COMMENTS OF STATES AND CITIES SUPPORTING REPEAL OF NHTSA'S "SAFE" PART ONE PREEMPTION RULE

June 11, 2021

--via www.regulations.gov--

Attention: Docket Number NHTSA-2021-0030

Steven S. Cliff
Acting Administrator
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Re: "Corporate Average Fuel Economy (CAFE) Preemption," 86 Fed. Reg. 25,980 (May 12, 2021).

Dear Acting Administrator Cliff,

The undersigned states and cities submit these comments on the National Highway Traffic Safety Administration's proposal entitled "Corporate Average Fuel Economy (CAFE) Preemption," published at 86 Fed. Reg. 25,980 (May 12, 2021). We welcome the opportunity to comment and especially welcome the proposal to repeal NHTSA's portion of "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program," 84 Fed. Reg. 51,310 (Sept. 27, 2019).

In SAFE Part One, NHTSA issued an ill-conceived rule ("The Preemption Rule") that purported to declare, with the force of law—and cement in the Code of Federal Regulations—that the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 ("EPCA") preempts California's greenhouse gas and zero-emission-vehicle standards. In doing so, NHTSA targeted state laws that exercise core police powers to protect public health and welfare and that have engendered significant reliance interests during the decades they were in place before NHTSA's action.

As explained in Section I of these comments, NHTSA must repeal the Preemption Rule because the agency lacked authority to issue it. As explained in Section II, even if NHTSA had authority to issue the Preemption Rule, it should be repealed anyway, because it unnecessarily interferes with important state interests. Finally, as explained in Section III, if NHTSA does repeal the Preemption Rule, the agency need not also separately repeal statements in the preamble to the Preemption Rule or in preambles to prior rulemakings.

I. NHTSA MUST REPEAL THE PREEMPTION RULE BECAUSE IT LACKS AUTHORITY TO ISSUE LEGISLATIVE RULES DEFINING THE SCOPE OF EPCA PREEMPTION.

All of the proposal's analysis of NHTSA's authority to issue the Preemption Rule correctly supports the proposed conclusion that "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" and therefore "*likely* overstepped its authority in issuing binding legislative rules on preemption." 86 Fed. Reg. at 25,985 (emphases added). NHTSA thus proposes to repeal the Preemption Rule based on the "substantial doubts" the agency has about its authority. We strongly encourage NHTSA to go further and draw the conclusion that logically follows from the proposal's analysis: The agency *does* lack authority to promulgate legislative rules defining the scope of EPCA preemption. And because the Preemption Rule was intended as such a rule, NHTSA must repeal it.

As the proposal notes, "[a]gencies may act only when and how Congress lets them." *Cent. United Life Ins. Co. v. Burwell*, 827 F.3d 70, 73 (D.C. Cir. 2016), and "literally ha[ve] no power" to act otherwise, *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). And, specifically, agencies "have no special authority to pronounce upon pre-emption absent delegation by Congress." *Wyeth v. Levine*, 555 U.S. 555, 577 (2009). Instead, they must "tether" their pronouncements "to a relevant source of statutory authority." *Mozilla Corp. v. FCC* 940 F.3d 1, 80 (D.C. Cir. 2019).

The Preemption Rule attempted to locate this delegation of authority in the Department of Transportation's general rulemaking authority provision, 49 U.S.C. § 322(a). 84 Fed. Reg. at 51,320. But the authority granted under that provision is limited to regulations necessary to "carry out" the specific "duties and powers" granted the agency by Congress. The Preemption Rule claimed at various times to be carrying out EPCA's standard-setting provisions, 49 U.S.C. § 32902.[1] It appeared

[1] *E.g.*, 84 Fed. Reg. at 51,325 (describing Preemption Rule as "implementing" agency's authority to set nationally applicable fuel economy standards); *id.* at 51,317 (claiming Preemption Rule "implements that authority in 49 U.S.C. 32902"). NHTSA also claimed to have "clear authority to issue this regulation under 49 U.S.C. 32901 through 32903," 84 Fed. Reg. at 51,320, but did not attempt to—and in any event could not—explain how Section 32901 (which establishes definitions) or Section 32903 (which allows manufacturers to earn credits for overcompliance with national standards) would authorize NHTSA to issue legislative rules defining preemption.

at other times to be intended to carry out EPCA's express preemption provision, 49 U.S.C. § 32919.[2]

Neither of those provisions (or any other provision of EPCA), however, assigns NHTSA a power or duty to promulgate legislative rules defining the scope of preemption. Section 32902 assigns NHTSA limited powers and duties related to setting national fuel economy standards, mentioning state standards only insofar as the statute directs NHTSA to consider the effect of emission standards for which California has a waiver from EPA. It contains no mention of preemption, let alone of agency authority to declare state laws preempted. Section 32919, the section that expressly addresses preemption, does not assign NHTSA any powers or duties at all. *See* 86 Fed. Reg. at 25,988.

In contrast with these sections, other statutes expressly authorize agencies to define or implement preemption. For example, in EPCA itself, Congress was explicit when it wanted to assign an agency preemption duties. EPCA, § 327(b), 89 Stat. at 927, *recodified as amended at* 42 U.S.C. § 6297(d) (authorizing predecessor to Department of Energy to "prescribe … rule[s]" that preempt state and local appliance efficiency standards) Likewise, elsewhere in Title 49, Congress explicitly directed the Secretary of Transportation to carry out preemption under other statutes. See, *e.g.*, 49 U.S.C. §§ 5125, 31141.

But Congress did no such thing in EPCA's fuel economy chapter. Instead, it created a preemption regime that NHTSA itself recognizes as "self-executing," 86 Fed. Reg at 25,986, neither requiring nor authorizing NHTSA to implement it with legislative rules such as the Preemption Rule. The Preemption Rule must therefore be repealed.

II. NHTSA SHOULD REPEAL THE PREEMPTION RULE EVEN IF THE AGENCY HAD AUTHORITY TO ISSUE IT.

NHTSA should repeal the Preemption Rule even if it was not *ultra vires*, because the Preemption Rule contravened principles of federalism—targeting state laws adopted to protect state residents and to which serious state reliance interests

[2] *See id. at* 51,320 ("The statute is clear on the question of preemption, and NHTSA must carry it out."); *id.* at 51,319 (claiming Preemption Rule "clearly articulates NHTSA's views on the meaning of" § 32919), *id.* at 51,353 (justifying lack of NEPA analysis on grounds that Preemption Rule merely "provides clarity on the scope EPCA's preemption provision.")

have attached—and did so unnecessarily. No cognizable reliance interests counsel otherwise.[3]

a. NHTSA should exercise its discretion to repeal the rule to the extent it was a legislative rule.

As discussed above, EPCA does not give NHTSA authority to issue legislative rules declaring state laws preempted. But even if EPCA did give NHTSA that authority, the statute does not compel NHTSA to issue such rules. And NHTSA should not have contravened federalism principles through an unnecessary rulemaking targeting longstanding state programs that protect residents and natural resources.

Under longstanding federal policy, an agency considering legislating preemption should restrict the preemptive effect of its actions "to the minimum level necessary to achieve the objectives" of the relevant statute. Exec. Order No. 13,132, § 4(c) (Aug. 4, 1999), reprinted in 64 Fed. Reg. 43,255, 43,256 (Aug. 10, 1999). That restraint is grounded in respect for—and a desire to preserve—states' "unique authorities" and their ability to "function as laboratories of democracy" in which they "are free to experiment with a variety of approaches to public issues." *Id.* § 2(e), (f). That ability to experiment "allows States to respond … to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond v. United States*, 564 U.S. 211, 221 (2011); *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) (cataloging benefits of "'[d]eference to state lawmaking"). Indeed, respect for state authority is central to Congress's approach of making the prevention of air pollution, "the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3).

The Preemption Rule did violence to these principles. It declared preempted long-standing laws that protect public health and welfare and exercise core state police powers carefully preserved by Congress in the Clean Air Act. California's zero-emission-vehicle standards, for example, first adopted more than three decades ago, Cal. Code Regs. tit. 13, § 1960.1(g)(2) (1991), aim to reduce emissions of greenhouse and non-greenhouse gas emissions, including emissions of smog-forming pollutants affecting populations already over-burdened by pollution, *see* 2017 Cal.

[3] As indicated in the proposal, 86 Fed. Reg. 25,982 n.8, NHTSA can (and should) exercise its discretion to repeal separate and apart from NHTSA's potential, future reconsideration of the views it articulated in the Preemption Rule about the scope of EPCA preemption and its application to particular state laws. While we strongly disagree with those views, we understand them to be outside the scope of this proposal.

Stats. ch. 136 (A.B. 617), and to support the development and deployment of technology that will make further reductions achievable in the future. And California's greenhouse gas standards were first adopted 16 years ago in response to the prospect of disruptions in the states' water supply, increases in "catastrophic wildfires," damage to the State's extensive coastline and ocean ecosystems, aggravation of existing and severe air quality problems and related adverse health impacts, and more. 2002 Cal. Stat. c. 200 (A.B. 1493) (Digest).

These standards have long operated under waivers granted by EPA.[4] And they have been adopted by more than a dozen other states, pursuant to Section 177 of the Clean Air Act, to combat various forms of air pollution. Meanwhile, no court has ever held either of these standards preempted by EPCA. Indeed, the two courts to decide the issue both held, in 2007, that California's greenhouse gas standards (and Vermont's adoption of them) were not preempted by EPCA. *Green Mountain Chrysler* v. *Crombie,* 508 F. Supp. 2d 295 (D. Vt. 2007); *Cent. Valley Chrysler-Jeep, Inc.* v. *Goldstene,* 529 F. Supp. 2d 1151 (E.D. Cal. 2007), as corrected (Mar. 26, 2008).

Following those decisions, California and other states continued to invest resources in these standards and further iterations of them, basing long-term state planning on continued and increasing emission reductions and other benefits the standards were expected to produce. Several states sought and obtained EPA's approval to include one or both of California's standards in State Implementation Plans to meet federal air quality requirements,[5] reflecting expenditures of state planning resources significant enough—and with significant enough consequences—that the Clean Air Act prohibits federal agencies from interfering with them. 42 U.S.C. § 7506(c); *see also* Reply Br. of Nat'l. Coal. For Advanced Transportation et al., *Union of Concerned Scientists v. NHTSA*, D.C. Cir. Case No. 19-1230, Doc. No. 1868435 (Oct. 27, 2020) at 2-3 (highlighting significant investments made by private industry and public utilities in reliance on these state standards).

Despite these weighty state interests, developed over the course of decades of implementing these state laws, the Preemption Rule purported to declare these laws preempted, although NHTSA had never before in its history purported to

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[4] 58 Fed. Reg. 4166 (Jan. 13, 1993); 71 Fed. Reg. 78,190 (Dec. 28, 2006); 74 Fed. Reg. 32,744 (July 8, 2009) (reversing previous denial); 78 Fed. Reg. 2,112 (Jan. 9, 2013).

[5] *See* 82 Fed. Reg. 42,233 (Sept. 7, 2017) (Maine); 81 Fed. Reg. 39,424, 39,425 (June 16, 2016) (California); 80 Fed. Reg. 61,752 (Oct. 14, 2015) (Delaware); 80 Fed. Reg. 50,203 (Aug. 19, 2015) (Rhode Island); 80 Fed. Reg. 40,917 (July 14, 2015) (Maryland); 80 Fed. Reg. 13,768 (Mar. 17, 2015) (Connecticut).

speak to EPCA preemption with the force and effect of law. Nothing in the statute or anywhere else required the issuance of such a legislative rule. Indeed, precisely because, as NHTSA acknowledged, EPCA's preemption provision is "self-executing," decisions about whether particular state laws are preempted do not need to be made by NHTSA. Courts can and regularly do decide those issues.[6] Indeed, unlike NHTSA, courts are constitutionally *required* to decide those questions, when presented with an appropriate case. Courts are also capable of addressing these questions as they should be addressed, namely, "under the circumstances of the particular case," *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 873 (2000), rather than "in the abstract" or "in gross," *Mozilla*, 941 F.3d at 81, as NHTSA's Preemption Rule did. 86 Fed. Reg. at 25988.

Nor was the Preemption Rule necessitated by its stated goal of regulatory certainty. In fact, the Preemption Rule introduced substantial uncertainty, not just by suddenly declaring preempted longstanding state laws previously upheld by courts, but also by failing to be clear about what else it covered. For example, while the Preemption Rule's main regulatory provisions did nothing more than "parrot[]" the statute, clarifying nothing, 86 Fed. Reg. at 25,983 n.26, those provisions' appendices declared preempted all state laws that have the "direct or substantial effect of regulating or prohibiting tailpipe carbon dioxide emissions." But neither they nor the preamble provided any real clue about how to determine whether a state policy falls on one side or the other of the "direct or substantial effect" line. The preamble acknowledged that some laws have "no bearing on fuel economy," but, among those that do, pointed only to child safety seat laws as having an effect that is not "direct or substantial." 84 Fed. Reg. at 51,314. The Preemption Rule was particularly unclear as to whether and to what extent it preempted so-called "in-use" rules, such as speed limits, anti-idling rules, and tire pressure standards, and other laws that are not "for automobiles covered by an average fuel economy standard under" EPCA, 49 U.S.C. § 32919(a). *Cf.* 84 Fed. Reg. 51,318 n.96 (saying only that some state regulations of leased vehicles would be preempted).

Finally, no cognizable reliance interests in the Preemption Rule counsel against repeal. Besides being unclear, the Preemption Rule has faced litigation for all but a few hours of its 21-month existence, preventing any reasonable reliance interests from accruing during that time. *Bell Atl. Tel. Cos. v. FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996) (no reasonable reliance interests where "[t]he state of the law

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[6] *See, e.g.*, *Metro. Taxicab Bd. of Trade v. City of New York,* 615 F.3d 152 (2d Cir. 2010); *Green Alliance Taxi Cab Ass'n v. King County*, No. C08-1048RAJ, 2010 WL 2643369, at *5 (W.D. Wash. June 29, 2010); *Ophir v. City of Boston*, 647 F. Supp. 2d 86 (D. Mass. 2009); *Green Mountain,* 508 F. Supp. 2d 295; *Central Valley,* 529 F. Supp. 2d 1151.

has never been clear, and the issue has been disputed since it first arose"). The morning after the Preemption Rule was signed, a coalition of states and cities—including, among others, every state that has adopted California's greenhouse gas and zero-emission-vehicle standards—challenged the Preemption Rule in the U.S. District Court for the District of Columbia. Complaint, *California v. Chao*, D.D.C Case No. 19-cv-02826, Doc. No. 1 (Sept. 20, 2019). That coalition was soon followed by other groups. Similar coalitions also challenged the Preemption Rule in the D.C. Circuit, along with EPA's withdrawal of California's waiver for its greenhouse gas and zero-emission vehicle standards. In that case, automakers and other industry groups that intervened in support of the Preemption Rule acknowledged that the pendency of the litigation *removed* any certainty the Preemption Rule might have created for their planning and investment decisions. Mot. of Coalition for Sustainable Automotive Regulation & Ass'n of Global Automakers for Expedited Review, *Union of Concerned Scientists v. NHTSA*, D.C. Cir. Case No. 19-1230, Doc. No. 1821514 (Dec. 24, 2019) at 12; *see also id*. at 2-3 (claiming that litigation resulted in "regulatory uncertainty" and "disruptive effect"). In fact, in seeking expedited resolution of the case, these entities expressly told the D.C. Circuit that, until the case was resolved, "automakers must make production planning decisions based on" both "federal and state regulations." *Id.* at 16. The case was neither expedited nor resolved, and these groups cannot now credibly claim that they reasonably assumed, and planned for, a future in which the preemption of California's standards was a certainty.

b. NHTSA should repeal the Preemption Rule even if was merely an interpretive rule.

The agency should finalize its proposal to expressly state that it would repeal the Preemption Rule even if a court were to find it interpretive. *See* 86 Fed. Reg. at 25,985 n.47. Even as an interpretive rule, the Preemption Rule would still be inconsistent with federalism and unnecessary, and would not have engendered serious reliance interests, as explained above, *supra* 4-6. Repeal would also ensure that the Preemption Rule would not be mistaken for a legislative rule, a risk created by the indications that it was intended as such. *See* 86 Fed. at 25,985 n.47; *Guedes v. Bureau of Alcohol, Tobacco and Firearms*, 920 F.3d 1, 18 (D.C. Cir. 2019); *see also, e.g.,* Plf.'s. Resp. in Opp. to Defs.' Mot. to Dismiss, *Minn. Auto Dealers Association v. Minn. Pollution Control Agency*, D. Minn. Case No. 21-0053, Doc. No. 30 (Feb. 5, 2021) at 12, 33 (asserting that Preemption Rule itself preempts state greenhouse gas standards).

For all of the above reasons, we urge NHTSA to repeal the Preemption Rule whether or not the agency is required to do so.

III. NHTSA NEED NOT SEPARATELY REPEAL OR WITHDRAW ANY UNCODIFIED PREAMBULAR STATEMENTS.

Assuming NHTSA does repeal the Preemption Rule, as it should (and, indeed must), the agency need not go further and separately repeal statements it has made in preambles. See 86 Fed. Reg. at 25,982 & n.9 (listing examples).

In general, absent extraordinary circumstances, statements made in preambles do not have binding legal effect. *NRDC v. EPA*, 559 F.3d 561, 564-65 (D.C. Cir. 2009); *AT&T Corp. v. FCC*, 970 F.3d 344, 350-51 (D.C. Cir. 2020). The circumstances surrounding the statements NHTSA identified do not suggest, let alone establish, such extraordinary circumstances.

First, if the Preemption Rule is repealed, any preambular statements justifying or explaining the Preemption Rule's regulatory provisions or appendices will be a "legal nullity." *NRDC*, 559 F.3d at 565. Repealing the Preemption Rule ensures statements in its preamble alone will not be mistaken for a legislative rule. Separate repeal of those statements is unnecessary.

Second, the prior preambles that NHTSA identifies, 86 Fed. Reg. at 25,982 & n.9, were also not binding, final agency action. NHTSA made those statements—the most recent of which is now more than a decade old—in preambles to regulations that set national fuel-economy standards. NHTSA did not separately codify those statements as part of those regulations, nor did those statements even provide any basis for the final action the agency took in those rulemakings. And while some were subject to notice and comment, none expressed the agency's intent to bind itself or anyone else. To the contrary, NHTSA claimed—successfully—that such statements were not final agency action. *See Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1181 (9th Cir. 2008) ("[T]he parties agreed in their response briefs and at oral argument that the preemption discussion in the preamble of the Final Rule is not final agency action").

Because the preambular statements are non-final and because they would be due little if any weight, they do not themselves pose any meaningful obstacle to any future consideration of the issue the agency may want to undertake. We encourage NHTSA to reconsider the substance of these prior statements in a separate proceeding, but NHTSA can do so without withdrawing these statements now.

If, however, NHTSA does decide to finalize its proposed withdrawal of those non-binding preambular statements, it should stop there. NHTSA's proposal to also withdraw "all related statements" is unclear in its reach and could engender confusion. Accordingly, the agency should not finalize it.

Respectfully submitted,

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