vehicle technologies implicated by the respective regulations. These same advantages also apply if the Agency elects, as appropriate, to provide similar views outside of the litigation context as well. The clean slate facilitated by this approach is fully consistent with NHTSA's previous approach to EPCA preemption.

In contrast, establishing a clean slate and clearly communicating that NHTSA's views on EPCA preemption, while advisory, do not independently preempt, encourages states and political subdivisions to more freely devise programs that can potentially coexist with Section 32919. Therefore, the Agency is concerned that retaining the views announced in the SAFE I Rule, and categorically foreclosing consideration of any such programs that states may otherwise pursue, unnecessarily and inappropriately restricts potential policy innovation at the State and local level.

Further, the Agency believes that repealing all aspects of the SAFE I Rule and restoring a clean slate is appropriate because the Agency has substantial doubts about the substantive EPCA preemption conclusions reached in the SAFE I Rule. The proposal, final rule, and ensuing litigation for the SAFE I Rule generated an extensive array of public comments, scholarship, and legal briefing regarding both the procedural and substantive matters of EPCA preemption. While NHTSA is not announcing any new substantive views regarding EPCA preemption in this document, the Agency recognizes that many of these writings raised very detailed and thorough arguments advocating for a different reading and application of Section 32919 than was adopted by NHTSA in the SAFE I Rule.[86]

[86] For instance, in 2019 and 2020, Professor Greg Dotson with the University of Oregon School of Law published two law review articles dedicated entirely to the Agencies' SAFE I rulemaking.[86] In these articles, Professor Dotson comprehensively analyzed applicable legislative and regulatory history, before suggesting that Congress did not intend to preempt state GHG standards or ZEV mandates under Section 32919. Similar conclusions have been reached by other commenters and litigants in the SAFE I rulemaking and consolidated litigation.

Although the Agency does not propose to adopt any substantive views in this proposal, NHTSA acknowledges that these substantive arguments merit careful consideration and raise significant doubts for the Agency as to the validity of the positions taken in SAFE I. As long as the SAFE I Rule statements remain in place, any opportunity for a more nuanced consideration of particular state programs is significantly diminished. Moreover, if they remained in place, the SAFE I views would inaccurately suggest that the Agency remained certain about substantive issues for which, in reality, the Agency harbored significant doubts and continued to reconsider. Accordingly, NHTSA preliminarily believes that even if it does not yet wish to articulate new substantive views, withdrawing any interpretations from the SAFE I Rule is a necessary and appropriate next step to ensure the Agency can fully exercise its interpretative and policymaking discretion to do so in a more nuanced and careful way at a later point, if warranted.

Due to these concerns, the Agency has tentatively determined that it is appropriate to first repeal the interpretative positions, rather than also to include a new interpretation in this proposal, as doing so enables the most efficient and streamlined removal of NHTSA's express preemption regulations. If the Agency finalizes its view that the express preemption regulations in Parts 531 and 533 indeed exceed NHTSA's delegated authority, repealing the *ultra vires* regulations quickly is imperative to restore NHTSA's regulations to their properly authorized scope, which remains NHTSA's paramount objective in this proposal. In contrast, broadening the scope of this proposal to include new substantive interpretations regarding ECPA's

application to state motor vehicle emissions regulations may significantly expand both the purview of the Agency's analysis and the scope of public input on the proposal, and the time needed to complete this action. Therefore, repealing but not replacing the Agency's substantive views on preemption provides the additional time needed to fully reconsider the issue without leaving any implication that the statements in the SAFE I rulemaking remain in effect or inappropriately dampening state regulatory activity in the interim.

Accordingly, NHTSA is proposing to fully withdraw any interpretative statements or views espoused in the Preambles of the SAFE I Rule to ensure that no ambiguity exists regarding whether the Agency continues to endorse such statements. Such a rescission and repeal offers the opportunity to establish a clean slate, in which no prior overstatements as to NHTSA's role lead to confusion about a party's legal obligations or the weight the Agency's statements should carry and no interpretative statements with which the Agency may no longer agree could influence state actions.

G. Repealing the regulations and positions announced in the SAFE I rulemaking remains appropriate even if NHTSA possessed the authority for the rulemaking.

Even apart from the Agency's substantial concerns discussed above, the Agency is also proposing a complete repeal of the codified provisions and interpretative views as independently worthwhile steps. Upon reconsideration, even if it could do so lawfully, NHTSA no longer deems it necessary to speak with the force and effect of law on matters of EPCA preemption.

At the outset, the Agency considers the codified text in 531.7 and 533.7 unnecessary, as they merely repeat the statutory text and, thus, have no effect beyond the statute simply by virtue of their codification in NHTSA's regulations. In fact, NHTSA is concerned that their verbatim recitation in the CFR could even be confusing to some, who assume some subtle difference must exist in the statutory and regulatory provisions. As such, the Agency no longer considers the two provisions to offer any utility and proposes their repeal. As for the remaining two Appendices and associated Preamble text, the Agency remains concerned that, even if NHTSA possessed authority for the rulemaking, the categorical manner in which the SAFE I Rule applied preemption does not appropriately account for the importance of a more nuanced approach that considers state programs on a more particularized basis. NHTSA believes this more nuanced approach could better balance federalism interests by avoiding a sweeping and premature prohibition of all state and local programs and instead evaluating such programs more specifically. Further, NHTSA now has significant doubts about the validity of its preemption analysis as applied to the specific state programs discussed in SAFE I. Therefore, for both these reasons and the further discussion on the subject that appears in the preceding section, NHTSA considers a proposal to repeal the regulations and interpretations appropriate irrespective of the Agency's level of authority on preemption.

H. 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. This rulemaking document has been considered a "significant regulatory action" under Executive Order 12866. At this stage, NHTSA does not believe that this rulemaking would be "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.

2. 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 notice under the Regulatory Flexibility Act and certifies that this rulemaking will not have a significant economic impact on a substantial

number of small entities. The following provides the factual basis for this certification under 5 U.S.C. 605(b). This proposed action would only concern the question of preemption; the action does not set CAFE or emissions standards themselves. The preemption regulations at issue in this proposal have no direct effect on any private entities, regardless of size, because the rules do not regulate private entities. Thus, any effect on entities implicated by this regulatory flexibility analysis is merely indirect.

3. 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."[87] "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."[88] Executive Order 13132 imposes additional consultation requirements on two types of regulations that have 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.[89]

[87] Executive Order 13132, *Federalism*, Sec. 1(a) (Aug. 4, 1999).
[88] *Id.* at Sec. 1(a).
[89] *Id.* at Sec. 6(b), (c).

While this proposal concerns matters of preemption, it does not propose either type of regulation covered by Executive Order 13132's consultation requirements. Rather, the action in this proposal expressly proposes to repeal regulations and positions that sought to preempt State law. Thus, this proposal 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.

4. 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 is not expected to include a Federal mandate, no unfunded mandate assessment will be prepared.

5. National Environmental Policy Act

The National Environmental Policy Act of 1969 (NEPA)[90] directs that Federal agencies proposing "major Federal actions significantly affecting the quality of the human environment" must, "to the fullest extent possible," prepare "a detailed statement" on the environmental

[90] 42 U.S.C. 4321–4347.

impacts of the proposed action (including alternatives to the proposed action).[91] However, there are some instances where NEPA does not apply to a particular proposed action.

One consideration is whether the action is a non-discretionary action to which NEPA may not apply.[92] In this notice, NHTSA has expressed its substantial concerns over whether Congress provided 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 expresses a concern throughout this proposal that such actions exceed the Congressional grant of authority to NHTSA under EPCA. If NHTSA in fact exceeded its authority, the Agency believes that the only legally appropriate course of action would be 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 GHG emissions programs in the SAFE I Rule. Courts have long held that NEPA does not apply to nondiscretionary actions by Federal agencies.[93] If NHTSA were to conclude in its final rule that it lacked authority to issue regulations mandating preemption or

[91] 42 U.S.C. 4332.

[92] *See Dept. of Transp. v. Public Citizen*, 541 U.S. 752, 768-69 (2014) (holding that the agency need not prepare an EIS in addition to an 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.").

[93] *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).

otherwise categorically proclaiming state regulations to be preempted, it must therefore conclude that NEPA does not apply to this action.

The Agency also notes that the Supreme Court has characterized an express preemption statue's scope as a legal matter of statutory construction, in which "the purpose of Congress is the ultimate touchstone of pre-emption analysis." *Cipollone v. Liggett Grp., Inc*., 505 U.S. 504, 516 (1992). In turn, "Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it." *Lohr*, 518 U.S. at 485–86 (plurality opinion). 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." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

In light of this background, as both this proposal and the SAFE I Rule itself consistently made clear, the statutory text of 49 U.S.C. Section 32919 governs express preemption through self-executing terms. Specifically, the Preamble to the SAFE I Final Rule stressed:

> Any preemptive effect resulting from this final action is not the result of the exercise of Agency discretion, but rather reflects the operation and application of the Federal statute. NHTSA does not have authority to waive any aspect of EPCA preemption no matter the potential environmental impacts; rather, preempted standards are void *ab initio.* Courts have long held that NEPA does not apply to nondiscretionary actions by Federal agencies. As NHTSA lacks discretion over

EPCA's preemptive effect, the Agency concludes that NEPA does not apply to this action.[94]

In this notice, NHTSA does not seek to take any new substantive step or announce any new substantive view. Instead, NHTSA proposes only to withdraw the SAFE I Rule, which was an action for which the Agency already determined NEPA did not apply as the operative statute continued to govern any environmental effects from preemption. As before, the express preemption provision of Section 32919 remains enacted, in full and unchanged, irrespective of the SAFE I Rule, this proposal, or any subsequent final rule. As such, even though NHTSA now expresses doubts about its substantive conclusions in the SAFE I Rule and proposes to withdraw those views here, the Agency continues to believe that it did not and cannot dictate or define by law the self-executing scope of preemption under Section 32919. This is because of the Agency's belief expressed herein that its views on Section 32919, while potentially informative and advisory, do not carry the force and effect of law.[95] Therefore, this proposal likewise would not change the statutorily set scope of express preemption and, as such, the Agency does not

[94] 84 Fed. Reg. 51310, 51353-54.

[95] *See supra* Sec. E(3). 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 establishing a clean slate and restoring the scope to the *status quo ante* would rectify this overstep. *See, e.g.*, *supra* Sec. F(2). In the event NHTSA is adjudged to possess such binding authority and decides to exercise it in a future rulemaking, such a clean state will allow NHTSA to include such environmental considerations, if appropriate, at that time.

consider this proposal to result in any environmental impact that may arise from such preemption.

6. Executive Order 12988 (Civil Justice Reform)

Pursuant to Executive Order 12988, ''Civil Justice Reform,''[96] NHTSA has determined that this proposed rule does not have any retroactive effect.

7. 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.

8. Privacy Act

Please note that anyone is able to search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78), or you may visit http://dms.dot.gov.

Proposed Regulatory Text

For the reasons stated in the preamble, the National Highway Traffic Safety Administration proposes to amend 49 CFR Parts 531 and 533 as set forth below.

[96] 61 Fed. Reg. 4729 (Feb. 7, 1996).

The Acting Administrator of the National Highway Traffic Safety Administration, Steven S. Cliff, Ph.D., signed the following Proposed Rule on April 22, 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 Proposed Rule, it is not the official version of the Proposed 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.

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.

2. Remove § 531.7.

3. Remove Appendix B to Part 531.

PART 533— LIGHT TRUCK FUEL ECONOMY STANDARDS

1. 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.

2. Remove § 533.7.

3. Remove Appendix B to Part 533.

Issued on April 22, 2021, in Washington, D.C., under authority delegated in 49 CFR 1.81, 1.95, and 501.4

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Steven S. Cliff, Ph.D.
Acting Administrator

BILLING CODE 4910-59-P

[Signature page for Notice of Proposed Rulemaking – CAFE Preemption]