

Statutory Purpose in the Rollback Wars

ALICE KASWAN[†]

The Trump Administration has been rolling back environmental and other regulations at a rapid rate. Each time, they are called upon to interpret their authorizing statutes. As they reverse previous administrations' regulations, how do their new interpretations address the statutes' fundamental objectives? In this Essay, I assess one part of the National Highway Traffic Safety Administration (NHTSA)'s and Environmental Protection Agency (EPA)'s rollback of clean car standards: a regulation stating that the Energy Policy and Conservation Act (EPCA) preempts California's trailblazing controls on vehicles' greenhouse gas emissions. I argue that the agency preemption analysis gave insufficient attention to Congress's explicit statutory purposes, largely ignoring EPCA's energy-conservation goals and the Clean Air Act (CAA)'s and California's environmental goals. This lack of fidelity to the statutes' fundamental purposes and values has significant consequences. From a systemic perspective, unmoored from the statutes' core purposes, the agency is freely pursuing an anti-regulatory agenda that runs contrary to congressional intent. From an environmental standpoint, the rule compromises the nation's capacity to curb greenhouse gas (GHG) emissions from and promote essential technological innovation in the transportation sector, the nation's largest GHG emissions source.

[†] Professor of Law and Associate Dean for Faculty Scholarship, University of San Francisco School of Law.

TABLE OF CONTENTS

INTRODUCTION.....	1179
I. WHAT’S AT STAKE: CLIMATE CHANGE, THE DECARBONIZATION IMPERATIVE, AND MOTOR VEHICLE EMISSIONS.....	1182
A. EMERGING CLIMATE CHANGE IMPACTS	1182
B. MITIGATING CLIMATE CHANGE: THE DECARBONIZATION IMPERATIVE.....	1183
C. THE ROLE OF MOTOR VEHICLES.....	1184
II. THE RISE AND FALL OF CALIFORNIA’S VEHICLE EMISSION STANDARDS	1185
A. CALIFORNIA’S VEHICLE EMISSION STANDARDS IN FEDERAL CONTEXT.....	1185
B. MOTOR VEHICLE GREENHOUSE GAS INITIATIVES.....	1186
C. NHTSA’S PREEMPTION OF CALIFORNIA’S VEHICLE EMISSION STANDARDS.....	1187
1. <i>The Rollback Proposals</i>	1187
2. <i>NHTSA’s Preemption Rule</i>	1189
3. <i>NHTSA’s Preemption Analysis</i>	1190
a. <i>NHTSA’s Interpretation: Objectives Test</i>	1191
b. <i>NHTSA’s Interpretation: Effects Test</i>	1192
III. FIDELITY TO STATUTORY PURPOSE IN PREEMPTION ANALYSIS	1193
A. THE DUAL FEDERAL-STATE CHARACTER OF CALIFORNIA VEHICLE EMISSION STANDARDS	1193
B. EXPRESS PREEMPTION	1194
1. <i>Congressional Purposes Analysis</i>	1195
2. <i>Role of State Statute’s “Effects” in Interpreting “Related To”</i>	1197
3. <i>Statutory Structure and Context</i>	1199
C. IMPLIED PREEMPTION	1201
1. <i>Conflict or Harmony Between Core Purposes?</i>	1201
2. <i>One National Program (EPCA) Meets Two National Programs (CAA)</i>	1203
CONCLUSION	1206

INTRODUCTION

In the environmental context, the Trump Administration has been on a roll. Or, a *rollback*, to be more precise. As of May 2020, the *New York Times* reports that the Trump Administration had proposed or finalized 100 rollbacks to environmental rules, Executive Orders, guidance documents, and other initiatives instituted by previous administrations.¹

The rollbacks do not tinker at the margin. Many have major implications for the environment and regulated industry. Rolling back the Obama Administration's Clean Water Rule and replacing it with the Navigable Waters Protection Rule substantially reduces the wetlands protected by federal law and eliminates jurisdiction over many western streams.² Replacing the Obama Administration's Clean Power Plan, which took into account the utilities' capacity to shift away from GHG-intensive coal-fired power,³ with the Affordable Clean Energy Rule,⁴ which focuses only on improving coal-plant efficiency, will shrink the CAA's capacity to engender the best systemic approaches to emissions reduction.⁵ The Council on Environmental Quality's recent proposal to reinterpret the National Environmental Policy Act (NEPA)'s environmental impact statement requirements to reduce their coverage and limit agencies' time will "streamline"—and lessen the quality of—environmental assessments of large-scale infrastructure projects.⁶

1. Nadja Popovich et al., *The Trump Administration Is Reversing Nearly 100 Environmental Rules. Here's the Full List*, N.Y. TIMES, <https://www.nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html> (last updated May 20, 2020).

2. See The Navigable Waters Protection Rule, Definition of "Waters of the United States," 85 Fed. Reg. 22,250, 22,251 (Apr. 21, 2020) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116, 117, 120, 122, 230, 232, 300, 302, 401) (explaining that the rule covers only "perennial and intermittent" streams that flow regularly into navigable waters, not ephemeral streams, like those in the western states, that flow only when it rains). Excluding ephemeral streams and flows that run only in response to weather events eliminates jurisdiction over eighteen percent of U.S. waterways overall and, in the western states, could remove federal jurisdiction over the majority of streams. Ariel Wittenberg, *Final WOTUS Rule Drains Wetland Protections*, E&E NEWS: GREENWIRE (Jan. 23, 2020), <https://www.eenews.net/greenwire/stories/1062159101/search?keyword=Clean+Water+rule>. The Navigable Waters Protection Rule also narrowed the definition of "adjacent wetlands" to those with a surface connection to navigable waters or separated by a natural berm or bank. See The Navigable Waters Protection Rule, 85 Fed. Reg. at 22,251.

3. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,667 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

4. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, 84 Fed. Reg. 32,520 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60). Some researchers predict that the power plant efficiency investments generated by the rule could lead utilities to operate their coal-fired power plants more intensively, leading to increases rather than decreases in emissions. See Amelia T. Keyes et al., *The Affordable Clean Energy Rule and the Impact of Emissions Rebound on Carbon Dioxide and Criteria Air Pollutant Emissions*, 14 ENVTL. RES. LETTERS, Apr. 9, 2019, at 3.

5. See Umair Irfan, *Trump's EPA Just Replaced Obama's Signature Climate Policy with a Much Weaker Rule*, VOX, <https://www.vox.com/2019/6/19/18684054/climate-change-clean-power-plan-repeal-affordable-emissions> (last updated June 19, 2019). Irfan indicates that the rule is expected to prompt only about a one percent reduction in emissions by 2030, a small effect in light of current emission reduction trends. *Id.*

6. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1,684 (Jan. 10, 2020) (to be codified at 40 C.F.R. pts. 1500–08); see Zackary D. Knaub et al., *Trump Administration Proposes Significant Streamlining of National Environmental Policy Act*, NAT'L L. REV. (Jan. 14, 2020), <https://www.natlawreview.com/article/trump-administration-proposes-significant-streamlining-national-environmental-policy> (describing the potential impact of the proposed regulatory changes); Robert L. Glicksman & Alejandro E. Camacho, *The Trump Card: Tarnishing Planning, Democracy, and the Environment*, 50 ENVTL. L. REP. 10281 (2020) (detailing how CEQ's "streamlining" proposal expands

These rollbacks raise a host of cross-cutting and statute-specific interpretive questions. As any student of government or administrative law knows, statutes are not self-executing. When agencies develop the specific regulations necessary to implement the statutes they administer, they are tasked with interpreting the law to best effectuate congressional intent.

In this Essay, I focus on one issue: the role of statutory purpose in agencies' statutory interpretation. Statutory interpretation is, of course, all about discerning congressional intent. But there are multiple avenues for determining Congress's intent, including focusing on the text's plain meaning, considering a provision in its statutory context, statutory history, and legislative history. I argue that these techniques do not operate in a vacuum. Grounded in statutory text, statutory purposes establish the core substantive values a statute was designed to address and should play an indispensable role in statutory interpretation.

Courts and scholars have also long addressed the relative role of text and purposes in interpreting statutes.⁷ In recent years, courts have increasingly focused on analyzing statutory text and been reluctant to delve into analyses of statutory purposes that are ascertained from legislative history, an approach exemplified in *Bostock v. Clayton County*, a high-profile case decided as this Essay went to press.⁸ As we consider the Administration's rollbacks, the debate is not between sticking to the statutory text versus cherry-picking purposes from indeterminate legislative history. Instead, I suggest that the agencies are giving insufficient weight to the statutes' explicit statutory purposes, as enshrined in either the language or the structure of the statutes. In other words, statutory purposes are text too.

Rather than canvass the whole range of Trump Administration rollbacks, I focus on one specific and important example: NHTSA's rollback of California's authority to control GHG emissions from motor vehicles, authority granted to California by the federal CAA.⁹

NHTSA's preemption rule, a key building block for the car standard's rollback, gives insufficient weight to the CAA's explicit health and welfare purposes and the role of California in effectuating them, and also risks subordinating these purposes to the Administration's crabbed view of EPCA's clearly articulated goals. Moreover, NHTSA overstates the "conflict" between the CAA and EPCA by failing to acknowledge EPCA's fundamental goal: reducing fuel consumption. In failing to adhere to the statutes' fundamental purposes and values, the agencies have compromised the nation's capacity to

exceptions, reduces analysis of reasonable alternatives, imposes arbitrary time and length limitations, and makes numerous other changes likely to weaken the integrity of agency environmental reviews).

7. See, e.g., Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006) (discussing and comparing textualist and purposivist approaches to statutory interpretation); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006) (same).

8. *Bostock v. Clayton Cty.*, No. 17-1618 (Sup. Ct. June 15, 2020) (relying on text, a 6-3 majority interpreted Title VII's explicit prohibition against sex discrimination to apply to LGBTQ and transgender discrimination).

9. See The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310 (Sept. 27, 2019) (to be codified at 40 C.F.R. pts. 85, 86; 49 C.F.R. pts. 531, 533).

curb GHG emissions from and promote essential technological innovation in the transportation sector, the nation's largest emissions source.

In critiquing the car rollback, I am not suggesting that agency interpretations should be static. Different presidents are entitled to interpret statutes differently from their predecessors,¹⁰ subject to administrative law principles designed to avoid arbitrary government action.¹¹ As Aaron Nielson explains in this Issue, the appropriate degree of flexibility—the value of stickiness versus responsiveness—is contested.¹² My concern about this rollback, and others, does not turn on or resolve these difficult tradeoffs.

Instead, I argue that the Trump Administration's motor vehicle emissions rollback evidences a lack of fidelity to statutory purpose. Despite purporting such fidelity, the agency's reasoning appears to be driven by a deregulatory agenda that gives short shrift to the statutes the Administration is tasked with implementing. Whether maintaining or shifting the rules, agencies owe Congress a deep and honest engagement with the central substantive values at the heart of the statutes they are obliged to interpret.

Part I illuminates what is at stake in the vehicle emissions rollback, explaining the threat posed by climate change, the increasing necessity to transition to a clean, fossil-free economy, and the role of motor vehicle emissions in that process. Part II explains the trajectory of California's vehicle emission standards, tracing their emergence, their amplification to address GHGs and promote emission-free technologies, and their fate under the Trump Administration. Part III argues that the Administration's approach shortchanges the statutory purposes served by both the EPCA and the CAA. In so doing, the Administration has undermined congressional intent and is standing as a roadblock to the evolution of the regulatory and technological innovations necessary to meet the climate challenge.

10. In her article *Presidential Administration*, now-Supreme Court Justice Elena Kagan argued that presidential influence on administrative agencies is legitimate and offers systemic benefits. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–46 (2001). It should be noted, however, that Justice Kagan did not suggest that the ascendancy of a new president, alone, provided a compelling argument for deference to presidential control. *Id.* at 2334.

11. The Supreme Court has established parameters for agency interpretive shifts in a trio of cases. In *Motor Vehicle Manufacturers Association v. State Farm*, responding to the Reagan Administration's revocation of car safety rules, the Court stated that, when an agency changes its position, it must "supply a reasoned analysis for the change beyond that which may be required when the agency does not act in the first instance." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). More recently, in *FCC v. Fox Television Stations, Inc.*, addressing a new interpretation of what constitutes on-air obscenity, the Justices appeared to agree that agencies must explain policy changes and why they believe the new interpretation is superior. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (plurality opinion). Lastly, in *Encino Motorcars*, the Court held that agencies must provide a "reasoned explanation" as to why they are disregarding facts and circumstances relevant to the earlier policy. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016).

12. Aaron L. Nielson, *Sticky Regulations and Restoring Internet Freedom*, 71 HASTINGS L.J. 1209 (2020); see also William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357 (2018).

I. WHAT'S AT STAKE: CLIMATE CHANGE, THE DECARBONIZATION IMPERATIVE, AND MOTOR VEHICLE EMISSIONS

A. EMERGING CLIMATE CHANGE IMPACTS

The consequences of climate change are already here. According to the Fourth National Climate Assessment conducted by the U.S. Global Change Research Program, since 1901 average global temperatures have increased by almost two degrees, leading to the warmest period “in the history of modern civilization[,] . . . and the last three years have been the warmest years on record for the globe.”¹³ Average U.S. temperatures are projected to increase by another 2.5 degrees by 2050.¹⁴

More concerning, from a public health perspective, are persistent heat waves. The frequency of extreme heat waves has been increasing since the mid-1960s,¹⁵ and their frequency and intensity are expected to continue to increase.¹⁶ Heat is particularly dangerous to the elderly, socially and economically vulnerable populations, those who are socially isolated, and those who do not have or cannot afford to run air conditioning.¹⁷

Since 1900, average sea levels have increased by approximately seven to eight inches, with a three-inch increase in just the last couple of decades.¹⁸ Global sea levels are expected to rise by one to four feet by 2100,¹⁹ and could rise even more if the polar ice caps deteriorate.²⁰ Higher sea levels have triggered higher tides, which are causing tidal flooding “in more than 25 Atlantic and Gulf Coast cities,”²¹ as well as in low-lying coastal communities on the West Coast.²²

Warmer seas generate more intense hurricanes.²³ Climate change is also impacting precipitation, with heavier rainfall (and flood risk) in the eastern half of the United States, with the greatest increases in the Northeast.²⁴ Higher sea levels and more intense storms will trigger higher storm surge that “will increase the frequency and extent of extreme flooding associated with coastal storms.”²⁵

13. U.S. GLOB. CHANGE RESEARCH PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT, VOLUME I: EXECUTIVE SUMMARY 10 (2018), https://science2017.globalchange.gov/downloads/CSSR_Executive_Summary.pdf.

14. *Id.* at 11.

15. *Id.* at 19.

16. *Id.* at 21.

17. Colleen E. Reid et al., *Mapping Community Determinants of Heat Vulnerability*, 117 ENVTL. HEALTH PERSP. 1730, 1733 (2009). Factors contributing to social and economic vulnerability include education levels, poverty, race, and the prevalence of green space. *Id.*

18. U.S. GLOB. CHANGE RESEARCH PROGRAM, *supra* note 13, at 10.

19. *Id.* In the Northeast and in the western parts of the Gulf of Mexico, localized sea level rise is expected to be higher than the global average. *Id.* at 26.

20. *Id.* In February 2020, scientists documented that warm sea water beneath a massive glacier in the Antarctic is leading to accelerated melt levels and instability. This melt could, on its own, raise global sea levels by almost two feet. Jeff Tollefson, *First Look Under Imperiled Antarctic Glacier Finds “Warm Water Coming from All Directions”*, NATURE (Feb. 20, 2020), <https://www.nature.com/articles/d41586-020-00497-4>.

21. U.S. GLOB. CHANGE RESEARCH PROGRAM, *supra* note 13, at 10.

22. See Anne C. Mulkern, *Calif. City with Water on 3 Sides Faces Grim Future*, E&E NEWS (Dec. 14, 2017), https://www.eenews.net/special_reports/california_crumbling_coast/stories/1060069003.

23. U.S. GLOB. CHANGE RESEARCH PROGRAM, *supra* note 13, at 22.

24. *Id.* at 20.

25. *Id.* at 27.

The flooding and devastation caused by Superstorm Sandy and Hurricanes Katrina, Maria, and Harvey provide a glimpse of the human and economic consequences of increasingly intense storms coupled with rising seas. In the long term, as coastal and riparian communities and infrastructure confront repeated risks and damage, analysts predict the need to retreat from highly vulnerable areas.²⁶ One study, focusing only on sea level rise, predicts about thirteen million domestic migrants by 2100.²⁷

In the West, the problem will be too little, not too much, precipitation. Scientists predict less rainfall and greater drought risk.²⁸ That, combined with higher temperatures, is creating a tinderbox for large wildfires.²⁹ In California, the regional utility's poorly maintained transmission lines have garnered the spotlight.³⁰ But these power lines have existed for decades; what is new are the fire-ready conditions created by changing weather patterns.

The list of climate impacts in the United States and around the globe could go on. The precise timing and intensity of various effects remains contested. But there is little question that climate change is happening and that, without dramatic measures, it will cause severe environmental, economic, and social disruption within the coming decades.

B. MITIGATING CLIMATE CHANGE: THE DECARBONIZATION IMPERATIVE

Climate change is not like the other pollution problems we have encountered. We are not seeking reductions on the margins. Instead, scientists contend that we will need to decarbonize to avoid the worst climate change impacts. In 2017, the U.S. Global Research Program, in its National Climate Assessment, stated that stabilizing global temperatures to under two degrees Celsius “above preindustrial levels requires substantial reductions in net global CO₂ emissions prior to 2040 . . . and likely requires net emissions to become zero or possibly negative later in the century.”³¹

26. Mathew E. Hauer, *Migration Induced by Sea-Level Rise Could Reshape the US Population Landscape*, 7 NATURE CLIMATE CHANGE 321, 321 (2017).

27. *Id.*

28. U.S. GLOB. CHANGE RESEARCH PROGRAM, *supra* note 13, at 22.

29. *Id.*

30. See Morgan McFall-Johnsen, *Over 1,500 California Fires in the Past 6 Years—Including the Deadliest Ever—Were Caused by One Company: PG&E. Here's What It Could Have Done But Didn't*, BUSINESS INSIDER (Nov. 3, 2019, 6:52 AM), <https://www.businessinsider.com/pgc-caused-california-wildfires-safety-measures-2019-10>.

31. U.S. GLOB. CHANGE RESEARCH PROGRAM, *supra* note 13, at 31. The National Climate Assessment assumes the goal of stabilizing global temperatures at no more than two degrees Celsius (3.6 degrees Fahrenheit). *Id.* at 32. Scientists have long believed that the worst impacts of climate change could be avoided by achieving that goal. See Nathan Hultman, *We're Almost Out of Time: The Alarming IPCC Climate Report and What To Do Next*, BROOKINGS (Oct. 16, 2018), <https://www.brookings.edu/opinions/were-almost-out-of-time-the-alarming-ipcc-climate-report-and-what-to-do-next/> (“[D]iscussion across government and civil society . . . increasingly cohered around the concept that there appeared to be more extreme and significantly worrying risk . . . beyond about 2 degrees of warming.”). In recent years, however, climate scientists have been increasingly concerned that catastrophic impacts could occur at lower levels of warming, concerns that were validated by the Intergovernmental Panel on Climate Change's 2018 evaluation of potential impacts at 1.5 degrees Celsius of warming. *Id.*

Decarbonization means replacing our reliance on fossil fuel combustion across all sectors: industry, electricity supply, vehicles, and buildings. Although some sources, like air travel, might not be able to achieve complete decarbonization, analysts suggest that vehicle emissions can and should be substantially reduced, largely by electrifying vehicles and then decarbonizing electricity generation.³²

C. THE ROLE OF MOTOR VEHICLES

Motor vehicle emissions are a critical piece of the puzzle. Nationally, transportation contributed nearly twenty-eight percent of U.S. GHG emissions in 2018, the largest single sector, slightly exceeding emissions from the electric power sector.³³ Passenger vehicles contribute around half of the nation's transportation emissions.³⁴

In California, the only state with the authority to set its own vehicle emission standards, the transportation sector's contribution to overall GHG emissions in 2017 was forty percent,³⁵ considerably greater than the power sector's fifteen percent contribution.³⁶ Although renewable energy has steadily reduced the electricity sector's share of emissions,³⁷ and California's vehicle emission standards and other transportation strategies have reduced transportation emissions somewhat relative to 2000 levels, progress has been slow.³⁸ Continued efforts are necessary to maintain and accelerate vehicle decarbonization.

To be clear, vehicle emission standards are not the only mechanism for reducing transportation GHG emissions. Reducing the transportation sector's emissions will require many and diverse strategies in the short- and long-term, including increasing public transit options, preventing an increase in sprawl, making communities bikeable and walkable, and decreasing the carbon content of fuels.³⁹ Within this array of options, however, eliminating the internal combustion engine and replacing it with electricity or some other non-carbon emitting source is essential.⁴⁰ As discussed below, California has played a

32. See JAMES H. WILLIAMS ET AL., U.S. DEEP DECARBONIZATION PATHWAYS PROJECT, POLICY IMPLICATIONS OF DEEP DECARBONIZATION IN THE UNITED STATES 49–50, 58 (2015), <http://usddpp.org/downloads/2015-report-on-policy-implications.pdf>; see also Amy L. Stein & Joshua Fershée, *Decarbonizing Light-Duty Vehicles*, 48 ENVTL. L. REP. 10,596 (2018) (analyzing the role of light-duty vehicles in emissions and decarbonization).

33. EPA, DRAFT INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990–2018, at 26–27 (2020), <https://www.epa.gov/sites/production/files/2020-02/documents/us-ghg-inventory-2020-chapter-executive-summary.pdf>.

34. Stein & Fershée, *supra* note 32, at 10,596–97.

35. CAL. AIR RES. BD., CALIFORNIA GREENHOUSE GAS EMISSIONS FOR 2000 TO 2017: TRENDS OF EMISSIONS AND OTHER INDICATORS 7 (2019), https://ww3.arb.ca.gov/cc/inventory/pubs/reports/2000_2017/ghg_inventory_trends_00-17.pdf.

36. *Id.* at 9.

37. *Id.* at 9–10.

38. See *id.* at 7–8, figs. 5, 6, & 7 (showing a gradual decline in CO₂ emissions).

39. Alice Kaswan, *Climate Change, Consumption, and Cities*, 36 FORDHAM URB. L.J. 253, 258–66 (2009) (discussing the importance of land use patterns to reducing transportation sector emissions).

40. Of course, electrifying transportation will not achieve decarbonization unless the electricity sector is also decarbonized. See Stein & Fershée, *supra* note 32, at 10,599.

leadership role in promoting pollution-free vehicles, a role substantially compromised by the Administration's rollback.

II. THE RISE AND FALL OF CALIFORNIA'S VEHICLE EMISSION STANDARDS

A. CALIFORNIA'S VEHICLE EMISSION STANDARDS IN FEDERAL CONTEXT

Under the CAA, EPA has the primary authority to establish vehicle emission standards.⁴¹ EPA has promulgated standards for passenger vehicles, light trucks, and heavy-duty trucks for pollutants such as nitrogen oxides, carbon monoxide, sulfur dioxide, and other hazardous substances.⁴²

The CAA preempts state vehicle emission standards⁴³—with one critical exception. The law gives California⁴⁴ the authority to develop its own vehicle emission standards and requires EPA to waive preemption so long as the state standards will be as protective as the applicable federal standards.⁴⁵ However, EPA will not grant a waiver if it concludes that the state standards are arbitrary and capricious, are not needed “to meet compelling and extraordinary conditions,” or are not consistent with the factors EPA considers in setting motor vehicle standards.⁴⁶ EPA has granted tens of waivers for California's vehicle emissions standards as they have evolved over the last fifty years.⁴⁷

In the Clean Air Act Amendments of 1977, Congress gave the California exception national relevance. Congress added a new provision that gave all states two vehicle emission options: it allowed the other forty-nine states to choose either the California or the federal standards.⁴⁸ Thirteen states have adopted California's criteria pollutant and GHG vehicle emission standards.⁴⁹ These states, plus California, represent approximately thirty-six percent of the

41. 42 U.S.C. § 7521 (2018).

42. See, e.g., *Control of Air Pollution from Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards*, 81 Fed. Reg. 23,414, 23,417 (Apr. 28, 2014) (to be codified at 40 C.F.R. pts. 79, 80, 85, 86, 600, 1036, 1037, 1039, 1042, 1048, 1054, 1065, 1066) (establishing new vehicle emission standards for sulfur, nitrogen oxides, volatile organic compounds, particulate matter, carbon monoxide, and a range of air toxics for passenger cars, light-duty trucks, and heavy-duty trucks). See generally *Regulations for Smog, Soot, and Other Air Pollution from Passenger Cars & Trucks*, EPA, <https://www.epa.gov/regulations-emissions-vehicles-and-engines/regulations-smog-soot-and-other-air-pollution-passenger> (last visited June 28, 2020) (listing motor vehicle regulations).

43. § 7543(a).

44. The statute refers to “any State which has adopted standards . . . prior to March 30, 1966.” *Id.* § (b)(1). California was the only state to have adopted standards as of that date. *History*, CAL. AIR RES. BD., <https://ww2.arb.ca.gov/about/history> (last visited June 28, 2020).

45. § 7543(b)(1).

46. *Id.*

47. See *Vehicle Emissions California Waivers and Authorizations*, EPA, <https://www.epa.gov/state-and-local-transportation/vehicle-emissions-california-waivers-and-authorizations> (last visited June 28, 2020) (listing EPA responses to California waiver and authorization requests).

48. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 207, 91 Stat. 685, 755 (codified as amended at 42 U.S.C. § 7543).

49. CAL. AIR RES. BD., STATES THAT HAVE ADOPTED CALIFORNIA'S VEHICLE STANDARDS UNDER SECTION 177 OF THE FEDERAL CLEAN AIR ACT (Aug. 19, 2019), https://ww2.arb.ca.gov/sites/default/files/2019-10/ca_177_states.pdf.

national car market.⁵⁰ As a result, California's vehicle emission standards play a significant national role.

B. MOTOR VEHICLE GREENHOUSE GAS INITIATIVES

California's first major climate change statute addressed transportation emissions. Assembly Bill No. 1493, adopted in 2002, required the California Air Resources Board to set GHG emission standards for vehicles.⁵¹ The state's first standards, adopted in 2004, applied to new passenger vehicles for model years 2009 through 2016.⁵²

Meanwhile, at the federal level, environmental groups petitioned EPA to set GHG emission limits for automobiles, a petition the Bush Administration denied, claiming the CAA did not give it the authority to regulate GHGs.⁵³ States and environmental groups sued, resulting in the landmark 2007 Supreme Court case *Massachusetts v. EPA*, which held that GHGs are "air pollutants" under the CAA, and that EPA therefore had the requisite statutory authority to set vehicle emission standards for GHGs.⁵⁴

In 2009, at the beginning of the Obama Administration, EPA granted California's request for a CAA preemption waiver for its GHG vehicle emission standards.⁵⁵ At the same time, the President moved to develop federal GHG vehicle emission standards.⁵⁶ Under the Administration's approach, in 2009, NHTSA and EPA promulgated compatible fuel economy and GHG standards for model years 2012 through 2016.⁵⁷ The federal agencies, in turn, coordinated with California.⁵⁸ Although each agency retained its own standards, the interagency and cross-jurisdictional coordination provided greater clarity and consistency for automakers. Thereafter, the federal and state stakeholders proceeded to develop additional fuel economy and GHG standards for model years 2017 through 2025.⁵⁹

California's requirements have long recognized the limits of tailpipe controls in addressing the fundamental pollution challenge posed by vehicle-

50. *Id.*

51. A.B. 1493, 2001–02 Gen. Assemb. (Cal. 2002) (amending CAL. HEALTH & SAFETY CODE § 42823 and adding § 43018.5) (requiring the state agency to develop regulations for the "maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles" by 2005).

52. *Low-Emission Vehicle Greenhouse Gas Program*, CAL. AIR RES. BD., <https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/lev-program/low-emission-vehicle-greenhouse-gas> (last visited June 28, 2020). California applied for a waiver from EPA in 2005. Jody Freeman, *The Obama Administration's National Auto Policy: Lessons from the "Car Deal"*, 35 HARV. ENVTL. L. REV. 343, 349 (2011).

53. See *Massachusetts v. EPA*, 549 U.S. 497, 510–14 (2007) (describing the fate of environmental groups' rulemaking petition).

54. *Id.* at 528–29.

55. California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32,744 (July 8, 2009).

56. See Freeman, *supra* note 52, at 344.

57. *Id.* at 345 n.6.

58. Office of Transp. & Air Quality, EPA, *EPA Will Propose Historic Greenhouse Gas Emissions Standards for Light-Duty Vehicles* (May 2009), <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100JPPD.pdf>.

59. Office of Transp. & Air Quality, EPA, *EPA and NHTSA, in Coordination with California, Announce Plans to Propose Greenhouse Gas and Fuel Economy Standards for Passenger Cars and Light Trucks* (July 2011), <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100EG12.pdf>.

specific combustion engines. Facing extreme levels of air pollution, in 1990 the state began to promote the development of non-combustion-based technologies by requiring automakers to produce zero-emission vehicles (ZEVs) and offer them for sale in the state, beginning in model year 1998.⁶⁰ The program's requirements have ebbed and flowed over the years, and incorporated low-emission vehicles (LEVs), like hybrid cars, as well as ZEVs.⁶¹ Through its various iterations, EPA has consistently found that the state meets the CAA criteria for a preemption waiver.⁶²

By 2012, the State deepened its commitment to alternative vehicles. Its "Advanced Clean Cars" program is a comprehensive program that integrates emission reduction objectives for GHGs and for pollutants having more direct health impacts.⁶³ Heightened ZEV requirements are a central component of the program.⁶⁴ EPA approved a waiver for the Advanced Clean Cars program, including the more demanding GHG vehicle emission standards and higher ZEV mandates, in 2013.⁶⁵ Ten states have opted to implement California's ZEV program, and, as noted above, these ten states plus California comprise approximately thirty percent of the national car market.⁶⁶

C. NHTSA'S PREEMPTION OF CALIFORNIA'S VEHICLE EMISSION STANDARDS

In 2018, the Trump Administration proposed rolling back the next set of federal GHG vehicle emission standards and forestalling California, and the states following California, from continuing to regulate GHG emissions and require ZEVs. After explaining EPCA's fuel economy standard and introducing the Administration's range of vehicle standard rollbacks, this section narrows in on NHTSA's interpretation of EPCA's preemptive reach.

1. *The Rollback Proposals*

The Administration's rollback of California's GHG vehicle emission programs is inextricably linked to the Administration's interpretation of EPCA's fuel economy standards, set by NHTSA.⁶⁷ Unlike vehicle emission standards, which limit pollution to a specified number of grams per mile,⁶⁸ fuel economy

60. Virginia McConnell et al., *California's Evolving Zero Emission Vehicle Program: Pulling New Technology into the Market* 3, 6 (Res. for the Future, Working Paper No. 19-22, 2019), https://media.rff.org/documents/RFF_WP_Californias_Evolving_Zero_Emission_Vehicle_Program.pdf.

61. *Id.* at 3–4, 7.

62. *Vehicle Emissions California Waivers and Authorizations*, *supra* note 47.

63. *Advanced Clean Cars Program*, CAL. AIR RES. BD., <https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program> (last visited June 28, 2020).

64. McConnell et al., *supra* note 60, at 4.

65. California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's Advanced Clean Car Program and a Within the Scope Confirmation for California's Zero Emission Vehicle Amendments for 2017 and Earlier Model Years, 78 Fed. Reg. 2,112 (Jan. 9, 2013).

66. CAL. AIR RES. BD., *supra* note 49.

67. 49 U.S.C. § 32902(a) (2018).

68. *See Freeman*, *supra* note 52, at 346.

standards establish minimum miles per gallon requirements.⁶⁹ Automakers must produce a fleet of vehicles that, on average, and across all makes and models in the relevant category, meet the applicable fuel economy standards.⁷⁰

In August 2018, NHTSA and EPA proposed a three-part package to roll back federal GHG vehicle emission standards and prevent California from developing and implementing standards on its own.⁷¹ First, the agencies proposed freezing federal GHG emission standards at existing levels and eliminating increases that were to unfold for model years 2021 through 2026.⁷² To prevent California (and states following California standards) from continuing to control GHG emissions, NHTSA proposed a rule interpreting EPCA to preempt California's GHG standards as well as its ZEV program.⁷³ Third, EPA revoked its 2013 waiver for California's Advanced Clean Car program, which encompassed both the more stringent GHG standards and its ZEV program.⁷⁴

In September 2019, NHTSA and EPA finalized the preemption rule and waiver revocation.⁷⁵ The following spring, the agencies rolled back the federal GHG vehicle emission standards.⁷⁶ If the agency had only rolled back the federal emission standards, California and the states choosing the California option could have maintained their more stringent vehicle emission standards. By revoking the EPA waiver, California lost the authority to maintain its current standards. The preemption rule solidifies the result, preempting the current regulations and precluding future state GHG controls. In addition, because California's ZEV requirements are designed to achieve both local pollution and GHG reduction goals, revoking the waiver for the ZEV program could undermine California's and other states' ability to address persistent local air pollution and meet the nation's air quality standards.⁷⁷

69. 49 U.S.C. § 32902(b) (2018). The fuel economy standards are known as "corporate average fuel economy standards" or "CAFE" standards. See *Corporate Average Fuel Economy*, NHTSA, <https://www.nhtsa.gov/laws-regulations/corporate-average-fuel-economy> (last visited June 28, 2020).

70. § 32902(b).

71. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 (proposed Aug. 24, 2018) (to be codified at 40 C.F.R. pts. 85, 86; 49 C.F.R. pts. 523, 531, 533, 536, 537).

72. *Id.* at 42,988, 42,990–99.

73. *Id.* at 42,999, 43,232–39. NHTSA's views on whether EPCA preempts California's EPA-approved vehicle emission standards has shifted over the years. As Professor Greg Dotson details, the agency did not preempt California standards in the program's first couple of decades. Greg Dotson, *State Authority to Regulate Mobile Source Greenhouse Gas Emissions, Part I: History and Current Challenge*, 49 ENVTL. L. REP. NEWS & ANALYSIS 11037, 11047–50 (2019). For most of the 2000s, the agency stated that EPCA preempted the California standards, but the statements did not appear to affect the agency's fuel economy rules. *Id.* at 11051–52. Once the Obama Administration came into office in 2009, NHTSA and EPA began working together on joint rulemaking, avoiding potential conflicts. *Id.* at 11053–54.

74. SAFE Vehicles Rule for Model Years 2021–2026, 83 Fed. Reg. at 42,999, 43,240–53.

75. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310 (Sept. 27, 2019) (to be codified at 40 C.F.R. pts. 85, 86; 49 C.F.R. pts. 531, 533).

76. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (Apr. 30, 2020) (to be codified at 40 C.F.R. pts. 86, 600; 49 C.F.R. pts. 523, 531, 533, 536, 537).

77. The agencies argue that California, in seeking the waiver for the ZEV program, indicated that the program was designed to achieve GHG reductions and was not necessary to achieving air quality goals. SAFE Vehicles Rule Part One, 84 Fed. Reg. at 51,337 ("[I]n the 2012-2013 . . . waiver proceeding, CARB presented

All of these actions present important questions of statutory interpretation. The analyses for each are quite distinct. To surface the specific question of fidelity to statutory purpose and values, this Essay focuses on NHTSA's assertion that EPCA preempts California's vehicle emission standards and ZEV program.

2. NHTSA's Preemption Rule

EPCA's express preemption provision prevents states from adopting "a law or regulation *related to* fuel economy standards or average fuel economy standards for automobiles"⁷⁸ NHTSA formalized its current view of preemption in appendices to its fuel economy regulations.⁷⁹ To interpret the phrase "related to" in EPCA's express preemption provision as applied to vehicle carbon dioxide emissions, the agency began by asserting that regulating carbon dioxide "relates to" fuel economy. The agency finalized the following regulatory language:

(a) Express Preemption:

(1) To the extent that any law or regulation of a State or a political subdivision of a State regulates or prohibits tailpipe carbon dioxide emissions from automobiles, such a law or regulation relates to average fuel economy standards within the meaning of 49 U.S.C. 32919 [EPCA's express preemption provision].⁸⁰

NHTSA then asserted that, because carbon dioxide emissions relate to fuel economy, they are preempted. The new regulatory language states:

(2) As a law or regulation related to fuel economy standards, any law or regulation of a State or a political subdivision of a State regulating or prohibiting tailpipe carbon dioxide emissions from automobiles is expressly preempted under 49 U.S.C. 32919.⁸¹

And, to cover the ZEV program or any other program that strongly affects carbon emissions, but does not explicitly regulate them, NHTSA's regulation states:

(3) A law or regulation of a State or a political subdivision of a State having the direct or substantial effect of regulating or prohibiting tailpipe carbon dioxide emissions from automobiles or automobile fuel economy is a law or regulation

its ZEV program to EPA solely as a GHG compliance strategy . . . and expressly stated that the ZEV program *did not confer NAAQS pollutant benefits*."). However, California maintains that the ZEV program (as well as more demanding emission standards) are essential to clean air goals, and many other states have included these programs in their SIPs for achieving federal air quality standards. *Id.* at 51,337 n.251; *see also* CAL. AIR RES. BD., ANALYSIS IN SUPPORT OF COMMENTS OF THE CALIFORNIA AIR RESOURCES BOARD ON THE SAFER AFFORDABLE FUEL-EFFICIENT (SAFE) VEHICLES RULE FOR MODEL YEARS 2021-2026 PASSENGER CARS AND LIGHT TRUCKS 282-302 (2018), <https://ww2.arb.ca.gov/carbs-comments-safe-proposal> (follow "CARB's Comments on Federal Rollback Proposal (October 26, 2018)" hyperlink).

78. 42 U.S.C. § 32919(a) (2018) (emphasis added).

79. The regulation will be codified in 49 C.F.R. Ch. V (Appendix B to Part 531). The agency's opinion on preemption is, in the end, opinion. While courts can defer to an agency's interpretation of an ambiguous statutory provision, courts carefully evaluate whether the agency interpretation is worthy of deference. *See generally* *Kisor v. Wilkie*, 139 S. Ct. 2400, 2410-18 (2019).

80. SAFE Vehicles Rule Part One, 84 Fed. Reg. at 51,362.

81. *Id.*

related to fuel economy standards and expressly preempted under 49 U.S.C. 32919.⁸²

In addition to opining on express preemption, the Agency also made explicit its view that EPCA impliedly preempts states' direct and indirect carbon dioxide controls. The new regulation first asserts that tailpipe carbon dioxide emissions controls conflict with EPCA, stating:

(b) Implied Preemption:

(1) A law or regulation of a State or a political subdivision of a State regulating tailpipe carbon dioxide emissions from automobiles . . . conflicts with:

(A) The fuel economy standards in this part;

(B) The judgments made by the agency in establishing those standards; and

(C) The achievement of the objectives of the statute (49 U.S.C. Chapter 329) . . . including objectives relating to reducing fuel consumption in a manner and to the extent consistent with manufacturer flexibility, consumer choice, and automobile safety.⁸³

The implied preemption regulation goes on to state that, in light of the conflict with the agency's standards, judgments, and the achievement of its objectives, any state law or regulation "prohibiting tailpipe carbon dioxide emissions" or "having the direct or substantial effect of regulating or prohibiting tailpipe carbon dioxide emissions from automobiles . . . is impliedly preempted under 49 U.S.C. Chapter 329."⁸⁴

3. NHTSA's Preemption Analysis

In considering EPCA preemption, the critical question is: What does "related to" mean? When might a state vehicle emissions standard or clean car program be "related to" a fuel economy standard, and therefore preempted by EPCA? As is true in any case of statutory construction, the goal is "ascertain[ing] Congress's intent in enacting the federal statute at issue."⁸⁵

Recognizing the "scant utility" of interpreting the phrase "related to" literally, the Supreme Court has stated, in the context of ERISA's similar express preemption provision, that we look both to "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive," as well as to the nature of the effect of the state law on ERISA plans.⁸⁶ The two focal points for analysis, then, are, first, the way the statutes' objectives inform our understanding of whether federal and state statutes are related in a way that suggests congressional intent to preempt; and, second, whether the effects of the

82. *Id.*

83. *Id.*

84. *Id.*

85. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983).

86. *Cal. Div. of Labor Standards Enf't v. Dillingham Constr.*, 519 U.S. 316, 325 (1997) (citations omitted) (quoting *Travelers*, 514 U.S. at 656). This analysis applies to determine whether the state statute "has a connection with" the federal statute. *Id.* at 324 (quoting *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 129 (1992)). A state statute that directly references the matters covered by the federal statute also relates to the federal statute. *Id.* at 324.

state law on the federal program indicate that the state law is inherently related to the federal law in a way suggesting Congress's preemptive intent.

Debates over EPCA's preemption of California's GHG vehicle emission standards have generated two strands of discussion for ascertaining "congressional intent" to preempt. One strand looks to the statutes' purposes and values. The other strand has focused on statutory context and congressional actions over time that provide specific evidence of Congress's intent to preempt (or preserve) California's GHG standards. My primary focus in this Essay is on the first inquiry: the degree to which the agency's interpretation engaged or ignored Congress's underlying goals and values. However, in Part III.B.3, I briefly highlight some of the statutory features and legislative history that casts light on Congress's intent to preempt or preserve California's GHG standards.

a. NHTSA's Interpretation: Objectives Test

NHTSA argued that the state vehicle emission programs undermine EPCA's uniformity objective. The rule's title, One National Program,⁸⁷ expresses this core concern. The Agency stated that "Congress's intent to provide for uniform national fuel economy standards is frustrated when State and local actors regulate in this area."⁸⁸ The Agency stated further that the "primacy of a single national fuel economy standard, set by the Federal government, was an important objective of Congress in enacting EPCA."⁸⁹

NHTSA also emphasized that allowing California vehicle emission standards would interfere with its statutorily-required balancing test. The statute states that, in setting "maximum feasible average fuel economy" standards, the agency must consider "technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy."⁹⁰ California's vehicle emission standards, in contrast, do not require precisely the same balancing.⁹¹ And, according to NHTSA, the ZEV mandates, like the carbon dioxide standards, do not consider "technological feasibility or economic practicability," and, thus, do not reflect the balancing that EPCA requires for fuel economy standards.⁹²

NHTSA highlighted the impact of state standards on automakers, stating that they could increase automakers' fuel economy-related expenses, which "would render the critical balancing required by EPCA devoid of meaning."⁹³ Further, NHTSA observed that "unbound" state standards would "unjustifiably

87. SAFE Vehicles Rule Part One, 84 Fed. Reg. at 51,310.

88. *Id.* at 51,313.

89. *Id.*; *see also id.* at 51,316–20 (discussing EPCA's objective of creating one national program).

90. 49 U.S.C. § 32902(f) (2018).

91. SAFE Vehicles Rule Part One, 84 Fed. Reg. at 51,314.

92. *Id.* at 51,314, 51,320.

93. *Id.* at 51,312; *see also id.* at 51,314 ("ZEV mandates require the application of additional efforts and resources beyond those needed to comply with Federal standards. . . . [and] also directly conflict with the goals of EPCA as they apply irrespective of the Federal statutory factors . . . [NHTSA] is required to consider in setting fuel economy standards, including technological feasibility and economic practicability.").

increase manufacturers' compliance costs, which must be either passed along to consumers or absorbed by the industry."⁹⁴

NHTSA commented that "the entire purpose of a balanced standard is defeated if a State can place its thumb on the scale."⁹⁵ State vehicle emission standards "related to" national fuel economy standards would require manufacturers to spend resources on technology even if that technology was not considered appropriate under NHTSA's multi-factor balancing test.⁹⁶ The agency said that it must "carefully assess and balance [its range of statutory factors] in setting standards under EPCA, and the notion that a State has the unilateral ability to veto or undermine NHTSA's determination by setting higher standards directly conflicts with EPCA."⁹⁷

b. NHTSA's Interpretation: Effects Test

The second prong of the express preemption analysis is whether California's vehicle emission standards are, in effect, fuel economy standards. The Agency argued that state or local requirements "relate to" fuel economy if they "directly or substantially affect[] corporate average fuel economy levels."⁹⁸ Throughout its explanation of the final rule, NHTSA stressed the strong correlation between carbon dioxide emissions and fuel economy. The Agency stated that carbon dioxide emissions were the "necessary and inevitable byproduct of burning gasoline," which in turn is directly related to fuel economy.⁹⁹ Further, it noted that limiting carbon dioxide emissions had "the direct and substantial effect of regulating fuel consumption and, thus, is 'related to' fuel economy standards."¹⁰⁰

The Agency argued that the definition of "related to . . . is a matter of science and mathematics."¹⁰¹ The NHTSA regulations for determining compliance with fuel economy standards rely heavily on carbon dioxide emissions, demonstrating the tight relationship between fuel economy and carbon dioxide emissions.¹⁰² Moreover, according to NHTSA, the primary mechanism for reducing carbon dioxide emissions is to improve fuel economy.¹⁰³ The Agency argued that "[t]he label a State chooses to put on its regulations [that is, calling them emissions standards rather than fuel economy standards] certainly is not dispositive in a preemption analysis."¹⁰⁴

94. *Id.* at 51,317.

95. *Id.* at 51,314.

96. *Id.*

97. *Id.* at 51,326.

98. *Id.* at 51,313.

99. *Id.*

100. *Id.*

101. *Id.* at 51,315.

102. *Id.* Although fuel economy standard compliance testing includes other substances as well, including carbon monoxide and hydrocarbons, NHTSA stated that carbon dioxide's role in measuring compliance is "approximately 100 times greater" than the other pollutants. *Id.*

103. *Id.*

104. *Id.*

In the final rule, NHTSA argued that the ZEV program is likewise “related to” fuel economy standards. The agency stated that “regulations that require a certain number or percentage of a manufacturer’s fleet of vehicles sold in a State to be ZEVs that produce no carbon dioxide tailpipe emissions necessarily affect the fuel economy achieved by the manufacturer’s fleet”¹⁰⁵ Prohibiting emissions “is the equivalent of setting a specific emissions level [at] zero,” which is the equivalent of requiring maximum fuel economy.¹⁰⁶

III. FIDELITY TO STATUTORY PURPOSE IN PREEMPTION ANALYSIS

The statutory purposes of the laws that federal agencies are charged with implementing provide key insights into the appropriate relationships among them. NHTSA’s preemption analysis pays scant attention to California’s environmental goals and to the health and welfare and cooperative federalism purposes of the CAA, the federal statute that serves as the authorizing umbrella for California’s vehicle emission standards. Nor does NHTSA do justice to the statute it administers: the fuel-conserving EPCA.

In this section, I work through express and implied preemption analysis. Although NHTSA’s final rule intertwined the discussion, I address each distinctly. Before embarking on the preemption analysis, however, I first note the ways in which California’s vehicle emission standards, a product of the CAA’s cooperative federalism model, do not fall neatly into a “state” or “federal” law basket.

A. THE DUAL FEDERAL-STATE CHARACTER OF CALIFORNIA VEHICLE EMISSION STANDARDS

Assessing the relationship between EPCA and California’s GHG standards is complicated by the dual state and federal nature of California’s standards. EPCA expressly preempts only state laws that relate to fuel economy standards, not federal laws. Are California’s standards state or federal?

Though developed by the state, they are not purely state standards. California has the power to adopt GHG vehicle emissions standards and the ZEV program only because the CAA explicitly allows California—and only California—to develop an alternative to national standards. As noted above, although the CAA generally preempts state vehicle emission standards, Congress explicitly allowed California to have its own standards, required the federal EPA to waive preemption if California met certain standards, and allowed other states to choose California’s standards instead of the federal standards.¹⁰⁷ California’s emission standards are thus an integral part of the federal CAA.

If the special role of California standards in the federal scheme renders them “federal,” then the debate is about whether one federal statute (EPCA)

105. *Id.* at 51,320.

106. *Id.* at 51,321.

107. *See supra* notes 41–48 and accompanying text.

precludes another (the CAA),¹⁰⁸ not about EPCA's preemption provision, which preempts only state fuel economy laws. In *Massachusetts v. EPA*, the Supreme Court concluded that EPCA's fuel economy standards did not preclude federal GHG vehicle emission standards under the CAA.¹⁰⁹ If the California standards are considered "federal," then the Supreme Court's holding in *Massachusetts* would presumably preserve California's standards from EPCA preemption.

I do not attempt to resolve the federal versus state debate in this Essay. Ultimately, the federal-state dichotomy is ill-suited to statutes like the CAA, which have created collaborative dynamics between federal and state governments that defy easy categorization.¹¹⁰ For our purposes, I suggest that the quasi-federal nature of the California standards is a factor to consider in determining whether they represent the type of "state law" Congress intended EPCA to preempt.

B. EXPRESS PREEMPTION

In other contexts, the Supreme Court has struggled to interpret the preemptive phrase used in EPCA, which preempts state laws and regulations "related to fuel economy standards or average fuel economy standards for automobiles."¹¹¹ The meaning of the term "relate to" is not self-evident. Interpreting "relate to" in ERISA's similar preemption provision, the Supreme Court has observed the "unhelpful text and the frustrating difficulty of defining [ERISA's] . . . key term"—"related to."¹¹² The Court has also noted the risk of extending federal law too far. As Justice Souter wrote in a unanimous opinion, "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for [r]eally, universally, relations stop nowhere."¹¹³ In other words, "everything is related to everything else," as Justice Scalia opined in a concurring opinion in another express preemption case interpreting the phrase "relate to."¹¹⁴

To assess whether Congress intended EPCA to preempt the California motor vehicle standards, I follow the standard Supreme Court test developed to interpret ERISA's frequently-litigated preemption provision.¹¹⁵ I first analyze

108. A Vermont federal district court addressing whether EPCA preempts California's GHG vehicle emission standards concluded that, given the integral role California's vehicle standards play under the CAA, the debate is between federal laws, not federal versus state. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 343–47 (D.Vt. 2007).

109. See *infra* note 124 and accompanying text.

110. See Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 166–173 (2006) (describing instances where federal and state authorities overlap expected jurisdictional boundaries).

111. 42 U.S.C. § 32919(a) (2018) (emphasis added).

112. *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995).

113. *Id.* at 655 (second alteration in original) (quoting HENRY JAMES, RODERICK HUDSON xli (New York ed., World's Classics 1980)).

114. *Cal. Div. of Labor Standards Enf't v. Dillingham Constr.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring).

115. I do not address the role of the Court's customary presumption against preemption of state laws. The Supreme Court had long found a presumption against preemption of state laws, recognizing the importance of allowing states to exercise their traditional police powers. See, e.g., *Dillingham Constr.*, 519 U.S. at 331 ("[W]e

statutory purposes to assess the scope of the state law Congress intended to allow, and then turn to the implications of overlapping effects, an inquiry that is also informed by statutory purposes. I then briefly discuss a few highlights based on statutory structure and legislative history that also cast light on whether Congress intended to preempt or permit California's GHG emission standards.

1. Congressional Purposes Analysis

The relationship between state and federal objectives helps determine whether the state law relates to the federal law and, accordingly, whether Congress would have intended to preempt the state law. In *California Division of Labor Standards Enforcement v. Dillingham Construction*, an ERISA case interpreting the term "relate to" in the scope of that statute's preemption clause, the Supreme Court noted that a state law's focus on wages and substantive standards was "remote from the areas with which ERISA is expressly concerned"¹¹⁶ Citing an earlier ERISA case, the Court observed that preempting substantive state law in areas "where ERISA has nothing to say would be 'unsettling.'"¹¹⁷ *Dillingham Construction* reveals that a key inquiry is how the respective purposes of the federal and state laws contribute to our understanding of whether the state law "relates to" the federal law. Thus, assessing the relationship between EPCA's objectives and California's vehicle emission standards' objectives is a helpful mechanism for interpreting whether the emission standards "relate to" the fuel economy standards.

As explained above, according to NHTSA, EPCA's fundamental goals are to create "one national program" of fuel economy standards and to develop fuel economy standards that balance a range of factors, including economic and practical feasibility and consumer choice.¹¹⁸ NHTSA's selective focus on these goals fails to acknowledge EPCA's broader purposes and how California's vehicle emission standards relate to them.

EPCA's broad purpose is to reduce U.S. reliance on foreign oil and, in the context of the fuel economy standards, to increase fuel efficiency. EPCA arose in response to the OPEC oil embargo in the early 1970s, which led to skyrocketing oil prices, oil shortages, long lines at gas stations, and serious

are reluctant to alter our ordinary 'assumption that the historic police powers of the States were not to be superseded by the Federal Act.'" (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). However, a recent case stated that, where a federal statute contains an express preemption provision, courts should rely only on the statute's plain language and that the presumption against preemption does not apply. See *Commonwealth of Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016). That statement is curious because statutory language is often ambiguous in application, and presumptions are useful tools for resolving ambiguities. It is also possible that the Court intended to forego the presumption against preemption of state law only where the statute's preemptive language is "plain," not ambiguous. Be that as it may, given the doubts that the Court has cast, the preemption discussion in this Essay will proceed without reference to the presumption against preemption.

116. *Dillingham Constr.*, 519 U.S. at 330.

117. *Id.* (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 665 (1995)).

118. *SAFE Vehicles Rule Part One*, 84 Fed. Reg. at 51,314.

economic repercussions.¹¹⁹ Through a wide range of mechanisms, Congress sought to insulate the United States from these harms by reducing dependence on foreign oil.¹²⁰ EPCA explicitly articulates Congress's intent to reduce oil demand, stating: "The purposes of this chapter are . . . to conserve energy supplies through energy conservation programs . . . [and] to provide for improved energy efficiency of motor vehicles."¹²¹

California's GHG vehicle emission standards, in contrast, are not designed to reduce our dependence on foreign oil, but to reduce the transportation sector's contribution to global warming. The State legislature found that "[t]he control and reduction of emissions of greenhouse gases are critical to slow the effects of global warming,"¹²² and that "[p]assenger vehicles and light-duty trucks are responsible for approximately 40 percent of the total greenhouse gas pollution in the state."¹²³

In *Massachusetts v. EPA*, the Supreme Court recognized that vehicle GHG emission standards and EPCA's fuel economy standards serve different purposes. Although *Massachusetts* addressed the contention that EPCA precluded federal—not state—GHG vehicle emissions standards, the Court's treatment of the different purposes served by these laws informs our understanding of the relationship between vehicle emission standards, on the one hand, and fuel economy standards, on the other. The Court stated:

EPA has been charged with protecting the public's 'health' and 'welfare,' a statutory obligation wholly independent of DOT [Department of Transportation]'s mandate to promote energy efficiency. The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.¹²⁴

The standards set to achieve one objective—reducing GHG emissions—could be very different from the standards set to resolve a different objective: conserving oil to reduce dependence upon foreign sources. Given the increasing urgency of reducing GHG emissions to reduce climate change impacts, it is not surprising that California's GHG emission standards and ZEV program are more stringent than NHTSA's current fuel economy standards, which were designed to reduce reliance on foreign oil.

119. See ROBERT BAMBERGER, CONG. RESEARCH SERVICE, IB90122, AUTOMOBILE AND LIGHT TRUCK FUEL ECONOMY: THE CAFE STANDARDS 1, 3 (2003); Greg Myre, *The 1973 Arab Oil Embargo: The Old Rules No Longer Apply*, NPR (Oct. 16, 2013, 12:15 PM), <https://www.npr.org/sections/parallels/2013/10/15/234771573/the-1973-arab-oil-embargo-the-old-rules-no-longer-apply>; Greg Dotson, *State Authority to Regulate Mobile Source Greenhouse Gas Emissions, Part 2: A Legislative and Statutory History Assessment*, GEO. ENVTL. L. REV. (forthcoming 2020) (manuscript at 11–15), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455700; Paul Sabin, *Crisis and Continuity in U.S. Oil Politics, 1965–1980*, 99 J. AM. HIST. 177, 183 (2012).

120. See BAMBERGER, *supra* note 119, at 3. In addition to requiring increases in fuel efficiency, EPCA contained measures to increase domestic fuel supplies, buffer potential oil shortages by creating the Strategic Petroleum Reserve, and encourage energy conservation. Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975).

121. 42 U.S.C. § 6201 (2018).

122. A.B. 1493, 2001–02 Gen. Assemb. (Cal. 2002) (amending CAL. HEALTH & SAFETY CODE § 42823 and adding § 43018.5).

123. *Id.*

124. *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (citations omitted) (quoting 42 U.S.C. § 7521(a)(1)).

Moreover, although the purpose of EPCA's preemption provision was to create uniform federal fuel economy standards, that is not the purpose at issue in determining whether the state statute "relates to" the federal statute. The relevant inquiry is whether the federal statute's substantive purpose—here, reducing dependence on foreign oil—encompasses the scope of the state statute's function—here, reducing GHG emissions. EPCA's oil conservation purpose suggests that it does not encompass the broader environmental purpose served by the state's GHG standards. By avoiding EPCA's overarching statutory purpose, NHTSA failed to properly interpret EPCA's preemption provision.

NHTSA's assertion that the vehicle emission standards sabotage EPCA's purposes because they do not balance the same factors is, fundamentally, a claim that the emission standards conflict with (rather than relate to) fuel economy standards. Instead, this argument pertains to "conflict preemption," a form of implied preemption, and is discussed below, in Part III.C.¹²⁵

2. Role of State Statute's "Effects" in Interpreting "Related To"

As noted above, in the ERISA context, the *Dillingham* Court stated that "the nature of the effect of the state law"¹²⁶ on the federal program was also relevant to assessing when a state statute is connected with and so "relates to" a federal statute, thereby revealing congressional intent to preempt. While a state program's direct and indirect effects on a federal program are relevant, they do not, *per se*, lead to preemption. The courts have recognized that state laws can affect matters covered by federal laws without necessarily "relating to" and being preempted by them.¹²⁷ If any state law affecting matters covered by a federal statute were deemed to "relate to" that statute and be preempted, federal preemption would reach much farther than Congress likely intended.¹²⁸ Ultimately, the "effects" test does not operate in the abstract. A state law's effects are relevant to the degree they cast light on whether the state statute "relates to" the federal statute in a way that indicates congressional intent to preempt.

As noted above, NHTSA argues that the ZEV program affects EPCA's fuel economy standards.¹²⁹ That assertion is implausible. EPCA requires manufacturers to develop cars that use less fuel, a requirement that is focused on

125. See *infra* Part III.C.

126. Cal. Div. of Labor Standards Enft v. *Dillingham Constr.*, 519 U.S. 316, 325 (1997). This analysis applies to determine whether the state statute "has a 'connection with'" the federal statute. *Id.* A state statute that directly references the matters covered by the federal statute also "relates to" the federal statute. *Id.* at 324.

127. See N.Y. State Conf. of Blue Cross & Blue Shield Plans v. *Travelers Ins. Co.*, 514 U.S. 645, 662 (1995) (concluding that state law having an indirect impact on the costs of health plans does not "relate to" ERISA and is not preempted).

128. See *Dillingham Constr.*, 519 U.S. at 329 (observing, in the ERISA context, that if ERISA covered all state actions affecting the costs of benefits, "we could scarcely see the end of ERISA's pre-emptive reach, and the words 'relate to' would limit nothing").

129. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310, 51,321 (Sept. 27, 2019) (to be codified at 40 C.F.R. pts. 85, 86; 49 C.F.R. pts. 531, 533) (suggesting that requiring zero-emission vehicles "is the equivalent of setting a specific emissions level—zero," which is, in turn, the same as requiring "maximum" fuel economy).

efficiency.¹³⁰ All existing fuel economy standards impose mile-per-gallon fuel use requirements.¹³¹ California's ZEV program, in contrast, takes an entirely different tack, with very different effects on manufacturers. The ZEV program does not impose efficiency requirements on vehicles' internal combustion engines. Instead, it imposes a design requirement.¹³² The program forces manufacturers to come up with new technologies for powering vehicles, like electricity or hydrogen fuel cells, not improvements in fuel efficiency.¹³³ The effects of the ZEV program on manufacturers are thus very different from the effects of fuel economy standards and, accordingly, do not relate to fuel economy standards.

In contrast, vehicle GHG emissions controls are, as NHTSA observed, likely to have a substantial effect on fuel economy. NHTSA emphasized that "[t]he label a State chooses to put on its regulations certainly is not dispositive in a preemption analysis."¹³⁴ NHTSA stated further that "[a]rguments focused on form, or worse—labels—over substance are not persuasive."¹³⁵ In other words, NHTSA appeared to be suggesting that the vehicle standards' effects on fuel economy mean that California is hiding a fuel economy standard in a vehicle emission standard's clothing.

Notwithstanding the GHG standards' strong overlap in effects, however, the fundamental inquiry is whether the overlap means that GHG vehicle emissions standards are "related to" fuel economy standards such that we can assume Congress intended to preempt them. It is again important to ground the analysis in statutory purpose, because that inquiry can help determine whether the state's regulation is hiding a preempted standard behind a false label.

Here, although GHG vehicle emissions standards affect fuel economy, the state and federal statutes are serving different (though not necessarily inconsistent) purposes. NHTSA, in setting fuel economy standards, is focused on conserving fuel. California, in setting GHG vehicle emission standards, is striving to set limits that will address the existential threat of climate change. Although the effects of each standard are similar, the similarity in effects does not mean that the one is the same as the other. Because the California standards serve a legitimate and distinct statutory purpose, they are not fuel economy standards by another name; the California standards address the transportation sector's substantial role in causing climate change, not EPCA's more limited fuel conservation purpose.¹³⁶

130. See 42 U.S.C. § 6201(5) (2018) (stating EPCA's purpose is "to provide for improved energy efficiency of motor vehicles").

131. 49 C.F.R. § 531.5(a) (2019) (stating that fuel economy standards must be "expressed in miles per gallon").

132. See *Zero Emission Vehicle Program: About*, CAL. AIR RES. BD., <https://ww2.arb.ca.gov/our-work/programs/zero-emission-vehicle-program/about> (last visited June 28, 2020) (requiring manufacturers to produce "the very cleanest cars available" using technology such as full battery-electric, hydrogen fuel cell, and plug-in hybrid electric).

133. *Id.*

134. SAFE Vehicles Rule Part One, 84 Fed. Reg. at 51,315.

135. *Id.* at 51,316.

136. See Dotson, *supra* note 73, at 11066 (concluding that, given the consensus about climate change and the need for action, there is little possibility that courts would consider California's emission standards a pretext

Another example reveals the value of statutory purpose analysis in assessing the implications of overlapping effects. If overlapping effects automatically triggered preemption, then state speed limits could be preempted by EPCA because automobile speeds significantly impact fuel economy.¹³⁷ But no one would argue that Congress intended EPCA to preempt state speed limits. Notwithstanding overlapping effects, most state speed limits serve such different purposes from EPCA's fuel economy standards that Congress could hardly have intended EPCA to preempt them. Because GHG emission standards, like speed limits, serve purposes that are distinct from EPCA's, the overlapping effects do not prove that California was attempting to insidiously legislate in an area reserved to NHTSA.¹³⁸ Statutory purposes provide a touchstone that prevents "effects" analysis from contributing to an overly expansive view of federal preemption. Grounding "effects" analysis in the statutes' respective statutory purposes helps distinguish state laws attempting to avoid preemption from state laws serving distinct objectives that do not relate to the federal statute.

3. *Statutory Structure and Context*

Although the primary focus of this Essay is the importance of grounding preemption analysis in the respective statutes' overarching purposes, statutory structure and legislative history also provide important insights into the specific question of whether Congress intended to preempt California's GHG vehicle emission standards. Advocates for and defenders of NHTSA's preemption rule have intensively parsed EPCA's statutory structure and legislative history for indicia of Congress's intent to preempt California's GHG standards. I highlight a few of the many arguments.

The clearest evidence that Congress recognized that vehicle emission standards affect fuel economy standards, but that that affect does not trigger preemption is in the factors NHTSA must consider in developing fuel economy standards.¹³⁹ EPCA explicitly states that NHTSA, in setting fuel economy standards, must take into account the effect of other vehicle emission standards on fuel economy.¹⁴⁰ The provision indicates that, rather than preempting vehicle

for prohibited fuel economy standards); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 351–53 (D. Vt. 2007) (observing that California's GHG standards "embrace much more than a simple requirement to improve fuel economy, cloaked in the rhetoric of reducing carbon dioxide emissions").

137. See *Driving More Efficiently*, FUELECONOMY.GOV, <https://www.fueleconomy.gov/feg/driveHabits.jsp#:~:text=While%20each%20vehicle%20reaches%20its,%204.14%20per%20gallon%20for%20gas.&text=O bserving%20the%20speed%20limit%20is%20also%20safer> (last visited June 28, 2020) (stating that "gas mileage usually decreases rapidly at speeds above 50 mph"); see also *Green Mountain*, 508 F. Supp. 2d at 353 (observing that the expression "'relate to' could be interpreted to include virtually all state provisions with even a tangential connection to fuel economy"); Dotson, *supra* note 73, at 11059–61 (observing that NHTSA's preemption argument could impact an uncertain range of state and local laws, including speed limits).

138. See *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1175 (E.D. Cal. 2007) ("Congress did not intend that EPCA should preempt state laws that serve purposes different from EPCA, but which may have some effect on fuel economy as a byproduct of their enforcement.").

139. 49 U.S.C. § 32902(f) (2018).

140. *Id.* The lower courts addressing EPCA preemption of California's vehicle emission standards found EPCA's accommodation of vehicle emission standards an important attribute in deciding that EPCA did not preempt GHG standards. See *Cent. Valley Chrysler-Jeep*, 529 F. Supp. 2d at 1168–70 (indicating that EPCA's admonition that NHTSA "shall consider" vehicle emission standards evidences congressional intent that

emission standards, EPCA requires NHTSA to accommodate their impact on fuel economy.

Professor Greg Dotson's in-depth analysis of EPCA's legislative history demonstrates that Congress initially included this provision because Congress was concerned that vehicle emission standards would have a negative effect on fuel economy.¹⁴¹ EPCA's requirement that NHTSA consider other vehicle emission standards in developing its fuel economy standards allowed NHTSA to lessen fuel economy standards if needed to meet CAA public health goals. Over time, it became clear that vehicle emission standards might enhance rather than impede fuel economy,¹⁴² raising the prospect that the emission standards were "related to" and might be preempted by EPCA.

When Congress amended EPCA in 2007, in the wake of the Supreme Court's *Massachusetts v. EPA* case affirming EPA authority to regulate greenhouse gases, Congress's assumption that EPCA did not preempt federal or state vehicle GHG programs was revealed by active debates over whether to preempt them, debates that presumed that the standards were not otherwise preempted.¹⁴³ Notwithstanding legislative and White House efforts to eliminate EPA's and the states' ability to adopt vehicle GHG emission standards,¹⁴⁴ the Energy Independence and Security Act, which amended EPCA, did not limit that authority and, instead, included a savings clause intended to preserve state and federal environmental authority over GHGs.¹⁴⁵

NHTSA suggests that EPCA's plain preemptive language is more determinative of congressional intent than these legislative developments, and that lawmaker statements about preserving federal and state authority to regulate vehicle GHG emissions do not override EPCA's statutory preemption language.¹⁴⁶ However, where the plain language is inherently ambiguous, as is the case with the words "related to," and the objective is discerning congressional intent to preempt, legislative history can inform, even if it does not determine, statutory interpretation.

NHTSA must conform to what EPA deems is necessary, and so EPCA does not preclude GHG vehicle emission standards); *Green Mountain*, 508 F. Supp. 2d at 346 ("[T]he term 'other motor vehicle standards of the Government' continues to include both emission standards issued by EPA and emission standards for which EPA has issued a waiver under section 209(b) of the [Clean Air Act] . . ." (quoting 49 U.S.C. § 32902(f))). These courts also concluded that EPCA's requirement that NHTSA consider "other vehicle emission standards" included California standards that had received an EPA preemption waiver. *Centr. Valley Chrysler-Jeep*, 529 F. Supp. 2d at 1173; *Green Mountain*, 508 F. Supp. 2d at 345–47.

141. Dotson, *supra* note 119, at 9–10, 15–30.

142. *Id.* at 33 (explaining that, as Congress considered amendments to the Clean Air Act of 1977, it recognized that vehicle emission standards can improve fuel economy).

143. *Id.* at 41–44 ("During floor debate as the legislation received final approval in Congress, legislators voiced the view that both EPA and California retained their preexisting authority to establish and enforce tailpipe standards for greenhouse gases. Those views went un rebutted." (footnote omitted)). A subsidiary line of legislative and statutory history queries whether EPCA's reference to "other motor vehicle standards" refers only to federal emission standards, not California standards. For discussion of that debate, see *infra* notes 161–62 and accompanying text.

144. *Id.* at 41–56.

145. *Id.* at 55–56, 64–70; Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 3, 121 Stat. 1492, 1498 (2007).

146. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310, 51,321 (Sept. 27, 2019) (to be codified at 40 C.F.R. pts. 85, 86; 49 C.F.R. pts. 531, 533).

In sum, where applying an express preemption provision is inherently ambiguous, explicit statutory purposes shape our understanding of congressional intent to preempt. Here, EPCA's scope, focused on fuel conservation, suggests that Congress did not intend to preempt a state law addressing environmental impacts like climate change. And, notwithstanding the GHG standards' overlapping effects with the fuel economy standards, a concern that California has attempted to engage in preempted activity by artful labeling is belied by the clear differences between EPCA's and the California standards' purposes. The statutory structure and history further suggest that Congress did not intend for EPCA to preempt vehicle emission standards, notwithstanding their overlapping effects.

C. IMPLIED PREEMPTION

According to NHTSA, even if EPCA does not expressly preempt California's vehicle standards, Congress impliedly preempted them.¹⁴⁷ Congressional intent to imply preemption is found where a federal statute "occupies the field" addressed by the state statute or where the state statute conflicts with the federal statute.¹⁴⁸ Here, NHTSA asserts conflict preemption, arguing that California's programs interfere with EPCA's objectives by undermining its goal of having uniform national fuel economy standards for automobile manufacturers¹⁴⁹ and undermining EPCA's multi-factor balancing test.¹⁵⁰

To analyze implied preemption, I first assess the degree of conflict or harmony between the core purposes of EPCA and California's GHG vehicle emission standards. I then move beyond the implied preemption test, which addresses the relationship between federal and state enactments, and consider the quasi-federal nature of California's vehicle emission standards. Because the CAA explicitly allows the California standards as part of its regulatory scheme, invalidating the California standards implicates the purposes of the CAA and adds another dimension to discerning congressional intent to preempt.

1. *Conflict or Harmony Between Core Purposes?*

NHTSA is correct that EPCA and the California clean air requirements have differing goals and could thus lead to differing requirements. As suggested above, to address the looming consequences of climate change, the CAA's public health and welfare goals may well require auto manufacturers to substantially reduce GHG emissions, indirectly increasing fuel economy beyond NHTSA's requirements.

Nonetheless, NHTSA's selective articulation of EPCA's purposes overstates the degree of conflict. The "one national program" that NHTSA now

147. *Id.* at 51,313.

148. Robert N. Weiner, *The Height of Presumption: Preemption and the Role of the Courts*, 32 *HAMLIN L. REV.* 727, 731–32 (2009) (describing field and conflict preemption as forms of implied preemption).

149. SAFE Vehicles Rule Part One, 84 *Fed. Reg.* at 51,313.

150. *Id.*

promotes reflects the purpose of EPCA's preemption provision, not the statute's overarching objectives. As noted above, EPCA's fundamental purpose is reducing oil consumption and reliance on foreign oil.¹⁵¹ In its argument that GHG standards are "related to" fuel economy standards, NHTSA repeatedly states that mechanisms to reduce GHG emissions will also reduce fuel consumption.¹⁵² GHG vehicle emission standards are therefore likely to serve, not conflict with, EPCA's core statutory purpose.¹⁵³

NHTSA's argument that California's GHG standards conflict with NHTA's balancing test elevates the balancing-test factors beyond their appropriate role. The economic and technological feasibility factors that NHTSA must consider in setting fuel economy standards are qualifications on EPCA's central purpose: fuel conservation.¹⁵⁴ Moreover, the tension between the standards is overstated. California's vehicle emission standards also take economic and technological feasibility into account. In order to obtain a waiver, California must meet the criteria the CAA specifies for vehicle emission standards,¹⁵⁵ criteria that consider cost and feasibility. The federal vehicle emission standard parameters California must meet to be eligible for a waiver state that standards should "reflect the greatest degree of emission reduction achievable through the application of [available] technology . . . giving appropriate consideration to cost, energy, and safety[.]"¹⁵⁶ Although the standard-setting criteria are not identical, there is more consistency, and less conflict, than NHTSA implies.¹⁵⁷

From a practical standpoint, recent collaboration among NHTSA, EPA, and California reveals the potential for workable collaboration and belies the assertion of inevitable conflict. As discussed above, NHTSA and EPA, in coordination with California, worked together to develop federal GHG vehicle emission standards, demonstrating that all agencies were capable of releasing compatible standards true to their respective missions.¹⁵⁸

Whatever the compatibility perceived by a prior administration, however, this Administration perceives conflict. If there is a conflict, the key question is whether Congress intended that conflict to lead to EPCA's preemption of California's vehicle emission standards.

151. See *supra* notes 119–21 and accompanying text.

152. See, e.g., SAFE Vehicle Rule Part One, 84 Fed. Reg. at 51,319 ("[R]egulation of tailpipe carbon dioxide emissions has a direct and undeniably substantial effect on fuel economy.").

153. See *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1177 (E.D. Cal. 2007) (observing that EPA's mandate to protect public health and welfare and DOT's mandate to establish fuel efficiency "are aligned," and the goals are mutually reinforcing).

154. As a California district court concluded in assessing preemption, NHTSA should not conflate EPCA's overarching objective with the "factors against which that objective should be balanced." *Id.* The court stated that considerations like price, consumer choice, safety, and dealer profitability are not EPCA's goals, they are simply "factors against which the possibility of increased fuel efficiency is weighed in order to determine feasibility." *Id.*

155. 42 U.S.C. § 7543(b)(1) (2018).

156. *Id.* § 7521(a)(3)(A)(i).

157. See *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 338 (D. Vt. 2007) (observing that the state agency considered virtually the same factors that NHTSA considers in setting fuel economy standards, although its economic analysis focused on California).

158. See *supra* notes 57–59 and accompanying text.

As noted above, Congress anticipated and addressed the potential for conflict between EPCA's fuel economy goals and the CAA's health and welfare goals. One of the explicit factors EPCA must consider in developing fuel economy standards is "the effect of other motor vehicle standards of the Government on fuel economy."¹⁵⁹ In other words, if they conflict, NHTSA must adjust potential fuel economy standards to accommodate existing vehicle emission standards designed to meet the CAA's health and welfare goals.¹⁶⁰

A key controversy is whether this accommodation includes not only federal vehicle emission standards, but also California vehicle emission standards that have received an EPA waiver. NHTSA now contends that EPCA requires it to accommodate only federal emission standards and not state standards, which are preempted by EPCA.¹⁶¹ In contrast, the district courts that have analyzed this question have parsed EPCA's statutory history differently, and concluded that, if there is a conflict, Congress intended EPCA to accommodate California as well as federal standards.¹⁶² This Essay is not the place to wind through the complex statutory, legislative, and regulatory history on this question. Instead, in the next section, I turn again to statutory purposes: Congress's goals in intentionally giving California a key role in developing vehicle emission standards.

2. *One National Program (EPCA) Meets Two National Programs (CAA)*

This is not your garden-variety federal versus state conflict preemption scenario. The dual federal-state nature of California vehicle emission standards is relevant to analyzing whether Congress intended EPCA to preempt California vehicle emission standards or, instead, to take them into account. Because the California standards were adopted as part of the federal CAA's two-option

159. 49 U.S.C. § 32902(f) (2018). This statutory language is significant in multiple ways. It demonstrates that Congress recognized vehicle standards as distinct from, and not "related to," fuel economy standards, see *supra* notes 139–40 and accompanying text, as well as evidencing Congress's intent that, should conflict arise, Congress intended to prioritize, not impliedly preempt, the CAA standards.

160. See *Cent. Valley Chrysler-Jeep*, 529 F. Supp. 2d at 1167–70 (stating that NHTSA must conform to EPA standards, not the other way around, and that, "[g]iven the level of impairment of human health and welfare that current climate science indicates may occur . . . it would be the very definition of folly if EPA were precluded from action simply because the level of decrease in greenhouse gas output is incompatible with existing mileage standards under EPCA").

161. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986, 43,236–37 (proposed Aug. 24, 2018) (to be codified at 40 C.F.R. pts. 85, 86; 49 C.F.R. pts. 523, 531, 533, 536, 537) (arguing that NHTSA was required to consider California standards for only a limited time period, which ended in 1994 when Congress removed outdated provisions). The final rule did not repeat these arguments, instead incorporating the just-described explanation in the proposal. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310, 51,323 (Sept. 27, 2019) (to be codified at 40 C.F.R. pts. 85, 86; 49 C.F.R. pts. 531, 533).

162. *Centr. Valley Chrysler-Jeep*, 529 F. Supp. 2d at 1173 (observing that, when EPCA was adopted in 1975, "Congress unequivocally stated that federal standards included EPA-approved California emissions standards"). The court noted that, although Congress revised this language in 1994, the modifications merely removed unnecessary language and did not effect any substantive change. *Id.*; see also *Green Mountain*, 508 F. Supp. 2d at 346 (stating that, although less explicit about including California standards after the 1994 revisions, "the term 'other motor vehicle standards of the Government' continues to include both emission standards issued by EPA and emission standards for which EPA has issued a waiver . . . as it did when enacted in 1975").

approach to vehicle emission standards, the CAA's purposes, not just EPCA's purposes, matter.

While the goal of "one national program" may be key to EPCA, having two national standards is key to the CAA. The CAA, in contrast to EPCA, explicitly and intentionally created a variant of cooperative federalism to allow and promote California's unique ability to set alternative vehicle emission standards that would then give all states the option of adopting either the federal or the California standards.¹⁶³ NHTSA's insistence on its singular program conflicts with the CAA's commitment to a vehicle standards program offering two options.

Congress has consistently retained California's unique ability to develop a contrasting set of vehicle emission standards. As noted above, when California choked in vehicle-induced smog in the 1960s, California developed the nation's first vehicle emission controls, which Congress allowed California to retain.¹⁶⁴ In Ann Carlson's words, Congress decided to make California a "superregulator," with special federally granted powers beyond those of other states.¹⁶⁵ By the 1977 CAA Amendments, Congress went a step further, turning California's option into a second national option.¹⁶⁶ Although the CAA still preempts non-California states from adopting their own vehicle emission standards, other states can adopt either federal or California standards.¹⁶⁷

By creating a two-option approach in the CAA, Congress could balance the competing values served by consistency and state autonomy. The impact on uniformity is small because the CAA limits the number of options facing auto manufacturers to two: the federal standard and the California standard.¹⁶⁸ At the same time, allowing variation gives each state at least some flexibility to choose the standard that best meets its preferences. The states are not constrained to one option: they have the benefit of the federal option or a more stringent option (the California option).

Furthermore, one of the goals of the CAA's two-option approach is to generate more technological innovation than would occur with a single standard.¹⁶⁹ Over the years, California has provided a "laboratory" of innovation that has prompted automakers to develop new pollution controls. Once tried out

163. *See supra* notes 45–48 and accompanying text.

164. In the 1967 amendments to the CAA, Congress preempted all state vehicle emission standards except those already in place. California was the only state with such standards at that time. Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1111–12 (2009).

165. *Id.* at 1107 (describing the term "superregulator").

166. *See supra* notes 48–50 and accompanying text.

167. 42 U.S.C. § 7507 (2018).

168. Carlson, *supra* note 164, at 1141.

169. *See* Dotson, *supra* note **Error! Bookmark not defined.**, at 11038 (arguing that a "critical element" of the federal approach is to "promote innovation at the state level," which is later reflected federally); *see also* Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295, 344–45 (D. Vt. 2007) ("Congress allowed California to avoid preemption . . . because . . . [i]t determined that there were potential benefits for the nation in allowing California to continue to experiment and innovate in the field of emissions control." (citations omitted) (citing Motor & Equip. Mfrs. Ass'n, Inc. v. EPA, 627 F.2d 1095, 1110 (D.C. Cir. 1979))). Carlson also notes that giving one state superregulator status serves to concentrate innovation expertise and resources, leading to an "agglomeration" effect that enhances innovation. Carlson, *supra* note 164, at 1134–37.

in California and in the states adopting California standards, the federal government has been more willing to adopt increasingly stringent national vehicle emission controls.¹⁷⁰ The existence of two options has avoided stagnation and prompted a dynamic improvement in standards.¹⁷¹

Eliminating California's ability to establish a second option for GHG emission standards seriously undermines Congress's statutory goal of giving states two options and the systemic benefits of that approach. Although the federal GHG vehicle emission standards had tracked the California standards,¹⁷² EPA's April 2020 decision to roll them back means that the federal standards will become less stringent than the California standards. With NHTSA's determination that EPCA preempts the California GHG standards, California, and the thirteen states that had adopted GHG vehicle emission controls,¹⁷³ will not be able to respond to the rollback by maintaining the California standards, their chosen GHG emissions option.

NHTSA's preemption of the ZEV program will, at least in the short term, have even more significant consequences. The ZEV program is considered the primary driver of alternatives to the internal combustion engine. Given automaker resistance to developing new technology, commenters have observed that the program has been critical to inducing technological change.¹⁷⁴ Although lukewarm consumer interest and insufficient charging infrastructure continue to hold back electric vehicle sales in the short term, vehicle electrification is considered essential to decarbonization.¹⁷⁵ The federal government's GHG standards do not include a ZEV mandate, so preemption eliminates that entire dimension of vehicle controls for California and the ten other states that have relied on it.¹⁷⁶

California's GHG vehicle emissions standards and ZEV program emerged from the CAA's two-option approach. NHTSA's invocation of EPCA's "one national program" goal must be juxtaposed with Congress's purposeful creation

170. See Carlson, *supra* note 164, at 1115–17 (describing a series of California vehicle emission standards that EPA subsequently adopted); *id.* at 1118–19 (describing federal Clean Air Act amendments requiring vehicle emissions standards that California had previously adopted); Freeman, *supra* note 50 (describing the federal government's adoption of GHG vehicle emission standards similar to those initially adopted by California).

171. Engel, *supra* note 110, at 171–72 (describing the positive EPA-California dynamic that led to evolving vehicle emission standards).

172. See *supra* notes 57–59 and accompanying text.

173. See *supra* note 49 and accompanying text.

174. McConnell et al., *supra* note 60, at 16–18 (“It is not an exaggeration to suggest that most of the increase in innovation and demand for vehicle batteries has been as a result of the California ZEV program, which other US states and several other countries have also joined.”).

175. See ETHAN ELKIND & TED LAMM, U.C. BERKELEY CTR. LAW, ENERGY, & ENV'T, SYMPOSIUM BRIEF: ELECTRIC VEHICLES AND GLOBAL URBAN ADOPTION: POLICY SOLUTIONS FROM FRANCE AND CALIFORNIA 1 (2019), <https://www.law.berkeley.edu/wp-content/uploads/2019/11/Electric-Vehicles-and-Global-Urban-Adoption.pdf>. The ZEV program is also central to California's long-term air pollution concerns. Because NHTSA's proposal preserves the state's ability to adopt programs to address criteria pollutants, however, I am not addressing that aspect of the program in this Essay. It is possible that California would be able to apply for a waiver for its ZEV program based only on criteria emission benefits, the basis on which the program was first established. McConnell et al., *supra* note 60, at 3 (observing that ZEV program was initially designed to address local air quality concerns).

176. CAL. AIR RES. BD., *supra* note 49.

of a two-state option in the CAA. Concluding that Congress intended EPCA to preempt the California standards would run counter to Congress's goals under the CAA.

In sum, a serious reckoning with EPCA's and the CAA's purposes casts doubt on NHTSA's conclusion that EPCA impliedly preempts California's federally authorized GHG vehicle emission standards. NHTSA's conflict preemption analysis misses EPCA's central fuel conservation purpose and so perceives conflict rather than harmony between EPCA's fuel economy standards and GHG vehicle emission standards. And NHTSA's one-sided analysis focuses only on the impact of California's standards on EPCA's purposes, without also considering Congress's goal, under the CAA, of allowing California to create a second vehicle emission standard option that would offer nationwide benefits.

CONCLUSION

NHTSA's preemption regulation reveals an agency unmoored from the explicit statutory purposes driving its authorizing statute and the central purposes of the CAA. When agencies detach from statutory purposes, they are likely to undermine, not serve congressional intent. Although statutory language is often ambiguous and agencies deserve deference for their expertise and experience, agencies risk following purely partisan agendas if they fail to honor the core statutory objectives they have been tasked with implementing.

In this instance, NHTSA's preemption regulation, along with the rest of the car standards rollback, appears to be serving a profoundly deregulatory agenda.¹⁷⁷ A presidential administration is entitled to its views on the wisdom or folly of the administrative state, but it cannot regulate in a vacuum. Statutory purposes remain a critical touchstone for determining congressional intent and, in this case, congressional intent to preempt.

The vehicle emissions rollback, like many of the Administration's rollbacks, is not a minor shift. Administrative agencies' interpretations of their authorizing statutes have enormous consequences. Climate change is happening, and only major efforts to reduce our most significant emissions sources, like vehicles, will protect future generations. Insufficient fidelity to EPCA's conservation purposes and the CAA's (and California's) health and welfare goals is exacerbating the specter of catastrophic climate change.

177. See Gillian E. Metzger, *The Supreme Court 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 9–10 (2017) (describing Trump Administration's anti-regulatory ideology); Popovich, *supra* note 1 (describing Trump Administration's 100 environmental rollback efforts).