

June 11, 2021

Mr. Steven Cliff
Acting Administrator
National Highway Traffic Safety Administration
U.S. Department of Transportation
West Building
Ground Floor
Room W12-140
1200 New Jersey Avenue SE
Washington, DC 20590

**Re: Proposed Repeal of the Safer Affordable Fuel-Efficient Vehicles Rule Part One
(Docket ID: NHTSA-2021-0030)**

Dear Mr. Cliff,

The Sabin Center for Climate Change Law submits these comments together with the National League of Cities (NLC), The U.S. Conference of Mayors (USCM), and the International Municipal Lawyers Association (IMLA) in response to the National Highway Traffic Safety Administration (NHTSA)'s proposal to repeal "The Safer Affordable Fuel Efficient (SAFE) Vehicles Rule Part One: One National Program," which codified regulatory text and made pronouncements regarding the preemption of state and local laws related to fuel economy standards (SAFE I Rule). We support NHTSA's proposal for the reasons that follow.

1. Cities Are Grappling with Transportation Pollution

The SAFE I Rule frustrates local governments' efforts to address greenhouse gas and conventional pollution from transportation. Over 80 percent of Americans live in urban areas—and even more work there—meaning that city governments are responsible for understanding the risks to, and planning for the wellbeing of, the great majority of Americans.¹ Climate change can exacerbate cities' existing challenges, including social inequality, aging and deteriorating infrastructure, and stressed ecosystems.² Cities' costs to recover from damage caused by climate change will be enormous. By 2100, unmitigated climate change could every year cause 57,000 pollution-related deaths, at a

¹ Center for Sustainable Systems, University of Michigan. 2020. "U.S. Cities Factsheet." Pub. No. CSS09-06.

² See Maxwell, K., et al., *Ch. 11: Built Environment, Urban Systems, and Cities in Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* (Reidmiller, D.R. et al., eds. 2018). U.S. Global Change Research Program, Washington, DC, USA, pp. 439.

cost of \$930 billion; lead to 1.2 billion lost labor hours, valued at \$110 billion; and result in hundreds of billions of dollars in infrastructure, water supply and other costs.³

Cities are not only on the front lines of climate impacts—they are also at the forefront of climate change adaptation and mitigation efforts nationwide. In fact, in 2019, 60% of U.S. cities launched or significantly expanded an initiative to address climate change, such as a green vehicle procurement program or new energy policy.⁴ Yet, local governments have limited ability to regulate the circumstances imposed on them by the wider world. A 2017 study found that by collaborating with national governments and other partners, cities can achieve over half of the emissions reductions that are necessary to limit warming to 1.5° Celsius; but acting unilaterally, cities can deliver only 5% of the total emissions reductions needed to reach that goal.⁵

Moreover, vehicle emissions impact air quality and a community's ability to meet required ozone levels. Falling outside of required ozone levels can have negative impacts on cities, potentially disqualifying them from federal funding opportunities for highway and transit infrastructure. Robust vehicle emission standards are key to ensuring cities are able to meet ozone requirements

2. The Proposed Action Would Return an Appropriate Level of Flexibility to State and Local Governments

Repeal of the SAFE I Rule would appropriately return authority to state and local governments to address transportation pollution. The Notice of Proposed Rulemaking (NPRM) expresses concern that in labeling “an entire segment of state and local regulation as preempted,” the SAFE I Rule “unnecessarily and inappropriately restricts potential policy innovation at the State and local level.”⁶ We agree.

As NHTSA well knows, its preemption rule set the stage for the revocation of California's waiver to maintain its own greenhouse gas and zero-emission vehicle

³ EPA. 2015. Climate Change in the United States: Benefits of Global Action. United States Environmental Protection Agency, Office of Atmospheric Programs, EPA 430-R-15-001 at 78, <https://bit.ly/2xc5uC0>.

⁴ Alliance for a Sustainable Future, MAYORS LEADING THE WAY ON CLIMATE 2 (Jan. 2020), <https://bit.ly/2T4tMpY>.

⁵ C40 & ARUP, DEADLINE 2020 79-80 (June 1, 2017), <https://bit.ly/2YL5J2f>. Although holding global temperature increase to 2 degrees Celsius was a commonly stated goal before 2015, the Paris Agreement seeks to limit warming to 1.5 degrees. “Climate-related risks to health, livelihoods, food security, water supply, human security, and economic growth are projected to increase with global warming of 1.5°C and increase further with 2°C.” IPCC, 2018: Summary for Policymakers. In: Global Warming of 1.5°C. (Masson-Delmotte, et al.) at 9.

⁶ 86 Fed. Reg. 25,980, 25,989-25,990 (May 12, 2021).

standards, which 13 states subsequently adopted under Section 177 of the Clean Air Act.⁷ In issuing the SAFE I Rule NHTSA unlawfully failed to consider local governments' reliance on the previous understanding of Energy Policy and Conservation Act (EPCA) preemption⁸—namely, that EPCA does not foreclose California's motor vehicle rules. Several cities located in Section 177 states submitted comments on the SAFE proposal explaining that their climate action plans relied on the existing motor vehicle emission standards.⁹ By repealing the SAFE I Rule, NHTSA would set the groundwork for reinstating California's authority to adopt a greenhouse gas and zero-emission vehicle mandate, which would in turn restore the conditions on which those local governments relied in setting their climate goals.

3. The SAFE I Rule is Contrary to Precedent

The NPRM details NHTSA's current view that the SAFE I Rule exceeds NHTSA's rulemaking authority. We support NHTSA's current interpretation. Additionally, the SAFE I Rule must be repealed because it directly contradicts the Supreme Court's holding in *Massachusetts v. EPA*.¹⁰ The SAFE I Rule provides that any state or local law regulating or prohibiting tailpipe carbon dioxide emissions is "related to" fuel economy standards, and therefore preempted by EPCA.¹¹ The Supreme Court has roundly rejected this view, dismissing the argument that EPCA intrudes on the authority to "regulate carbon dioxide emissions from motor vehicles because doing so would require tighten[ing] mileage standards."¹² Rather, regulating carbon dioxide emissions to protect public health and welfare is "wholly independent of [NHTSA's] mandate to promote energy efficiency."¹³ Accordingly, the SAFE Rule I cannot stand.

4. In Enacting the SAFE I Rule NHTSA Failed to Consider Criteria Pollutants

⁷ CALIFORNIA AIR RESOURCES BOARD, STATES THAT HAVE ADOPTED CALIFORNIA'S VEHICLE STANDARDS UNDER SECTION 177 OF THE FEDERAL CLEAN AIR ACT (Aug. 19, 2019), available at <https://bit.ly/2RixrCA>.

⁸ See *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

⁹ See, e.g., EPA-HQ-OAR-2018-0283-5687 (Sacramento); EPA-HQ-OAR-2018-0283-3899 (Eugene); EPA-HQ-OAR-2018-0283-3903 (Boulder); EPA-HQ-OAR-2018-0283-4017 (Chula Vista); EPA-HQ-OAR-2018-0283-3907 (Ojai); EPA-HQ-OAR-2018-0283-5472 (Aspen); EPA-HQ-OAR-2018-0283-5685 (Portland).

¹⁰ 549 U.S. 497 (2007).

¹¹ 84 Fed. Reg. 51,310, 51,362 (Sept. 27, 2019) (quoting 49 U.S.C. § 32919).

¹² *Massachusetts*, 549 U.S. at 531.

¹³ *Id.* at 532; see also *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1173 (E.D. Cal. 2007) ("California's effort to regulate greenhouse gas emissions through the waiver of preemption provisions of the Clean Air Act overlaps, but does not conflict with [NHTSA]'s activities under EPCA"); *Green Mountain Chrysler v. Crombie*, 508 F. Supp. 2d 295, 343-99 (D. Vt. 2007) (holding that EPCA does not preempt California's greenhouse gas standards).

Motor vehicle emissions within cities are also a significant source of criteria pollutants such as precursors to ozone and particulate matter.¹⁴ The SAFE I Rule must be repealed because in promulgating the rule NHTSA acted arbitrarily and capriciously by, among other things, failing to consider the connection between criteria pollutants and rules that regulate or prohibit tailpipe greenhouse gas emissions.¹⁵

The SAFE I Rule was justified on the grounds that greenhouse gas standards are “related to fuel economy standards” because “the more fuel a vehicle burns or consumes, the more carbon dioxide it emits,” and that zero-emission vehicle mandates standards are equally “related to fuel economy standards” because such a mandate is simply a carbon dioxide regulation.¹⁶ This reasoning suffers from at least two fatal flaws. First, it disregards the significant criteria benefits of both greenhouse gas and zero-emission vehicle standards (in other words, cars that meet relatively stringent greenhouse gas standards emit relatively fewer criteria pollutants, and zero-emitting cars emit no such pollutants).¹⁷ Second, it ignores the connection between the greenhouse gases that cause climate change and criteria pollutants such as ozone, which increases with temperature rise.¹⁸ For this reason the SAFE I Rule is arbitrary and capricious, and must be repealed.

5. The Interpretative Views Espoused in the SAFE Rule Part I Preamble Are Unsupported and Create Uncertainty for Local Governments

We also support NHTSA’s proposal to withdraw any interpretive views contained in the preamble to the SAFE I Rule and agree that those views failed to account for a number of considerations, including policies that could be affected.¹⁹

The preamble posits that “local requirements that . . . directly or substantially affect[] corporate average fuel economy levels” necessarily “relate to fuel economy standards” and therefore “are preempted,” and that state or local actions that have “the direct and substantial effect of regulating fuel consumption” are also “‘related to’ fuel

¹⁴ AMERICAN LUNG ASSOCIATION, STATE OF THE AIR 2021 20-21 (April 21, 2021).

¹⁵ *Regents of the Univ. of Cal.*, 140 S. Ct. at 1911 (An agency may not “entirely fail[] to consider [an] important aspect of the problem.” (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

¹⁶ 84 Fed. Reg. at 51,316, 51,320.

¹⁷ *See, e.g.*, Staff Report: Initial Statement of Reasons 2012 Proposed Amendments to the California Zero Emission Vehicle Program Regulations, California Air Resources Board (Dec. 7, 2011).

¹⁸ *See, e.g.*, AMERICAN LUNG ASSOCIATION, *supra* note 6 at 13, 20, 26; C.G., P.D. Dolwick, N. Fann, L.W. Horowitz, V. Naik, R.W. Pinder, T.L. Spero, D.A. Winner, and L.H. Ziska, 2018: Air Quality. In *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, p. 517.

¹⁹ 86 Fed. Reg. at 25,988-2590.

economy standards” and preempted.²⁰ Nothing in EPCA or related case law supports this reasoning. Courts have held that EPCA preempts state or local requirements that expressly distinguish between vehicles based on fuel economy,²¹ but no court has held that greenhouse gas emissions standards are preempted by EPCA. The SAFE I Rule extended EPCA preemption beyond any previous understanding of the statute’s reach.

Moreover, the preamble’s novel interpretation of EPCA could threaten local programs that no reasonable person could think are preempted. For example, municipal initiatives can increase the adoption of electric vehicles in order to reduce transportation pollution. Such initiatives include requirements that garages install electric vehicle charging stations or that residential buildings make a certain number of parking spaces amenable to charging equipment. A bump in electric vehicles purchases could have an “effect” on corporate average fuel economy. This is because an automaker’s average fuel economy is calculated using the fuel economy of each vehicle it manufactures, and electric vehicles factor into that calculation.²² However, by the reasoning of the SAFE I Rule preamble, one could argue that because local requirements that boost electric vehicle adoption “substantially affect[] corporate average fuel economy levels [they] are preempted.”

NHTSA’s novel reading of EPCA could also be construed to argue for preemption of municipal efforts to reduce vehicular traffic. Local governments regularly encourage residents to decrease personal vehicle use by expanding bike lanes, providing free public transportation, or creating high-occupancy vehicle lanes to incentivize carpools.²³ If the SAFE I Rule’s interpretive views are not withdrawn, an argument could be made that such a requirement “has the direct and substantial effect of regulating fuel consumption,” and is therefore preempted under NHTSA’s interpretation of EPCA. “Congress could not possibly have intended to eliminate” such “laws in areas traditionally subject to local regulation.”²⁴ Because EPCA should not be read to produce

²⁰ 84 Fed. Reg. at 51,313.

²¹ See, e.g., *Metropolitan Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 158 (2d Cir. 2010); *Ophir v. City of Boston*, 647 F. Supp. 2d 86, 88 (D. Mass. 2009); *Metropolitan Taxicab Bd. of Trade v. City of New York*, 08-CV-7837, 2008 WL 4866021, at *11-12 (S.D.N.Y. Oct. 31, 2008); but see *Green Alliance Taxi Cab Ass’n v. King County*, No. C08-1048RAJ, 2010 WL 2643369, at *5 (W.D. Wash. June 29, 2010) (city’s voluntary incentive program to encourage hybrid adoption was not preempted by EPCA).

²² See 49 U.S.C. § 32904(a)(1), (2). Even though electric vehicles can improve an automaker’s average fuel economy, they do not change the fuel economy *standards* that automakers must meet, and their fuel economy is divorced from emissions.

²³ See, e.g., *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1094 (D.C. Cir. 1996) (noting that EPA must provide state and local authorities with information related to carpool lanes, restrictions on car use, and other strategies they can use to reduce transportation emissions) (citing 42 U.S.C. § 7408(f)).

²⁴ *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995).

such an “unsettling result,”²⁵ we support NHTSA’s proposal to withdraw any interpretive views expressed in the SAFE I Rule preamble.

For these reasons, we support NHTSA’s proposal to repeal the SAFE Rule and withdraw the preamble. If you have any questions, please do not hesitate to contact our staff: Judy Sheahan, the U.S. Conference of Mayors (jsheahan@usmayors.org or 202-861-6775); Carolyn Berndt, National League of Cities (berndt@nlc.org or 202-626-3101); Deanna Shahnam (dshahnam@imla.org or 202-742-1019); and Hillary Aidun, Sabin Center (hwa2108@columbia.edu or 212-854-0081).

Sincerely,

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²⁵ *Id.* at 665.