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Docket No. NHTSA-2021-0030; RIN 2127-AM33

Comments of Twelve Public Interest Organizations on the National Highway Traffic Safety Administration Proposed Rule on Corporate Average Fuel Economy (CAFE) Preemption

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I. OVERVIEW

Twelve public interest groups—Center for Biological Diversity, Chesapeake Bay Foundation, Communities for a Better Environment, Conservation Law Foundation, Earthjustice, Environment America, Environmental Defense Fund, Environmental Law & Policy Center, Natural Resources Defense Council, Inc., Public Citizen, Inc., Sierra Club, and Union of Concerned Scientists (collectively, Commenters)—submit these comments on the proposed rule of the National Highway Traffic Safety Administration (NHTSA) entitled "Corporate Average Fuel Economy (CAFE) Preemption" and published at 86 Fed. Reg. 25,980 (May 12, 2021).

Commenters support, and we urge NHTSA to finalize, a repeal of the provisions and appendices added to Title 49 of the Code of Federal Regulations by "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program," 84 Fed. Reg. 51,310 (Sept. 27, 2019). All those regulatory provisions and appendices (collectively, Preemption Rule or Rule) *must* be repealed because they exceed NHTSA's authority. To the extent NHTSA did have authority to promulgate a rule on the subject of preemption, this Rule *should* be repealed because it contravenes longstanding Federal policy on when agencies should declare State and local laws preempted; and heightens confusion about the scope and nature of preemption.

Commenters also vehemently disagree with the Rule's conclusion about which State and local laws are preempted by the Energy Policy and Conservation Act of 1975 (EPCA), and we have set forth our reasons for disagreement in court filings. Br. of State and Local Gov't Petrs. & Public Interest Org. Petrs. 79–105, *Union of Concerned Scientists v. NHTSA* (*UCS*), No. 19-1230 (D.C. Cir. Oct. 27, 2020) (A-001); Reply Br. of State and Local Gov't Petrs. & Public Interest Org. Petrs. 37–51, *UCS*, *supra* (Oct. 27, 2020) (A-155). While the substantive errors in the Rule's preemption analysis could have formed an independent ground for repeal, Commenters understand that NHTSA considers those issues to be "outside the scope of this Proposal" because NHTSA will not be "[r]eassessing the scope of preemption under EPCA" or "announcing new interpretive views" in this proceeding. 86 Fed. Reg. at 25,982 n.8. The agency has indicated it may "undertake such a deliberation in the future," *ibid.*, and if it does so, Commenters will urge the agency to reach a different conclusion. However, in accord with NHTSA's proposal, none of the grounds for repeal set forth below require the agency to reconsider the scope of Federal preemption.

II. NHTSA MUST REPEAL THE PREEMPTION RULE BECAUSE IT EXCEEDED THE AGENCY'S STATUTORY AUTHORITY

Commenters believe that it is not merely "likely," as NHTSA acknowledges, but true as a matter of law that NHTSA "overstepped its authority in issuing binding legislative rules on preemption." 86 Fed. Reg. at 25,985. Federal agencies cannot "pronounce on pre-emption absent delegation by Congress," *Wyeth v. Levine*, 555 U.S. 555, 577 (2009), and NHTSA lacks delegated authority to speak with the force of law to declare State or local law preempted under EPCA's fuel-economy chapter. Repealing the Preemption Rule is nondiscretionary because retaining *ultra vires* regulations on the books is, by definition, "in excess of statutory … authority" and "not in accordance with law." 5 U.S.C. § 706(2)(A), (C).

Commenters urge NHTSA to finalize a repeal of the Rule predicated on a firm conclusion that it is *ultra vires*, rather than mere "substantial doubts about whether Congress provided the Agency with the authority" to promulgate a rule on this subject. 86 Fed. Reg. at 25,985.

A. The Rule is legislative

A legislative rule—in particular, a *substantive* legislative rule—is one meant to "have the 'force and effect of law.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979). Whether a rule is legislative "depends on the agency's intent when issuing it." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 20 (D.C. Cir. 2019). NHTSA's proposal correctly observes that the Preemption Rule "was intended to be a legislative rule." 86 Fed. Reg. at 25,985 n.47.

To decide whether a rule is legislative, courts "look to the rule's 'language' and 'ask whether the agency intended to speak with the force of law,' including 'whether the agency has published the rule in the Code of Federal Regulations and whether it explicitly invoked its general legislative authority.'" *POET Biorefining, LLC v. EPA*, 970 F.3d 392, 407 (D.C. Cir. 2020). NHTSA issued the Preemption Rule allegedly "to carry out its statutory authority." 84 Fed. Reg. 51,310, 51,310 (Sept. 27, 2019); *see also id.* at 51,317, 51,320. It codified the Rule, including appendices, in the Code of Federal Regulations. *Id.* at 51,361–63. NHTSA invoked, as "clear authority to issue" the Rule, *id.* at 51,320, its general authority "to carry out the duties and powers of the Secretary [of Transportation]," 49 U.S.C. § 322(a).

Moreover, the preamble "confirm[ed] throughout, in numerous ways," that NHTSA "intend[ed] to speak with the force of law." *Guedes*, 920 F.3d at 19. For example, it stated that *not* finalizing the Rule "amounts to … *allowing for* State and local requirements that interfere with NHTSA's statutory duty to set nationally consistent fuel economy standards" under Section 32902. 84 Fed. Reg. at 51,317 (emphasis added). But that could be so only if the Rule operated to *prohibit* the subject requirements, which could be so only if the Rule itself carried the force of law. *Cf. Wyeth*, 555 U.S. at 576 ("[A]gency regulation with the force of law can pre-empt conflicting state requirements."). Likewise, the Rule's preamble asserted that, "in light of" *the Rule*, "States may need to work with EPA to revise" implementation plans for compliance with the Clean Air Act to excise State laws the Rule declares preempted. 84 Fed. Reg. at 51,324.

NHTSA also sought *Chevron* deference for the statutory interpretation embodied in the Rule. 84 Fed. Reg. at 51,320 & n.118; *see also* U.S. Br. 36–37, *UCS*, *supra* (Oct. 27, 2020) (A-236). Deference under *Chevron* cannot attach unless "Congress delegated authority to the agency generally to make rules carrying the force of law, and … the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 57 (2011). NHTSA's invocation of *Chevron* "is compelling evidence that [the agency] did not conceive of its rule as merely interpretive," *Guedes*, 920 F.3d at 19, and intended to act with the force of law.

Further, NHTSA's sister agency, EPA, treated the Preemption Rule as having legal force in the Federal Register notice that announced the Rule's promulgation. 84 Fed. Reg. 51,338 (Sept. 27, 2019) ("California's GHG and ZEV standards are preempted as a result of NHTSA's finalized determinations …."). NHTSA itself did likewise when it later issued CAFE standards for model

years 2021‑2026. 85 Fed. Reg. 24,257 (Apr. 30, 2020) (contending that because, *inter alia*, the Preemption Rule's "regulatory text" asserted that "the ZEV mandate is expressly and impliedly preempted by EPCA," NHTSA "appropriately excluded California's ZEV mandate from the No-Action alternative" prepared to analyze environmental impacts of CAFE standards pursuant to the National Environmental Policy Act).[1]

To be sure, NHTSA also stated throughout the preamble that the Preemption Rule declared what the statute's preemptive effect always had been, *see, e.g.*, 84 Fed. Reg. at 51,314, 51,324, 51,354, 51,356—a feature commonly associated with an interpretive (*i.e.*, non-legislative) rule, *see Guedes*, 920 F.3d at 19. But those statements simply reflected NHTSA's view that EPCA independently preempted all State and local laws the Rule declares preempted, *i.e.*, that the Rule is legislative yet duplicative of the preemptive effect of the "clear" meaning of the "plain" wording, 84 Fed. Reg. at 51,318, of the "self-executing" statute, *id.* at 51,325. Thus, NHTSA expressly disclaimed the exercise of any interpretive "discretion over EPCA's preemptive effect," *id*. at 5,1354, and, rather than filling what it perceived as a legislative *gap*, adopted a legislative rule that it intended to go no further than the agency thought the statute had. (Even if the Rule were in fact interpretive, NHTSA nevertheless should repeal it for the reasons stated in Part III.B, *infra*.)

B. Congress did not authorize NHTSA to issue legislative rules declaring State or local laws expressly or impliedly preempted under EPCA's fuel-economy chapter

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). NHTSA exercises "authority vested in the Secretary [of Transportation] under" EPCA's fuel-economy chapter. 49 C.F.R. § 1.95(a). The Secretary's authority to issue legislative rules is limited to "regulations [that] carry out the duties and powers of the Secretary." 49 U.S.C. § 322(a). Those duties and powers do not cover all provisions of EPCA. *Cf. Gonzales v. Oregon*, 546 U.S. 243, 258–59 (2006) (holding that agency's authority to issue regulations to execute its statutory "*functions*" is narrower than "authority to carry out or effect all *provisions* of" a statute it administers); *id.* at 265 ("When Congress chooses to delegate a power of [the latter] extent, it does so not by referring back to the administrator's functions but by giving authority over the provisions of the statute he is to interpret.").

In particular, EPCA's preemption provision, 49 U.S.C. § 32919, does not vest the Secretary with any duty or power. It does not mention the Secretary or contemplate Federal regulations "to carry out" congressional intent to preempt State and local laws. Rather, as NHTSA recognized when it promulgated the Preemption Rule, *see* 84 Fed. Reg. at 51,325, and reaffirms in the proposal, *see* 86 Fed. Reg. at 25,986–87, Section 32919 is "self-executing." Indeed, NHTSA did not even cite Section 32919 as a source of delegated authority when it promulgated the Preemption Rule.

[1] Opponents of States' efforts to adopt zero- and low-emission-vehicle standards have pointed to the Rule as a distinct source of law that allegedly preempts those standards. *E.g.*, Compl. ¶¶ 83–86, *Minn. Auto Dealers Ass'n v. Minnesota*, No. 0:21-cv-00053 (D. Minn. Jan. 6, 2021) (A-371); Compl. ¶¶ 74–75, *Freedom to Drive v. Colo. Air Quality Comm'n*, No. 2019 CV 34516 (Colo. Dist. Ct. Denver Cty. Oct. 29, 2019) (A-393).

Instead, the agency purported to locate authority for the Rule in 49 U.S.C. §§ 32901–32904. 84 Fed. Reg. at 51,311, 51,316–17, 51,320; *see also* U.S. Br. 26–30, *UCS*, *supra* (Oct. 27, 2020). Those statutory sections do not individually or collectively authorize legislative rules on express or implied preemption. The text of those sections does not mention preemption, and it certainly does not authorize standalone regulations declaring State or local laws preempted with the force of law.

Section 32902 authorizes NHTSA to prescribe and amend CAFE standards. And, when NHTSA carries out *that* duty or power, it "shall consider … the effect of other motor vehicle standards of the Government on fuel economy." 49 U.S.C. § 32902(f). Thus, NHTSA may need to determine *when prescribing or amending a CAFE standard* whether certain State laws are "motor vehicle standards of the Government." *E.g.*, 53 Fed. Reg. 11,074, 11,078 (Apr. 5, 1988) (predicating CAFE standard in part on fuel-economy effects of California's vehicular emission standards).[2] *Those* determinations, incidental to NHTSA's exercise of delegated Section 32902 rulemaking authority, are not *ultra vires*.[3]

But the Preemption Rule is a different animal. NHTSA intentionally "decoupled" the Rule from prescription or amendment of CAFE standards under Section 32902. 86 Fed. Reg. at 25,983; *see also* 84 Fed. Reg. at 51,314–15. The agency's "sole purpose" here "was to pre-empt state law rather than to implement a statutory command." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 44 (2007) (Stevens, J., dissenting). The statute does not command, or allow, NHTSA to issue legislative rules declaring State or local law preempted. Section 32902's reference to "other motor vehicle standards of the Government" does not empower NHTSA to issue standalone legislative regulations construing text in Section 32919 or pronouncing upon implied preemption. NHTSA's power to pronounce upon preemption is limited "not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139 (D.C. Cir. 2006).

NHTSA asserted that standalone preemption regulations were necessary "to effectuate a national automobile fuel economy program unimpeded by prohibited State and local requirements." 84 Fed. Reg. at 51,320. But, in contrast with another provision of EPCA that expressly vested the Federal Energy Administration with authority to decide whether EPCA preempts State energy-conservation laws, no provision in EPCA's fuel-economy chapter vests NHTSA with authority to determine what State or local laws are preempted or prohibited. *Compare* 49 U.S.C. § 32919

[2] Similarly, NHTSA exercised delegated authority to adjust CAFE standards that Congress had fixed by statute, in light of the fuel-economy effects of "other Federal motor vehicle standards" including California's emission standards. Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, § 301, 89 Stat. 871, 905; *e.g.*, 49 C.F.R. § 531.5(b) (1983); *id.* § 531.5(b)(1) (1981).

[3] NHTSA may not, of course, adopt an interpretation of the phrase "motor vehicle standards of the Government" that is "not in accordance with law." 5 U.S.C. § 706(2)(A). As Commenters have explained elsewhere, Congress intended that phrase to encompass emission standards for which EPA has granted a waiver under Section 209(b) of the Clean Air Act, 42 U.S.C. § 7543(b). Br. of State & Local Gov't Petrs. & Public Interest Org. Petrs. 87–90, *UCS*, *supra* (Oct. 27, 2020).

with EPCA, § 327(b), 89 Stat. at 927, *recodified as amended at* 42 U.S.C. § 6297(d). And, to the extent State and local laws are prohibited by virtue of the *statute*—including Section 32919, EPCA's self-executing preemption clause—Congress did not authorize *rules* to effectuate that prohibition. Disputes arising over whether a particular State or local law is preempted can and should be resolved by courts. Federal officials are free to initiate or join such suits, *see Ex parte Young*, 209 U.S. 123 (1908); Fed. R. Civ. P. 24(b)(2), and, when they do, the court cannot "entirely fail[] to consider the agency's views" on preemption, 84 Fed. Reg. at 51,323, because the agency will be party to the suit. But NHTSA lacks authority to issue legislative rules declaring with the force of law which State and local laws are preempted.

C. The Rule did not engender serious reliance interests, and any such interest could not justify the Rule's retention in any event

If NHTSA definitively concludes that the Preemption Rule exceeds the agency's statutory authority, there are no reliance interests sufficient to overcome the imperative that the *ultra vires* rule be repealed.

At least arguably, repeal of such a Rule is required irrespective of any reliance interest it might have engendered. In *Department of Homeland Security v. Regents of the University of California* (*Regents*), 140 S. Ct. 1891 (2020), the Supreme Court held that although the Department of Homeland Security was bound by the Attorney General's conclusion that an earlier action of the Department was illegal, the Department could not repeal that action without considering reliance interests it might have engendered. *Id.* at 1913-15. But that was because the Attorney General's reasoning did not "foreclose[ ] … the options" of modifying, rather than outright repealing, the action in question: The Attorney General had found only certain aspects of the action illegal. *Id.* at 1915. Here, by contrast, NHTSA has no alternative, consistent with its unyielding duty to act within the confines of its statutory power, that would be more solicitous of reliance interests than a simple repeal. Because NHTSA cannot retain *any* legislative regulation that declares *any* State or local law preempted, this is likely a case, unlike *Regents*, where the agency's consideration of reliance interests "would be futile." *Regents*, 140 S. Ct. at 1928 (2020) (Thomas, J., concurring in the judgment in part and dissenting in part).

NHTSA need not, however, rely solely on the proposition that reliance interests need not be considered in this context, because here there are no genuine reliance interests of sufficient weight to require keeping the Preemption Rule in place. Thus, NHTSA should explicitly find that, to the extent the agency is required to review reliance interests, there are none that justify retention of the Rule. The only "prior policy" that NHTSA has proposed to change, *FCC v. Fox Television Stations, Inc.* (*Fox*), 556 U.S. 502, 515 (2009), is the "policy" to issue legislative rules pronouncing upon preemption. And that policy did not engender "serious reliance interests that must be taken into account." *Ibid.*

The Rule *did not* allay uncertainty about preemption of State emission standards to a degree that significantly impacted automakers' decisions about which cars and trucks to build or market. Automakers maintained in litigation over the Rule that automobile manufacturing is a "highly regulated, long lead-time industry." Motion of Coalition for Sustainable Automotive Regulation & Ass'n of Global Automakers for Expedited Review 3, *UCS*, *supra* (Dec. 24, 2019) (A-410).

And they explained that, notwithstanding the Rule, they "continue[d] to face multiple, overlapping, and inconsistent regulations, and [were] required to expend unrecoverable resources developing production plans preparing for this possibility." *Id.* at 12. In other words, automakers did not alter "invest[ment]" of significant resources," *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1114 (D.C. Cir. 2019), in reliance on the Rule. And understandably so, given that the Rule was challenged the day after it was signed. *See Mozilla Corp. v. FCC*, 940 F.3d 1, 64 (D.C. Cir. 2019) (noting that any reliance on an agency order "would not have been reasonable unless tempered by substantial concerns for legal or political jeopardy"). By extension, automobile dealers and other entities affected by automakers' choices could not reasonably have relied on the Rule to make their own business decisions.

EPA's reliance on the Rule as one basis to partially rescind California's 2013 waiver of Clean Air Act preemption for advanced clean-car standards also could not have engendered any reasonable reliance interest on NHTSA's Rule. Reliance on EPA's action—which likewise has been subject to legal challenge since it was issued—does not constitute reliance on NHTSA's. Plus, at least insofar as it applied to automobiles of model years 2021 and later, EPA independently relied for its rescission on a novel interpretation of Section 209(b) of the Clean Air Act. The Rule thus could not have engendered serious reliance interests respecting vehicles of those model years. For earlier model years, EPA used a one-time-only approach of premising reconsideration of a waiver decision on a factor—NHTSA's interpretation of EPCA—external to Section 209(b). 84 Fed. Reg. at 51,338. EPA has since called that novel approach into doubt, *see* 86 Fed. Reg. at 22,421, 22,429 (Apr. 28, 2021), and it would have been unreasonable for anyone to rely on *NHTSA's* Rule as a linchpin of preemption of State emission standards for model year 2019–2020 vehicles.

D. Environmental impacts of a repeal need not be analyzed

If NHTSA definitively concludes that the Preemption Rule exceeds its statutory authority, it need not analyze the environmental impacts of a repeal under the National Environmental Policy Act (NEPA). *See* 86 Fed. Reg.at 25,991. Because NHTSA lacks discretion to retain an *ultra vires* regulation, the agency "lacks the power to act on whatever information" it might gather in a NEPA analysis. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 768–69 (2014).

III. NHTSA SHOULD FINALIZE A REPEAL OF THE PREEMPTION RULE EVEN IF THE AGENCY HAD AUTHORITY TO PROMULGATE IT

A. The Rule should be repealed even if it was an authorized legislative rule

Even if NHTSA has authority to promulgate standalone legislative rules respecting preemption under EPCA's fuel-economy chapter, the Rule still should be repealed. Congress plainly did not *compel* NHTSA to issue such a rule. According to NHTSA's own analysis in the Preemption Rule—which Commenters dispute but the agency has not proposed to revisit, *see* 86 Fed. Reg. at 25,982 n.8—EPCA of its own force independently preempted every State or local law that the Rule declares preempted. NHTSA thus intended that its Rule be legislative but also duplicative of the statute. For purposes of the present proceeding, in which NHTSA has constrained itself not to engage with Commenters' contrary views on preemption, we agree that repeal of a legislative rule that purported not to alter the breadth of Federal preemption is appropriate.

1. The Rule's verbatim recitation of EPCA's preemption provision should be repealed

The Rule twice codified a verbatim recitation of EPCA's preemption section, 49 U.S.C. § 32919. 84 Fed. Reg. at 51,361–62 (codified at 49 C.F.R. §§ 531.7, 553.7). These "parroting regulations" are of no aid in statutory interpretation, *see Gonzales*, 546 U.S. at 257, yet can generate confusion about their intended meaning, as the proposal observes, 86 Fed. Reg. at 25,983 n.26. The Rule's preamble magnified the risk of confusion by stating that verbatim recitation of Section 32919 in the Code of Federal Regulations "articulates *NHTSA's* views on the meaning" of that section. 84 Fed. Reg. at 51,319; *see also id.* at 51,314–15. Eliminating the risk of any confusion is sufficient reason to repeal these gratuitous portions of the Rule.

2. The Rule's appendices should be repealed

NHTSA also should repeal the Rule's appendices, 84 Fed. Reg. at 51,362–63 (codified at 49 C.F.R. pt. 531 app. B & pt. 533 app. B).

First, basic respect for federalism militates against unnecessary rules declaring State and local laws preempted. "The Supremacy Clause gives priority to 'the Laws of the United States,' not the … priorities or preferences of federal officers." *Kansas v. Garcia*, 140 S. Ct. 791, 807 (2020) (quoting U.S. Const. Art. VI, cl. 2). And it has long been Federal policy that "[i]n the search for enlightened public policy, individual States and communities [should be] free to experiment with a variety of approaches to public issues. One-size-fits-all approaches to public policy problems can inhibit the creation of effective solutions to those problems." Exec. Order 13,132, § 2(f) (Aug. 4, 1999), *reprinted in* 64 Fed. Reg. 43,255, 43,256 (Aug. 10, 1999). Accordingly, NHTSA "should encourage opportunities for" States and localities "to achieve their personal, social, and economic objectives." *id.* § 2(h).

The Preemption Rule did the opposite. Having discerned what NHTSA termed a lack of "clarity" regarding EPCA's preemptive reach, 84 Fed. Reg. at 51,317,[4] the agency acted aggressively and inappropriately by codifying regulations declaring that Federal preemption reached beyond what had (and has) been adjudged by any court, *see id.* at 51,314 & n.53 (acknowledging conflict between the Rule and opinions of the only courts to have addressed whether EPCA preempts greenhouse-gas emission standards). In short, rather than proceed cautiously consistent with Federal policy, NHTSA took steps to frustrate State and local innovation on emissions reduction and encourage future courts to declare a broad swath of State and local laws preempted. That incaution was especially harmful because State and local governments play the primary role in protecting their residents' health and welfare from deleterious effects of air pollution, just as Congress intended. *See, e.g.*, 42 U.S.C. § 7401(a)(3).

Second, the Rule and accompanying preamble did not provide the clarity that the agency claimed was its *raison d'etre*. The appendices instead introduced the malleable term "direct or substantial effect," 84 Fed. Reg. at 51,362–63, which appears nowhere in EPCA or caselaw addressing preemption. NHTSA did not define "direct or substantial" and gave only one example (child-seat mandates) of State or local measures "that would not be preempted because they have only

[4] NHTSA asserted while that "the statute is clear on the question of preemption," 84 Fed. Reg. at 51,320, the Rule was "needed" to "provide clarity and certainty" on that question, *id.* at 51,317.

incidental impact on fuel economy or carbon dioxide emissions." *Id.* at 51,318 (emphasis added); *see also id.* (stating that laws governing refrigerant leakage have "no bearing" on fuel economy or carbon dioxide emissions).[5] NHTSA did not say whether "incidental" is an antonym of "direct," "substantial," or both. *See* U.S. Br. 52, *UCS*, *supra* (Oct. 27, 2020) (using both "marginal" and "insignificant" as stand-ins for "incidental"). The Rule accordingly created, rather than dispelled, confusion about EPCA's preemptive reach.

The appendices injected further confusion by omitting the statutory limitation that preemption can extend only to State and local laws and regulations affecting "automobiles covered by an average fuel economy standard under [EPCA]." 49 U.S.C. § 32919(a). Such standards apply only "to a manufacturer in a model year," *id.* § 32901(a)(6), yet the Rule made Federal preemption of State or local "in use" regulations a distinct possibility, creating further uncertainty. *See* 84 Fed. Reg. at 51,318 n.96 (opining that States and localities "could not prohibit dealers from leasing automobiles or selling used automobiles unless they meet a fuel economy standard").

Adding to the confusion, NHTSA suggested that the Rule's appendices do not codify "the broad sweep of EPCA preemption," merely a subset of it. 84 Fed. Reg. at 51,318. The agency made no attempt to answer many lingering "questions of interpretation … about the scope of preemption" under the statute. *Ibid.*

The above reasons are sufficient to warrant repealing the Rule's appendices even if NHTSA had authority to promulgate them.

B. The Preemption Rule should be repealed to the extent it was not a legislative rule

To the extent the Preemption Rule could be characterized as a non-legislative rule, *but see supra*, Part II.A.1, NHTSA still should repeal it. That would mean the Rule did not have the force of law and instead merely expressed NHTSA's opinion about State and local laws that the statute itself preempts—an opinion to which no court would owe any respect beyond its power to persuade. *See Gonzales*, 546 U.S. at 268–69. It would remain appropriate and advisable to repeal the Rule for the reasons stated in Part III.A, *supra*. Further, to the extent the Rule were interpretive, it would be advisory only, *see POET Biorefining*, 970 F.3d at 407, and NHTSA's stated desire not to "suggest that the Agency remained certain about substantive issues for which, in reality, the Agency … continued to reconsider," 86 Fed. Reg. at 25,990, would support a repeal of the codified regulatory text, *see also id.* at 25,888 n.84.

C. Neither reliance interests nor environmental impacts warrant retention of the Rule

As explained in Part II.C, *supra*, the Rule *did not* engender serious reliance interests that must be considered prior to repeal. Further, given NHTSA's stated intention that the Rule not declare

[5] Other examples of State and local measures that affect fuel economy abound. Petroleum-fueled vehicles combust less fuel per mile at lower speeds. Does that mean speed-limit laws have a "direct or substantial effect" sufficient to render them preempted under the Rule? What about vehicle height and weight restrictions under or atop bridges or in tunnels? Targeted highway tolls or license fees? Tax incentives for lower-emitting vehicles? Restrictions on idling? NHTSA's Rule did not provide a guiding principle, much less clarity, on any of these important questions.

preempted any State or local law not already preempted by EPCA itself, the Rule *could not* have engendered any reasonable reliance interests that a repeal would upset.

Nor, in light of NHTSA's express disavowal that it was exercising any interpretive discretion in promulgating the Rule, could repealing the Rule result in significant environmental impacts that NEPA would require NHTSA to analyze. Indeed, NHTSA did not perform NEPA analysis upon issuing the Rule, reasoning that "the operation and application of [EPCA]" separately preempted any State or local law that the Rule declared preempted. 84 Fed. Reg. at 51,353–54; *see* U.S. Br. 60–61, *UCS*, *supra* (Oct. 27, 2020). As NHTSA has bound itself not to reconsider that reasoning in this repeal proceeding, the same logic should apply and obviate the need for a NEPA analysis.

IV. NHTSA NEED NOT AND SHOULD NOT INDEPENDENTLY "WITHDRAW" OR "REPEAL" ITS UNCODIFIED PRONOUNCEMENTS ON PREEMPTION

It is unnecessary for NHTSA to "withdraw" or "repeal" the prior statements about preemption it cited when promulgating the Preemption Rule, because none of those statements merit any deference or pose an obstacle to a "clean slate" on preemption. 86 Fed. Reg. at 25,989. None of the cited statements suggesting preemption of any State law, *see* 84 Fed. Reg. at 51,312, were relevant to NHTSA's determination of maximum feasible CAFE standards or to disposition of any other final action. In the Rule's preamble, the agency cited two notices of final rulemaking that had accompanied past CAFE standards. But NHTSA's statements suggesting preemption in those rulemaking notices were, by its own admission, "entirely theoretical" insofar as they did not affect decisionmaking. Resp. Br. 129, *Ctr. for Biological Diversity v. NHTSA*, No. 06-71891 (9th Cir. Mar. 7, 2007); *see Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1181 n.1 (9th Cir. 2008) (declining to review "the preemption discussion" in the second of those notices because it was "not final agency action"); 68 Fed. Reg. 16,868, 16,895 (Apr. 7, 2003) (first notice, in which NHTSA endorsed its discussion in the notice of proposed rulemaking of tentative "state efforts to engage in CAFE related regulation," 67 Fed. Reg. 77,015, 77,025 (Dec. 16, 2002)). *Cf. ibid.* (classifying *actual* State standards for which EPA had granted Clean Air Act preemption waivers as "other motor vehicle standards of the Government" that NHTSA had to consider). In the Rule, NHTSA also relied on assertions it had made in an amicus brief, 84 Fed. Reg. at 51,312 & n.8, and notices of proposed rulemaking, *id.* at 51,312 & nn.9–11, which were not final actions either.

As for NHTSA's statements about preemption in the preamble to the Preemption Rule itself, the agency need not "withdraw" or "repeal" them separately from repealing the Rule. That preamble, standing alone, was not final agency action. *See Howmet Corp. v. EPA*, 614 F.3d 544, 552 (D.C. Cir. 2010); *NRDC v. EPA*, 559 F.3d 561, 565 (D.C. Cir. 2009). And, to the extent any statements in the preamble about preemption were essential to the Rule, the Rule's repeal automatically saps those statements of any importance they might have by virtue of their link to the Rule. NHTSA's statements in the notices for the proposed and final Preemption Rule will of course remain in the Federal Register if the Rule is repealed, but only as vestiges of a rescinded agency action.

Lastly, Commenters do not interpret NHTSA's proposal "to withdraw and repeal … statements" that "directly defin[ed] EPCA preemption" in "other NHTSA preambles[ ] which preceded the SAFE I Rule," 86 Fed. Reg. at 25,982, to contemplate withdrawal or repeal of findings necessary to NHTSA's determinations of maximum feasible CAFE standards. *See supra*, page 4. If NHTSA is now proposing to withdraw or rescind such findings, which were essential to the prescription

or amendment of existing CAFE standards, it would be inappropriate to finalize that element of the proposal because NHTSA has not here proposed to reconsider or solicited comment on any of its prior CAFE standards.

Respectfully submitted,

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