

CENTER FOR ENVIRONMENTAL ACCOUNTABILITY

**COMMENTS OF THE
CENTER FOR ENVIRONMENTAL ACCOUNTABILITY**

*Comments on
Corporate Average Fuel Economy Standards for Passenger Cars and Light Trucks
for Model Years 2027–2032 and Fuel Efficiency Standards for
Heavy-Duty Pickup Trucks
&
Notice of Environmental Impact Statement*

**88 Fed. Reg. 56,128 (August 17, 2023)
Docket No. NHTSA-2023-0022; NHTSA-2022-0075**

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“Oh, what a tangled web we weave . . . when first we practice to deceive.”

— Walter Scott, Marmion

I. Introduction

The internal combustion automobile transformed American life. It liberated rural counties from the tyranny of distance and displaced the horse and buggy. Throughout the 20th century, internal combustion automobiles got better on every metric, and quality-adjusted prices fell.¹ Today’s spark-ignition automobiles offer incredible acceleration, towing capacity, comfort, space, range, and yes, even fuel economy, at prices Americans can afford. They’ve gotten better on other metrics too. Since the 1970s, automobile manufacturers have reduced smog-forming emissions by an astonishing 99%. All new cars today are “clean cars.”

The Biden Administration now seeks to discard the internal combustion engine—and a century’s worth of innovation and improvement—through a “whole-of-government” approach, in cahoots with California.² The National Highway Traffic and Safety Administration (NHTSA) is proposing to do its part to carry out this bureaucratic agenda. By proposing fuel efficiency standards so stringent only hybrids and plug-in electric cars can meet them, NHTSA seeks to gradually phase out the internal combustion engine.

NHTSA and the Biden Administration, to be sure, have no serious plan beyond banning internal combustion engines. NHTSA simply assumes the enormous quantity of minerals—such as copper, cobalt, and lithium—needed to supply the electric automobiles it imagines will materialize. It says nothing about the geopolitical risks of relying on China’s coal-powered mineral monopoly to supply the vast quantity of raw materials needed for this “transition.” And it shrugs away all the greenhouse gases and pollution that’ll be shifted to the industrial sectors of third-world countries in the process.

To carry out this half-baked industrial plan, the agency relies on a tangled web of dissembling and deception. Chief among these misrepresentations is that, on the whole, the proposal would somehow be a boon for both the climate and consumers. This is fantasy. The proposal won’t make a difference to the climate, and it will be very expensive.

¹ Robert Gordon, *The Rise and Fall of American Growth* 149–163 (2016).

² E.O. 14037, 86 Fed. Reg. 43,583 (Aug. 10, 2021).

Fuel efficiency standards are an inherently inefficient way to reduce fuel use—or, what’s the same, carbon emissions from combustion. The way to do this would be a gas tax, but that’s a political nonstarter, as are *de jure* electric vehicle mandates. That’s why the Administration needs a “whole-of-government” plan: by distorting price signals through an opaque Rube-Goldberg machine of fiscal subsidies, regulatory cross-subsidies, and state laws, it avoids political accountability for the unacceptable social cost to Americans.

NHTSA’s principal lie takes the form of “behavioral economics.” The agency postulates that car drivers are extremely myopic, in that they irrationally ignore most of the fuel savings they could get if they invested in more efficient automobiles, such as hybrid cars. NHTSA, in short, says the proposal is here to help drivers buy better cars—coincidentally, those preferred by the Administration.

The only myopia is NHTSA’s. NHTSA assumes that fuel economy standards have zero opportunity costs to consumers, the fallacy of the free lunch. Of course, that’s not the case. When fuel economy standards tighten, manufacturers give up improving features that drivers like better than fuel economy—such as acceleration, space, towing capacity. When consumer preferences are considered, NHTSA’s rules harm, rather than help, consumers. Only by ignoring real consumer preferences, and assuming away all trade-offs, can NHTSA pretend the proposal will help consumers buy better cars.

But the laws of physics and economics have finally caught up with NHTSA. Deep within the preamble, NHTSA for the first time makes a remarkable concession: It admits that the proposed car standard will cost society over five billion on net. The costs are so high even NHTSA’s distorted math can no longer serve as a justification.

* * *

NHTSA lacks legal authority to carry out the Biden Administration’s plan to deindustrialize the Midwest and enrich China. But if it’s going to try anyway, it should at least be honest about the real cost.

II. Summary of Comments

NHTSA’s proposed Corporate Average Fuel Economy (CAFE) standards for automobiles must be withdrawn for multiple reasons.

First, NHTSA considers the fuel economy of electric automobiles by projecting millions of these automobiles in the “baseline” used as the starting point for setting the CAFE standards. But Congress said NHTSA “may not consider” the fuel economy of electric automobiles when setting standards.³ Because NHTSA’s starting point is illegal, the proposed rule that results from it is illegal.

Second, NHTSA’s “baseline” projection is flawed in other ways. NHTSA presumes state gasoline car bans are legally binding, even though they are preempted by federal law. Worse, NHTSA bizarrely assumes several states have adopted gas car bans as state law, even though they haven’t. And NHTSA considers manufacturer credits for overcompliance, even though, as with electric cars, NHTSA may not do so.

Third, even disregarding the flawed baseline, NHTSA’s proposal is unlawful because it fails the relevant statutory criteria. The rule may be “technologically feasible,” but it is not “economically practicab[le]”, and putative carbon benefits in foreign countries don’t advance “the need of *the United States* to conserve energy.”⁴

The proposal relies on flawed economics. NHTSA assumes an extreme level of consumer myopia that’s unsupported by the evidence, arbitrarily assumes zero opportunity costs to consumers, relies on fake prices to underestimate technology costs, and uses improbably low discount rates to inflate future fuel savings.

NHTSA’s standard for passenger cars cannot be legally justified. NHTSA claims discretion to pick any alternative that generates net benefits. But by that rule, the passenger car standard is unlawful. NHTSA says the proposal will cost society, on net, more than \$5 billion, after balancing the factors in a cost-benefit analysis. That shows the standard doesn’t satisfy the required statutory balancing, so the proposal is unlawful.

The same is true for the light truck standard. NHTSA still pretends the light truck standard has net benefits, but that’s not the case. Once one corrects NHTSA’s flawed projection of consumer benefits, the light-truck portion of the proposal can’t be economically justified.

The fuel efficiency standards for heavy-duty pickup trucks and vans are also unlawful, for several reasons: (i) NHTSA doesn’t give manufacturers “3 full model years of regulatory stability,”

³ 49 U.S.C. § 32902(h)(1).

⁴ 49 U.S.C. § 32902(f).

as required by law;⁵ (ii) the standards are not “appropriate” or “cost-effective”;⁶ and (iii) the proposed standards are arbitrary because they inaccurately assume the Administration’s preferred electric vehicles have infinite fuel efficiency.

Last, the entire proposal is invalid because it’s not signed by a properly appointed officer. Ann Carlson is not “Acting Administrator” of NHTSA.

III. Background

NHTSA proposes CAFE standards for passenger cars and light trucks for model years 2027–31, as well as fuel efficiency standards for heavy-duty pickup trucks and vans for model years 2030–35.⁷ The former would increase at a nominal rate of 2 percent per year for passenger cars and 4 percent per year for light trucks, while the latter would increase at a rate of 10 percent per year. The predicted result would be an industry fleet-wide average for passenger cars and light trucks of roughly 58 miles per gallon by model year 2032, and an industry fleet-wide average for heavy-duty vehicles of roughly 2.6 gallons per 100 miles by model year 2038.

NHTSA’s proposed rule, like its predecessor setting standards for MYs 2024–26,⁸ is part of the Biden Administration’s larger plan to electrify the vehicle fleet. NHTSA’s goal is to “bake in” the electrification mandates of the Environmental Protection Agency (EPA) and the California Air Resources Board (CARB).⁹ Together, the mandates aim to ban spark-ignition gasoline engines.

IV. Comment

A. The Proposed Rule Violates Express Statutory Prohibitions

When setting CAFE standards for automobiles, the statute provides certain factors NHTSA “shall consider” and other factors NHTSA “may not consider.” NHTSA “shall consider”: (i) “technological feasibility,” (ii) “economic practicability,” (iii) “the effect of other motor vehicle

⁵ 49 U.S.C. § 32902(k)(3)(B).

⁶ 49 U.S.C. § 32902(k)(2).

⁷ 88 Fed. Reg. 56,128 (Aug. 17, 2023).

⁸ 87 Fed. Reg. 25,710 (May 5, 2022).

⁹ 88 Fed. Reg. at 56,349 (noting the rule will “ensure continued improvements in energy conservation by requiring ongoing fuel economy improvements even if . . . other regulatory pushes change in unexpected ways”).

standards of the Government on fuel economy,” and (iv) “the need of the United States to conserve energy.”¹⁰

Section 32902(h) sets forth three factors NHTSA “may not consider.” First, NHTSA “may not consider the fuel economy of dedicated automobiles,” *i.e.*, automobiles that operate “only on alternative fuel.”¹¹ Among the “alternative fuel[s]” the statute lists is “electricity.”¹² Second, NHTSA shall consider “dual fueled automobile[s],” such as plug-in hybrid vehicles, “to be operated only on gasoline or diesel fuel,” meaning NHTSA may not consider the fuel economy of such vehicles when operated on electricity.¹³ Third, NHTSA “may not consider” the “trading, transferring, or availability of credits” that a manufacturer earns if it exceeds the fuel economy standard for a given model year.¹⁴

The purpose of these prohibitions is obvious: Congress wanted NHTSA to set standards that’d be economically practicable for automobiles that use “conventional” fuel—*i.e.*, gasoline and diesel. It made electric automobiles and compliance credits optional for manufacturers, not mandatory. Congress chose carrots, not sticks.

NHTSA—following the President’s desire to force electrification at all costs—wants sticks. So, the agency is considering electric automobiles and credit trading. That’s unlawful. And because the legal defect infects the entire analysis, the proposed rule must be withdrawn. NHTSA must start from scratch, with a proper baseline.

1. NHTSA improperly considers electric automobiles

In the last round of CAFE standards, NHTSA considered the fuel economy of electric automobiles when projecting the “baseline” for the standards. The standards were challenged in court, and the D.C. Circuit will soon rebuke the agency. Just listen to the oral argument.¹⁵ It didn’t go well for NHTSA.

Yet NHTSA is at it again. In setting CAFE standards, NHTSA includes an enormous quantity of new electric automobiles in its “baseline” projections.¹⁶ By 2032, NHTSA projects that 42.2% of

¹⁰ 49 U.S.C. § 32902(f).

¹¹ 49 U.S.C. § 32901(a)(8).

¹² 49 U.S.C. §§ 32901(a)(8), 32901(a)(1)(J).

¹³ 49 U.S.C. §§ 32901(a)(9), 32902(h)(2),

¹⁴ 49 U.S.C. § 32902(h)(3).

¹⁵ Oral Argument Audio, *NRDC v. NHTSA*, No. 22-1080 (D.C. Cir., Sept. 14, 2023), [https://www.cadc.uscourts.gov/recordings/recordings2023.nsf/DD26336C8C91F85F85258A2A006726FB/\\$file/22-1031%20and%2022-1080.mp3](https://www.cadc.uscourts.gov/recordings/recordings2023.nsf/DD26336C8C91F85F85258A2A006726FB/$file/22-1031%20and%2022-1080.mp3).

¹⁶ 88 Fed. Reg. at 56,278–79.

new passenger cars will be electric.¹⁷ And by 2050, NHTSA projects the entire new automobile fleet will be electric.¹⁸

NHTSA admits that it “considers the energy consumption” of electric cars when determining whether the standards promote “energy conservation,” as part of the statutory balancing:

In the analysis supporting this proposal, NHTSA considers the energy consumption from the entire on-road fleet, which already contains a number of plug-in hybrid and fully electric vehicles that are part of the fleet independent of proposed CAFE standards.¹⁹

Where do these electric automobiles come from? Not from the rule, says NHTSA. According to NHTSA, most of these electric automobiles come from state rules, particularly California’s Advanced Clean Cars II or “ACC2 program,” a *de jure* phase out of gasoline automobiles that that several other states have already purported to adopt—even though they are explicitly preempted from doing so.²⁰ *See infra IV.B.*

State mandates or not, Section 32902(h)(1)’s text provides that in “carrying out” the responsibility to set fuel economy standards, NHTSA “may not consider” the fuel economy of electric automobiles.²¹ To *consider* means to “take into account.”²² So the statute bars NHTSA from taking into account electric automobiles’ fuel economy in setting standards.²³ In other words, NHTSA may not account for the fuel economy of any electric automobile for any purpose when setting CAFE standards. There’s no baseline exception.

By considering the fuel economy of electric automobiles, the agency inflates the fuel economy of the automobile fleet, and therefore the starting point for setting the standards. Compare the projected average fuel economy of the fleet *with* and *without* electric automobiles, the trade organization that represents virtually all automakers:²⁴

¹⁷ 88 Fed. Reg. 56,279.

¹⁸ PRIA at 8-12, 8-13.

¹⁹ 88 Fed. Reg. 56,316.

²⁰ 88 Fed. Reg. 56,349 (Aug. 17, 2023).

²¹ 49 U.S.C. § 32902(h)(1).

²² *American Heritage Dictionary* 313 (2d ed. 1985).

²³ *See United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1620–21 (2021) (“may not” is “mandatory language”).

²⁴ *See* Exhibit A (Source: Auto Innovators calculation from data in Vehicles Report).

Passenger Car

Model Year	FE Compli- ance (pre-credit) all vehicles	FE Compli- ance (pre credit) without BEVs	▲
	[MPG]	[MPG]	[MPG]
2022	44.7	39.8	-5.0
2023	48.0	40.5	-7.5
2024	53.5	42.6	-10.9
2025	57.0	44.6	-12.4
2026	63.5	45.9	-17.6
2027	58.4	46.9	-11.5
2028	60.0	47.7	-12.3
2029	61.8	48.4	-13.4
2030	63.4	48.6	-14.8
2031	65.0	49.0	-16.0
2032	66.4	49.3	-17.1

Light Truck

Model Year	FE Compli- ance (pre-credit) all vehicles	FE Compli- ance (pre credit) without BEVs	▲
	[MPG]	[MPG]	[MPG]
2022	30.2	30.0	-0.2
2023	31.5	30.5	-1.0
2024	34.4	32.2	-2.2
2025	37.1	33.5	-3.5
2026	39.9	34.1	-5.8
2027	40.2	35.8	-4.4
2028	41.4	36.5	-4.8
2029	42.8	37.4	-5.5
2030	44.1	37.8	-6.3
2031	45.6	38.5	-7.2
2032	46.9	39.0	-7.9

By model year 2032, electric automobiles inflate average fuel economy by 17 miles per gallon for passenger cars, and by 8 miles per gallon for light trucks. The enormous shortfall must be

met by ramping up sales of electric automobiles or paying fines. This turns CAFE into a *de facto* ban on gasoline-powered automobiles, precisely the outcome Congress wanted to avoid.

The costs of this “baseline” are staggering and reveal the true cost of the proposal. A baseline without state gas car bans *doubles* the social cost of meeting the proposed standards for passenger cars and light trucks through model year 2032—from \$58.6 billion to \$90.7 billion, a 55% increase in cost.²⁵ It also increases new automobile sales lost to 174,661 automobiles by 2032, compared to 81,972 sales lost in the reference case.²⁶ NHTSA’s “baseline” is a ploy to avoid accountability for the full social cost.

NHTSA acknowledges the “statute-driven cognitive dissonance” of considering the fuel economy of millions of electric automobiles in the baseline when setting standards. But it argues ignoring these electric automobiles wouldn’t be “realistic.”²⁷ That’s ironic, because, as explained below, NHTSA’s “baseline” imagines state standards that don’t exist, and relies on regulations that are preempted by federal law. But in any event, realism is no defense. Statutory restrictions on considering means of complying with the CAFE standards can always be portrayed as less “realistic.”

Because NHTSA has no defense on the merits, it claims the error is harmless. NHTSA asserts it would make the same decision even if it ignored state gas car bans, although it acknowledges that in this scenario a less stringent standard would be “slightly more net beneficial.”²⁸ This doesn’t, however, show that NHTSA’s error is harmless.

First, NHTSA provides no adequate explanation for why a more “net beneficial” but less stringent standard is not preferrable, and choosing a worse option for no good reason is legally indefensible, a paradigmatic example of arbitrary and capricious agency action.²⁹

Second, it appears NHTSA’s sensitivity scenario is *still* considering a substantial number of electric automobiles, so the analysis remains flawed. To show the error is harmless, NHTSA must show that the standard is the “maximum feasible” alternative for the conventional passenger car or light truck fleet, after excluding *all* electric automobiles from the analysis. NHTSA doesn’t make that showing, because it can’t.

²⁵ PRIA, Table 9-2.

²⁶ PRIA, Table 9-3.

²⁷ 88 Fed. Reg. at 56,349.

²⁸ 88 Fed. Reg. at 56,349.

²⁹ *Judulang v. Holder*, 565 U.S. 42, 55 (2011) (if an agency decided policy “by flipping a coin . . . we would reverse the policy in an instant”).

Third, as discussed later, the putative consumer benefits are a figment of NHTSA’s imagination anyway, and the putative “climate” benefits are both imaginary and outside the scope of CAFE. Without these asserted co-benefits, NHTSA’s proposed standards cannot pass muster.

Fourth, NHTSA only presents a sensitivity analysis of the combined automobile standards, but NHTSA sets separate standards for passenger cars and light trucks, not combined standards. So, NHTSA’s numbers are useless, and misleading. More on that later.

NHTSA shouldn’t charge ahead with this unlawful baseline. As NHTSA knows well, this same legal issue is being litigated in *Natural Resources Defense Council v. NHTSA*, 22-1080 (D.C. Cir.) (argued Sept. 14, 2023). NHTSA should at least wait until the mandate issues in that lawsuit to proceed.

2. *NHTSA improperly considers credits*

Section 32903 gives manufacturers “credits” for exceeding CAFE standards, which they can bank and use later or trade to other manufacturers. NHTSA “may not consider” these credits “when prescribing a fuel economy standard, the trading, transferring, or availability of credits under section 32903.”³⁰

Yet NHTSA is considering these credits in the proposal. Although NHTSA’s model ignores credits during the “MY under consideration,” NHTSA considers compliance credits earned *before* the model years under consideration when creating the baseline for the analysis.³¹ This inflates fleet average fuel economy, as shown in Exhibit A. But as with electric automobiles, the law says NHTSA may not consider these compliance credits when it is setting standards. There is no “baseline” exception.

B. The Proposed Rule’s “Baseline” Assumes State Electric Mandates That Are Preempted or Don’t Exist

There’s another problem with NHTSA’s “baseline”—it assumes state rules that don’t exist, or that are preempted by federal law.

NHTSA’s baseline assumes 20 states and the District of Columbia have already adopted “ACC II”—California’s *de facto* gas car ban.³² That’s wrong. Eight of these states haven’t adopted the

³⁰ 49 U.S.C. § 32902(h)(3).

³¹ See 88 Fed. Reg. 56,164, 56,181.

³² See TSD at 2-74, 2-75; Exhibit B. The states are California, Colorado Connecticut, DC, Delaware, Hawaii, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington.

ACC II ban, at least for now: Colorado, Connecticut, Delaware, Minnesota, Nevada, New Jersey, New Mexico, and Rhode Island.³³ NHTSA could have learned that by consulting CARB’s website.³⁴ NHTSA’s “baseline” therefore overstates the market share of new automobiles subject to state gas car bans. NHTSA is simply projecting its own desires as state legislation.

But even if ACC II were as popular as NHTSA’s wish casting suggests, that would be irrelevant because ACC II conflicts with federal law.

The Clean Air Act also prohibits ACC II. Section 209(a) of the Clean Air Act provides:

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part.

The Supreme Court and several circuit courts have already held that state laws or regulations mandating the sale or purchase of new electric automobiles are standards relating to the control of emissions, and therefore conflict with this prohibition.³⁵ So, ACC II is preempted by the Clean Air Act.

EPA, to be sure, may waive this Clean Air Act prohibition if California shows its rules meet certain specific criteria.³⁶ But EPA hasn’t granted a waiver for ACC II, and unless and until it does so, ACC II is preempted by the Clean Air Act.³⁷

In any event, the Energy Policy and Conservation Act (EPCA) prohibits States from adopting or enforcing “a law or regulation *related to* fuel economy standards or average fuel economy standards for automobiles.”³⁸ This is a separate and independent requirement that is not subject to any kind of preemption waiver, and it condemns electric vehicle mandates. The Supreme Court has

³³ See Exhibit B. Colorado, Connecticut, New Jersey, Rhode Island, and New Mexico are in the process of adopting the ban, but haven’t done so yet.

³⁴ <https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/states-have-adopted-californias-vehicle-regulations>.

³⁵ *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004); *Am. Auto. Mfrs. Ass’n v. Cahill*, 152 F.3d 196, 200–01 (2d Cir. 1998) (Winter, J.); *Ass’n of Int’l Auto. Mfrs., Inc. v. Comm’r, Mass. Dep’t of Env’t Prot.*, 208 F.3d 1, 4 (1st Cir. 2000).

³⁶ 42 U.S.C. § 7543(b).

³⁷ EPA arguably can’t waive these standards at all, but that’s the subject of a pending case in the D.C. Circuit. See *State of Ohio v. EPA*, 22-1081 (D.C. Cir.) (argued Sept. 15, 2023).

³⁸ 49 U.S.C. § 32919(a) (emphasis added).

described “related to” preemption provisions like this one as “deliberately expansive,” and “conspicuous” in their breadth.³⁹ As the Court has explained, a state requirement “relate[s] to” a federal law or regulation as long as it has a “connection with,” or contains a “reference to,” the regulated topic.⁴⁰

Electric car mandates have a “connection with” manufacturer “average fuel economy” because they restrict manufacturers’ choice as to how to meet the “*maximum feasible*” average fuel economy standards. To keep costs down, the statute deliberately allows manufacturers to meet fleet-average performance standards by making and selling any combination of automobiles the market will bear, using whatever technological approach to fuel economy they think best. State electric-car mandates, by contrast, require manufacturers to comply with CAFE standards in a specific way: either by selling a certain percentage of electric automobiles for every conventional automobile sold in that State or by purchasing an equivalent number of credits from competitors. Thus, the state mandates relate to “average fuel economy” because they “force [a manufacturer] to adopt a certain scheme” and “restrict its choice” of compliance and are thus preempted.⁴¹

NHTSA tries to defend its “baseline” assumption, but it ties itself up in knots. NHTSA claims it is “not taking a position on whether or not these programs are preempted under EPCA.”⁴² But it also says the standards are “foreseeable legal obligations.”⁴³ This is both arbitrary and contrary to law.⁴⁴ A state law that conflicts with federal law is not a “legal obligation.” It is nullity *ab initio* under the Supremacy Clause of the Constitution: “An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.”⁴⁵ Nor can NHTSA avoid taking a position one way or the other. By proclaiming the standards to be “legal obligations,” NHTSA is determining they are lawful and endorsing them, just without the APA-required explanation, and in excess of its legal authority. That’s arbitrary and *ultra vires*.

In a slip of the tongue, NHTSA’s preamble reveals the real point of the “baseline.” NHTSA says its standards will “ensure continued improvements in energy conservation by requiring ongoing fuel economy improvements even if . . . other regulatory pushes change in unexpected ways.”⁴⁶

³⁹ *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987); *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990).

⁴⁰ *Rowe v. N.H. Motor Transport Ass’n*, 552 U.S. 364, 370 (2008) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)).

⁴¹ *NY State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995).

⁴² 88 Fed. Reg. at 56,316.

⁴³ 88 Fed. Reg. at 56,316.

⁴⁴ Initial Brief for Intervenors in Support of Petitions 21–22, No. 22-108 (D.C. Circuit).

⁴⁵ *Shelby Cnty.*, 118 U.S. at 442.

⁴⁶ 88 Fed. Reg. 56,349.

In other words, NHTSA’s baseline is a federal “insurance” policy in the event that state mandates are repealed or struck down by the courts—a federal regulatory “horcrux” that’ll ensure the continued survival of these state laws even if they are killed elsewhere.⁴⁷

C. The Proposed Rule Rests on Flawed Economics

1. *Climate change doesn’t justify the rule*

NHTSA doesn’t fool anyone. The primary purpose of the rule is to further the Biden Administration’s industrial policy of complete electrification, whatever the cost to the United States.⁴⁸ Everything else is a fig leaf.

The costs are enormous, and not justified in the least by climate change. As economists have explained, using standard economics, fuel efficiency regulations are an inefficient way to reduce carbon from the transportation sector: by one estimate, the compliance cost per ton exceeds even this Administration’s insanely high *global* social cost of carbon.⁴⁹ Even before NHTSA had squeezed manufacturers for efficiency like a desiccated orange, economists estimated the cost of reducing carbon emissions through tighter fuel economy standards would be \$85 per ton, far in excess of the current Administration’s central estimates of the global social cost of carbon of about \$56.⁵⁰ Since then, the cost of tighter CAFE standards has only increased. Under the law of diminishing returns, every improvement in fuel economy becomes more expensive and delivers less fuel savings to drivers.

There are better alternatives to reduce carbon from the transportation sector, if that’s the goal. According to a study by MIT economists, for example, a fuel tax is 6 to 14 times more cost-effective.⁵¹ Of course, the costs of a fuel tax are transparent and politically salient, so politicians and regulators much prefer the hidden tax and cross-subsidization wrought by fuel economy standards, however inefficient.⁵² And, of course, NHTSA doesn’t have authority to levy taxes.

⁴⁷ In the Harry Potter novels, “[a] Horcrux was an object in which a Dark wizard or witch had hidden a detached fragment of his or her soul in order to become immortal.” <https://harrypotter.fandom.com/wiki/Horcrux>.

⁴⁸ 86 Fed. Reg. 43,583, 43,583 (Aug. 5, 2021).

⁴⁹ William Nordhaus, *The Climate Casino* 262–63 (2013); IWG TSD Interim Estimates 5 (2021).

⁵⁰ *Id.*

⁵¹ Valerie J. Karplus et al., *Should a vehicle fuel economy standard be combined with an economy-wide greenhouse gas emissions constraint? Implications for energy and climate policy in the United States*, 36 *Energy Econ.* 322, 327 (Mar. 2013).

⁵² See Daniel Yergin, *The Quest* 675–676 (2011).

NHTSA’s own numbers show this inefficiency. Compare, for example, NHTSA’s estimated technology costs against the putative carbon benefits of different standards over the life of the fleet produced through model year 2032, discounted at 3%, to derive a rough estimate:⁵³

Proposed Standards	Technology cost (billions)	Carbon benefit (billions)	Net (billions)
Passenger Cars	10.9	1.3	- 9.3
Light trucks	26.9	12.7	- 14.2
HDPUVs	1.3	1	-0.3
Total	39.1	15	-23.8

Not efficient.⁵⁴

It gets worse. These numbers assume the rule in fact has global carbon benefits. But that’s unclear. Petroleum and refined gasoline are global commodities that can easily be exported elsewhere. Studies have found fuel economy standards have “leakage effects” to other sectors of the economy and to “unconstrained regions”—“such as India, Africa, and East Asia.”⁵⁵

NHTSA doesn’t account for carbon “leakage.” NHTSA, arbitrarily, assumes oil exports offset the decline in oil consumption when projecting upstream refinery emissions, but then assumes no leakage when quantifying carbon benefits.⁵⁶ Nothing in NHTSA’s proposed rule prevents global arbitrage, so oil producers may simply supply oil or gasoline to other sectors of the economy or unconstrained countries that are thirsty for oil—they have every incentive to do so. NHTSA’s

⁵³ 88 Fed. Reg. at 56,340–42; PRIA at 8-101. (Numbers don’t match due to rounding.)

⁵⁴ EPA has recently attempted to promote an inflated global social cost of carbon that arbitrarily ignores human adaptation and uses unjustifiably low discount rates. See David Friedman, *Critique of “Comprehensive Evidence Implies a Higher Social Cost of CO₂”* (July 30, 2023), criticizing Kevin Rennert et al., *Comprehensive Evidence Implies a Higher Social Cost of CO₂*, 610 *Nature* 687 (2012)); EPA Draft Report on the Social Cost of Carbon, https://www.epa.gov/system/files/documents/2022-11/epa_scghg_report_draft_0.pdf. NHTSA doesn’t rely on these inflated numbers in the proposal, so it can’t use them in the final rule without violating the notice-and-comment requirements of the APA.

⁵⁵ Valerie J. Karplus et al., *The Global Energy, CO₂ Emissions, and Economic Impact of Vehicle Fuel Economy Standards*, 49 *J. of Transp. Econ. & Pol’y* 517, 530–31 (2015), https://global-change.mit.edu/sites/default/files/MITJPSPGC_Reprint_15-34.pdf.

⁵⁶ See 88 Fed. Reg. at 56,245 (“Based on our assumption that any reduction in fuel consumption within the United States leads to an equal sized increase in gasoline exports, we currently do not project changes in upstream emissions resulting from feedstock extraction and fuel production outside the U.S.”).

cost-benefit analysis, and its environmental impact analysis, arbitrarily ignore the cumulative effect of global oil arbitrage on emissions and therefore fail to take a “hard look” at the problem of leakage.

Even ignoring leakage, the global social cost of carbon is misleading. According to NHTSA’s own projection, the proposal will have no measurable effect on climate at all. By 2100, the proposed rule would provide no discernible change in sea-level rise, mean precipitation, or ocean acidification.⁵⁷ It would reduce global mean temperatures by a mere 0.001°C, assuming a 4.4°C increase in global mean temperatures by then.⁵⁸

This 4.4°C climate scenario is unrealistically grim, and inappropriate for any analytical baseline. It is based on Intergovernmental Panel on Climate Change scenario that’s unlikely to come to pass given current trends.⁵⁹ But in any event, the number of decimals doesn’t pass the laugh test. The projected change is statistically insignificant. For context, the standard deviation in mean surface temperatures since 1850 has been 0.34°C,⁶⁰ so a 0.001°C change in mean temperatures is undetectable noise in the climate system, and may not rationally be considered a meaningful, quantifiable effect. Putting a price tag on a statistically insignificant number doesn’t change that. By pretending to help with rules that are in reality insignificant in terms of addressing the problem (but very expensive nonetheless), NHTSA only deceives the public and undermines its purported goal.

2. *Consumer benefits don’t justify the rule*

Because the rule can’t be justified as a climate policy, NHTSA doesn’t use standard economics to justify the rule. Instead, NHTSA relies on what it calls “behavioral economics.”⁶¹ It assumes car buyers are myopic. NHTSA speculates that car buyers underestimate fuel savings over the life of a more efficient car. NHTSA calls this the “energy efficiency gap,” or the “energy paradox.”

NHTSA assumes this gap is very big. It estimates car buyers value only the first 30 months of fuel savings.⁶² That means they are only willing to pay for efficiency improvements that pay off

⁵⁷ NEPA EIS 9-4.

⁵⁸ NEPA EIS 9-4.

⁵⁹ See Roger Pielke Jr. & J. Ritchi, *Distorting the view of our climate future: The misuse and abuse of climate pathways and scenarios*, 72 Energy Research & Social Science 101890 (2021).

⁶⁰ Own calculations from NOAA’s Global Time Series, available at <https://www.ncei.noaa.gov/access/monitoring/climate-at-a-glance/global/time-series>.

⁶¹ 88 Fed. Reg. at 56,238–39.

⁶² 88 Fed. Reg. at 56,239.

during the first 30 months of the life of a new car or truck. Or, what is the same, NHTSA assumes car buyers hyperbolically discount future fuel savings. Car buyers, therefore, ignore low-hanging fruit: cost-effective ways to reduce their future fuel costs. By mandating these cost-effective technologies, NHTSA (and EPA) argue they can help myopic buyers buy better cars.

Adding these putative “private welfare” benefits to the cost-benefit ledger, NHTSA projects some (but not all) of the proposed standards have net social benefits.⁶³ Here’s a summary of NHTSA’s estimates over the life of the vehicle fleet produced through model year 2032, using a 3% discount rate:⁶⁴

Proposed Standards	Private cost (billions)	Social cost (billions)	Private benefit (billions)	Social benefit (billions)	Net (billions)
Cars	-11.5	-0.6	5.7	1.4	-5
Light trucks	-31.8	-14.7	53.7	14.7	21.9
HDPUVs	-1.4	-0.7	3.3	1.2	2
Total	-44.7	-16	62.6	17.3	19.1

Two things are notable. First, *NHTSA predicts the passenger car standard has negative social benefits*. As NHTSA concedes, “for passenger cars, net benefits are higher when standards are less stringent.”⁶⁵ In other words, NHTSA should be relaxing the passenger car standards, or at least not making things worse. It is instead proposing to make us poorer.⁶⁶

Second, the purported benefits are dominated by gains in private welfare. The estimated private welfare gains are \$62 billion. That’s a lot of billions. Without these billions, the social cost of the standards would be negative, even assuming the rule has discernable global carbon benefits. The case for the rule therefore rests on NHTSA’s prediction that the proposal would be a boon to truck and van buyers. There’s a serious problem with that prediction: the empirical evidence doesn’t support it.

NHTSA’s “energy efficiency gap” is not supported by the evidence.

⁶³ 88 Fed. Reg. at 56,340–42; PRIA at 8-41, 8-42, 8-101.

⁶⁴ 88 Fed. Reg. at 56,340–42; PRIA at 8-41, 8-42, 8-101. Numbers don’t match due to rounding.

⁶⁵ 88 Fed. Reg. at 56,343; *see also id.* at 56,342 (“Net benefits for passenger cars remain negative across alternatives.”).

⁶⁶ *See also* PRIA at 8-23 (estimating buyers of model year 2032 passenger cars lose \$395 per car because of the standards).

First, there's not enough evidence to conclude there's an "energy efficiency gap," and the available evidence shows the gap, if it exists, is much smaller than NHTSA assumes.

Economics doesn't begin by assuming there's a market failure. Rather, economics begins by presuming markets work, and consumers make rational choices with their money.⁶⁷ Showing a market doesn't work requires evidence of a market failure. But, problematically for NHTSA, the empirical evidence doesn't show consumers are myopic.

NHTSA, at times, is candid about the weakness of the evidence supporting the energy efficiency gap. It says that "published economic literature provides support for assuming both full valuation of energy savings and their substantial undervaluation."⁶⁸ So, it's all over the place. Not exactly a sign of consensus, let alone reliable evidence on which to base a major rule.

NHTSA admits, however, that not all "published" studies are equal. Early published studies finding significant undervaluation have poor controls and omit confounding variables.⁶⁹ For example, these studies fail to "account for the opportunity cost of using technologies to improve fuel economy rather than to improve the acceleration performance or increase the size of vehicles."⁷⁰ More recent studies that at least try to correct for omitted variables, by contrast, "consistently suggest that buyers value a large portion—and perhaps even all—of the future fuel savings that models with higher fuel economy offer."⁷¹

Two recent published studies cited by NHTSA cover new car buyers. One finds no evidence that buyers systematically underinvest in fuel economy.⁷² As the study concludes, "we find little evidence of myopia."⁷³ The other study, using a different method and time period, finds car buyers value 54% of future fuel savings.⁷⁴ But that study doesn't control for some variables correlated with greater fuel economy, such as a distaste for stop-start ignition, reduced trunk space, or other undesirable features. So the observed "myopia" may not be myopia at all, but simply consumers reacting to factors the model doesn't control. And this study in any event concludes that tighter

⁶⁷ William Nordhaus, *The Climate Casino* 223 (2013).

⁶⁸ PRIA 2-4.

⁶⁹ PRIA 2-5.

⁷⁰ NRC (2015), at 315.

⁷¹ PRIA 2-5.

⁷² PRIA 2-6 (citing Meghan R. Busse et al., *Are Consumers Myopic? Evidence from New and Used Car Purchases*, 103 *Am. Econ. Rev.* 220 (2013))

⁷³ Busse (2013), at 253.

⁷⁴ Benjamin Leard et al, *How Much Do Consumers Value Fuel Economy and Performance? Evidence from Technology Adoption*, 105 *The Review of Econ. & Statistics* 158 (Jan. 2023), attached as Exhibit C.

standards *reduce* private welfare when accounting for the acceleration tradeoffs it does control for. So, the study significantly undermines, rather than supports, NHTSA’s claimed market failure.

As NHTSA suggests, therefore, recent published studies would suggest car buyers “value at least half—and perhaps all—of the fuel savings they expect from choosing models that offer high fuel economy.”⁷⁵ Even taking the low end of 54%, that implies buyers value about 84 months of fuel savings, not the 30 months that “feels” right to NHTSA.⁷⁶ But feelings, nothing more than feelings, are not *reasons*. Nor does the APA require emotive decisionmaking, but *reasoned* decisionmaking.

And there just aren’t good reasons here. NHTSA admits its estimated payback period is far too low given the evidence, even as it tries to defend it: “recent empirical research . . . suggests both new and used vehicle buyers value much large fractions of lifetime fuel costs than NHTSA assumes.”⁷⁷

NHTSA cites only one recent study that uses a novel method to support hyperbolic discounting.⁷⁸ That study covers only buyers of low cost (and theft-prone) Hyundai and Kia cars, which aren’t representative, during a recessionary period of low gasoline prices.

NHTSA also claims manufacturers have told the agency car buyers value only “between 2 to 3 years’ worth-of-fuel savings when making purchasing decisions.”⁷⁹ NHTSA cites nothing to support this. And it’s untrue, at least today. Automobile manufacturers have told OMB they are skeptical of the myopia asserted in some of the literature.⁸⁰ NHTSA cannot pick a low estimate based on hearsay that’s not even in the record, when the weight of empirical evidence in recent published studies supports a higher valuation.

⁷⁵ PRIA 2-6.

⁷⁶ 88 Fed. Reg. 56,239.

⁷⁷ PRIA 5-6.

⁷⁸ PRIA 2-6 (citing Kenneth T. Gilligham, *Consumer Myopia in Vehicle Purchases: Evidence from a Natural Experiment*, 13 Am. Econ. J. Econ. Pol’y 207 (2021) (0.16% to 0.39% valuation).

⁷⁹ 88 Fed. Reg. at 56,238.

⁸⁰ Exhibit C.

At best, the current evidence shows car buyers don't predict fuel prices perfectly. But neither does NHTSA. Indeed, as NHTSA has admitted, the 2012 rule's predicted fuel prices were extremely inaccurate.⁸¹ NHTSA cannot claim to know better than consumers, nor may it substitute its "feel[ings]."

In sum, as the National Research Council found in 2015, "the evidence on the existence of the energy paradox is inconclusive."⁸² Because the evidence is inconclusive, the scientifically reasonable thing to do would be to reject the hypothesis of market failure as unproven, not to embrace the most extreme incarnation of it.⁸³ At a very minimum, NHTSA should use a more conservative payback period in its central analysis.

NHTSA uses a 60-month period in the sensitivity analysis. As NHTSA's analysis shows, that reduces the asserted net benefit of the preferred CAFE alternative from \$16.8 billion to \$6.1, and the net benefit is negative with a 5% discount rate.⁸⁴ The payback period is highly significant. A more plausible alternative to 30 months should be modeled in the central analysis, not relegated to a sensitivity analysis.

For heavy-duty pickup trucks and vans, the numbers are far worse. A 60-month payback period means all the alternatives considered by NHTSA have net costs, using any discount rate, even when using the high-impact estimate of the social cost of carbon.⁸⁵ In other words, a 60-month payback period suggests NHTSA should do nothing to increase stringency for these vehicles.

And there is no empirical evidence supporting an energy efficiency gap in this heavy-duty market, so even a 60-month payback period is generous. As NHTSA admits, half of these vehicles are bought by sophisticated commercial operators with an incentive to maximize profits.⁸⁶ NHTSA's assumption that these buyers have similar payback periods therefore rests on speculation, not evidence.⁸⁷ That is arbitrary, and not remotely how economics or cost-benefit analysis should work.

NHTSA arbitrarily assumes opportunity costs for drivers are zero

⁸¹ 85 Fed. Reg. at 24,230–31.

⁸² NRC 2015, at 315.

⁸³ *Cf. Am. Pub. Gas Ass'n v. United States Dep't of Energy*, 22 F.4th 1018, 1027 (D.C. Cir. 2022).

⁸⁴ PRIA 9-9–10, 9-52. Consistent with its misleading presentation, NHTSA doesn't provide a sensitivity analysis of the separate standards in the PRIA.

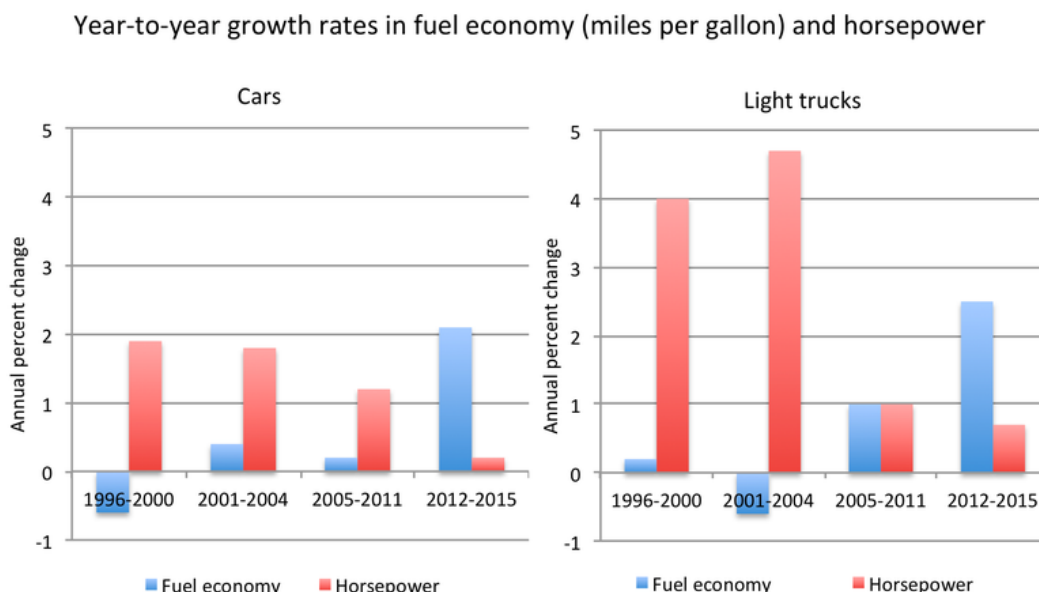
⁸⁵ PRIA 9-26.

⁸⁶ PRIA 2-8.

⁸⁷ PRIA 2-8.

Even if there is an “energy efficiency gap,” that wouldn’t show tighter standards benefit drivers.⁸⁸ Tighter standards may mean less of other desirable things drivers like, including acceleration, towing capacity, trunk space, safety, and other features. Acceleration and fuel economy are correlated. The National Research Council, for example, estimated that for a typical 3,500-pound car, “a 10 percent increase in 0 to 60 mph acceleration time will result in a 2.6 percent increase in fuel consumption.”⁸⁹

The trade-off is evident in historical data. During the 1990s, when the standards were constant, manufacturers used efficiency improvements to increase horsepower.⁹⁰ By contrast, most of the improvement in fuel economy since 2005, when the light truck standard first tightened, has been achieved by foregoing gains in horsepower.⁹¹ The same pattern was evident when the standard for cars tightened in 2011.



(Source: Leard RFF (2017)).

This trend can be seen in other metrics too. Since 2005, for example, the share of cars and trucks with V-8 and V-6 engines has plummeted. In 2005, only a quarter of gasoline cars and light trucks had V-4 engines. By 2022, the number had grown to over 55%, displacing V-6 and V-8

⁸⁸ Leard at 159.

⁸⁹ NRC (2015), at 59.

⁹⁰ Leard at 160, 161 Panel B & App’x Figures B.1 & B.2.

⁹¹ Leard at 171 (trade-off is 0.88 out of every 1 percent increase)

engines.⁹² NHTSA’s standards are sending the classic American V-8 engine down the road to the scrap yard.

A published study by Benjamin Leard and other economists at Resources for the Future, attached as Exhibit C, shows the trade-off between power and fuel economy cannot be ignored. Consumers are willing to pay lots for acceleration: by Leard’s estimate, “\$1,100 for a 1-second reduction of the time needed to accelerate from rest to 60 miles per hour (0-to-60 time).”⁹³ This is “three times as much” as consumers are willing to pay “for a comparable fuel economy performance increase.”⁹⁴ When consumer taste for acceleration is taken into account, “tighter standards reduce consumer welfare by 0.04% of the average price per vehicle sold.”⁹⁵ In other words, car buyers are, on average, worse off with tighter standards. Failing to model effects on attributes such as horsepower, therefore, leads to mistaken estimates of how drivers value cars.

It also leads to mistaken economic analyses. Leard’s numbers, for example, mean the agencies underestimated costs from 2012 to 2016 “by a factor of 4”: “if the agencies had included forgone performance improvements in their analysis, they would have estimated the costs of the standards to be \$4.6 billion (39%) higher than the estimates they reported.”⁹⁶

But NHTSA continues ignoring opportunity costs, committing the fallacy of the free lunch.⁹⁷ The CAFE model assumes manufacturers keep acceleration constant. A model that assumes stagnation is clearly inaccurate, as the National Research Council warned in 2015.⁹⁸

NHTSA acknowledges “the economics literature support that these tradeoffs have existed in the past.”⁹⁹ But NHTSA still assumes “opportunity costs” are zero, which is clearly wrong.¹⁰⁰ Indeed, it is arbitrary and capricious. Although “the record shows that there is a range of values, the value of [opportunity costs] is certainly not zero.”¹⁰¹

⁹² EPA, 2022 Fuel Economy Trends Report 45–46.

⁹³ Leard at 160; *see also id.* at 169.

⁹⁴ Leard at 160.

⁹⁵ Leard at 161.

⁹⁶ Leard at 172.

⁹⁷ *See* Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 *The Journal of Law & Economics* 1 (1969).

⁹⁸ NRC (2015), at 320 (“The Agencies do acknowledge that maintaining a reference or baseline case that shows no change in other attributes in the absence of the standards is a potential problem with their analysis but do not attempt to address it.”).

⁹⁹ PRIA at 9-53.

¹⁰⁰ 88 Fed. Reg. at 56,255; PRIA 9-55.

¹⁰¹ *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1200 (9th Cir. 2008).

NHTSA first argues that horsepower has continued to improve. But as the U.S. Court of Appeals for the D.C. Circuit Court told NHTSA many years ago, relating to “weight,” another automobile attribute NHTSA ignored:

This argument misses the point. The appropriate comparison, which NHTSA must but did not address, is between the world with more stringent CAFE standards and the world with less stringent standards. The fact that weight has remained constant over time despite mileage improvements shows the effect of technological improvements, to be sure, but in no way undermines the natural inference that weight is lower than it would be absent CAFE regulation.¹⁰²

Simply substitute “weight” for acceleration, and the analysis is the same.

NHTSA’s best argument is that the opportunity costs of tighter standards, although significant, are hard to estimate, because consumers have many reasons for buying cars that are hard to observe or model. But this is an argument against assuming a market failure, not for it. If NHTSA cannot reliably estimate opportunity costs, then it has no basis to claim myopia. Drivers may or may not be myopic, but NHTSA is myopic, even blind: it ignores *all* trade-offs faced by buyers. Therefore, NHTSA’s assumed market failure is unsupported by the evidence and arbitrary and capricious.¹⁰³

NHTSA made a similar “uncertainty” argument for ignoring the social cost of carbon, but courts rejected it.¹⁰⁴ That should be the death knell for NHTSA’s argument about “uncertainty”: The uncertainty in estimating consumer trade-offs pales in comparison with the uncertainty in estimating the social cost of carbon, which requires projecting complex climate feedback loops, tipping points, and the pace of population growth, economic growth, technology, and human adaptation over centuries, among other things. And yet, the Ninth Circuit was not impressed, and concluded it was unreasonable to tag the price at carbon at zero.¹⁰⁵ Necessarily, it is at least equally unreasonable to price opportunity costs at zero.

The government has already devoted enormous efforts to developing estimates of the social cost of carbon to justify expensive rules, but to date, it has devoted almost no effort to estimating opportunity costs that could easily dwarf the climate benefits. The asserted “private welfare” benefits are \$62 billion, and the climate benefits are \$17 billion. If as Lead predicts, the opportunity

¹⁰² *Competitive Enter. Inst. v. NHTSA*, 956 F.2d 321, 325 (D.C. Cir. 1992) (Williams, J.).

¹⁰³ *Am. Pub. Gas Ass’n v. United States Dep’t of Energy*, 22 F.4th 1018, 1027 (D.C. Cir. 2022).

¹⁰⁴ *Ctr. for Biological Diversity*, 538 F.3d at 1200.

¹⁰⁵ *Ctr. for Biological Diversity*, 538 F.3d at 1198–1203.

costs to car buyers negate the \$62 billion in benefits, that'd be fatal to the rule. So, this is important, but the agency doesn't seem to care. The only thing that can explain this disparate treatment is that one price tag expands the consequence and emoluments of bureaucratic office, and the other doesn't.

Considering opportunity costs is far easier than estimated the social cost of carbon for a separate reason: if NHTSA can't estimate trade-offs with precision, it can alternatively adopt attribute-based standards that account for acceleration to avoid the perverse trade-off.¹⁰⁶ When it comes to heavy-duty pickup trucks and vans, for example, NHTSA's attribute-based standards account for salient performance attributes correlated with fuel economy: payload and towing capacity. But when it comes to passenger cars and light-trucks, NHTSA controls only their footprint. Instead of dealing with the problem, NHTSA has therefore sought to "obscure" the trade-off, which is again arbitrary and capricious.¹⁰⁷

NHTSA purports to include a sensitivity analysis of the opportunity costs for automobile drivers. This is no real analysis. NHTSA simply assumes a 72-month payback period, instead of a 30-month payback period.¹⁰⁸ Assuming drivers discount fuel savings less foolishly than NHTSA imagines they do is no metric of opportunity cost.

Because NHTSA arbitrarily assumes no opportunity costs to consumers in the rule, its analysis of "economic practicability" for the CAFE standards is fundamentally flawed, arbitrary, and unlawful. NHTSA must stop trying to hoodwink the public.

3. *NHTSA relies on inaccurate nominal vehicle prices to project costs*

NHTSA's proposal also relies on manufacturer suggested resale prices to estimate the technology costs. These are nominal prices, not real prices, and do not reflect actual costs. To comply with the rule, manufacturers are forced sell electric cars and hybrids at a discount, and therefore must raise prices on gasoline cars to make up for the losses. Using technology cost estimates derived from these nominal prices ignores these regulatory cross-subsidies and therefore significantly understates technology costs. There is overwhelming evidence that the manufacturing costs for electric vehicles far exceed their current nominal price, and that current prices are the

¹⁰⁶ 49 U.S.C. § 32902(b)(3).

¹⁰⁷ *Competitive Enter. Inst.*, 956 F.2d at 325.

¹⁰⁸ PRIA 9-54.

result of (large) cross subsidization. Ford loses about \$60,000 per vehicle, meaning that each vehicle represented a more than 100 percent loss.¹⁰⁹ NHTSA's technology costs therefore do not reflect reality.

4. NHTSA's discount rate for fuel savings is too low

NHTSA rigs the cost-benefit analysis in yet another way. It prefers a discount rate of 3% instead of 7% for fuel savings in its central analysis, based on the real return on 10-year treasury notes from 1973 to 2003. According to OMB's Circular A-4, that's the recommended discount rate for rules that affect private consumption opportunities.¹¹⁰

As William Nordhaus has explained, Circular A-4 is confused.¹¹¹ The difference in rates simply reflects the rate paid for risk-free and risky assets. Setting aside Circular A-4, NHTSA's discount rate is far too low. New car loans usually hover above this rate, particularly for consumers with bad credit ratings.¹¹² Rational consumers borrowing to pay for greater fuel economy would demand a real rate of return that exceeds at least the real loan rate. Moreover, investing in fuel economy is not risk-free. The more fuel-efficient car may be totaled, driven less than expected, or fuel prices may fall. Oil prices in particular are notoriously volatile. A risk-free rate is therefore improper for an investment in a technology premised on the future price of oil. Rather, the discount rate should reflect the real opportunity cost. Instead of paying more for a hybrid, car buyers could invest their money in a diversified index fund that has less concentrated risk and a real rate of return far exceeding 3%. As automobile manufacturers have told OMB, a 6% discount rate is more appropriate given the empirical evidence, so the alternative 7% discount rate is closer the truth.¹¹³

What makes no sense, however, is assuming that consumers discount fuel hyperbolically and at 3% at the same time. NHTSA has to make a modeling choice. If it assumes consumers hyperbolically discount fuel savings when determining the proper "payback period" for the baseline, then,

¹⁰⁹ Robert Bryce, *Unplugged: Ford Lost \$72,762 For Every EV It Sold in Q2*, Substack (July 27, 2023); see also Esha Dey, *EV Make Lucid's \$338,000 Los Per Car Turns Investors Off*, Bloomberg (Oct. 6, 2023), <https://finance.yahoo.com/news/ev-maker-lucid-338-000-113355345.html> (i.e., Lucid loss per car \$-338k/EV, Rivian, \$-110k/EV).

¹¹⁰ 88 Fed. Reg. at 56,248.

¹¹¹ William Nordhaus, *The Climate Casino* 189 (2013).

¹¹² FRED, *Finance Rate on Consumer Installment Loans at Commercial Banks, New Autos 49 Month Loan*, <https://fred.stlouisfed.org/series/TERMCBAUTO48NS> (last visited Oct. 16, 2023).

¹¹³ Exhibit C.

it can't turn around and presume that consumers barely discount fuel savings at all. That's arbitrary.

Applying a 7% discount rate for fuel savings, the putative "private welfare" benefits fall significantly: From \$156.4 billion to \$75.8 billion for the passenger car and light truck CAFE standards,¹¹⁴ and from \$3 billion to \$1.3 billion for the heavy-duty van and pickup truck standards.¹¹⁵ Likely by design, NHTSA's risk-free rate of return biases the analysis in favor of excessive regulation.

D. The CAFE Standards Are Too Stringent

As already explained, NHTSA includes an enormous quantity of electric automobiles in the baseline for the analysis, so the standards should not pass go. They are illegal, and need to be rethought from the ground up.

Setting that aside, the proposed CAFE standards are not "maximum feasible." In setting CAFE standards, NHTSA "shall 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."¹¹⁶ These factors point against making the standards for passenger cars and light trucks more stringent.

One thing should be clear at the outset. NHTSA does not set "combined" standards for cars and light trucks, as it often pretends in the preamble. Rather, NHTSA sets separate standards.¹¹⁷ Each standard must be independently justified by the statutory criteria.

1. Passenger Car Standards

Increasing passenger car standards by two percent each year makes no sense. This alternative, "PC2," will cost society on net, by NHTSA's estimate, over five billion dollars.

¹¹⁴ PRIA 8-43.

¹¹⁵ PRIA 8-101.

¹¹⁶ 49 U.S.C. § 32902(f).

¹¹⁷ 49 U.S.C. § 32902(f).

TABLE V-8—INCREMENTAL BENEFITS AND COSTS OVER THE LIFETIMES OF TOTAL PASSENGER CAR FLEET PRODUCED THROUGH MY 2032 (2021\$ BILLIONS), 3 PERCENT SOCIAL DR, BY ALTERNATIVE, 3% SC-GHG DR

Alternative	PC1	PC2	PC3	PC6
Private Costs (see Table V-6 above):				
Subtotal—Incremental Private Costs	8.6	11.5	16.7	26.6
External Costs:				
Congestion and Noise Costs from Rebound-Effect Driving	-0.3	0.0	1.4	2.2
Safety Costs Not Internalized by Drivers	-0.3	-0.1	2.4	3.1
Loss in Fuel Tax Revenue	0.4	0.8	1.0	2.5
Subtotal—Incremental External Costs	-0.2	0.6	4.9	7.9
Total Incremental Social Costs	8.4	12.1	21.6	34.5
Private Benefits (see Table V-6 above):				
Subtotal—Incremental Private Benefits	2.9	5.7	8.0	19.0
External Benefits:				
Reduction in Petroleum Market Externality	0.1	0.1	0.2	0.5
Reduced Climate Damages, 3% SC-GHG DR	0.6	1.3	1.7	4.1
Reduced Health Damages	0.0	0.0	-0.1	-0.1
Subtotal—Incremental External Benefits	0.7	1.4	1.8	4.5
Total Incremental Social Benefits, 3% SC-GHG DR	3.6	7.1	9.8	23.5
Net Incremental Social Benefits, 3% SC-GHG DR	-4.7	-5.1	-11.7	-10.9

Of course, as already explained, NHTSA’s estimate of the social cost is too rosy. It ignores opportunity costs to consumers, it unrealistically assumes extreme consumer myopia, it understates costs, and uses faulty discount rates. But accept, for a minute, NHTSA’s fantasy world. It’s still a bad world.

NHTSA concludes the proposed passenger car standards would make society worse off to the tune of five billion dollars. That’s more than the GDP of many African nations. Is there anything making NHTSA regulate “in this fundamentally silly way”?¹¹⁸ No. There isn’t. So NHTSA’s passenger car standard is arbitrary and capricious.

In the past, NHTSA has balanced “economic practicability” against other factors by performing a cost-benefit analysis and picking the alternative that maximizes social welfare.¹¹⁹ This approach has been upheld by the Ninth Circuit, and it makes sense.¹²⁰ After all, NHTSA monetizes the externalities and internalities supposedly addressed by CAFE, so the marginal cost-benefit analysis balances the statutory factors.

Now NHTSA says that although maximizing welfare is important, NHTSA can pick an alternative that “produces the largest reduction in fuel consumption while still remaining net beneficial.”¹²¹ Even conceding the premise, NHTSA’s analysis shows the passenger car standard is not “net beneficial.” So, by NHTSA’s logic, the “PC2” standard is unlawful. Only PC0 is lawful.

¹¹⁸ Tr. of Oral Arg. at 13, *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489 (2014) (Nos. 12-1182, 12-1183).

¹¹⁹ 88 Fed. Reg. at 56,343.

¹²⁰ *Ctr. for Biological Diversity*, 538 F.3d at 1194–97.

¹²¹ 88 Fed. Reg. at 56,343.

NHTSA tries to avoid the patent illegality of its PC2 alternative by bundling the passenger car standard with the standard for light trucks, but that’s a silly trick. The passenger car standard must be independently justified under CAFE. And by NHTSA’s numbers, it isn’t. That’s all NHTSA needs to know to abandon the proposal. But for the sake of completeness, we provide a perspective on each of the relevant factors.

Technological Feasibility

NHTSA predicts that by 2032, the fleet of new passenger cars will need to have an average fuel economy of 66.4 miles per gallon.¹²² Only gasoline hybrids and electric cars exceed 60 miles per gallon.¹²³ Only three non-hybrid passenger car models have compliance values over 50 miles per gallon.¹²⁴ But these cars have tiny footprints, so they have far more stringent targets than the average car.¹²⁵ So, the standard is “technologically feasible” only for expensive hybrids, or the subsidized plug-in electric cars NHTSA may not consider.

This is shown by NHTSA’s technology projections. NHTSA expects the rule will cause a *decline* in the share of more efficient internal combustion engine configurations. By 2032, “advanced engines” fall by 8%.¹²⁶ By contrast, hybrids increase by 8%, and lightweighting by 19%. In other words, manufacturers will comply by discontinuing more efficient gasoline engines, and making hybrids, electric cars, and reducing car weight. The proposed rules are so stringent it’s not sensible to continue improving the internal combustion engine. NHTSA has reached the end of the “journey,” but it keeps marching on.¹²⁷

If one accepts NHTSA’s accounting, then its standards may be “technologically feasible,” but that doesn’t mean it’s a good idea. That’s where the other factors come in.

Economic Practicability

The proposed passenger car standards are not good for the consumers. By NHTSA’s rosy cost-benefit estimates, the proposed passenger car standards will cost drivers \$5.8 billion, on net,

¹²² 88 Fed. Reg. 56,137; PRIA App’x I, 44.

¹²³ Exhibit D.

¹²⁴ The Mitsubishi Mirage, the Hyundai Accent, and the Kia Rio.

¹²⁵ The Mirage, for example, would have to meet a standard of 75.6 miles per gallon by 2032, which is out of reach.

¹²⁶ 88 Fed. Reg. at 56,332, Tbl. V-2.

¹²⁷ 88 Fed. Reg. at 56,350.

through model year 2032. So, one would think, economic practicability weighs heavily against further tightening the standards.

The standards will also devastate “consumer choice.” The proposed standards can only be met through serious “product restrictions.”¹²⁸ For example, as NHTSA predicts, manufacturers will meet the standards by reducing offerings of more efficient gasoline cars, which have far better prices than hybrids and better prices, refueling times, and range than electric cars. The standards will also make it economically impracticable to sell high-displacement V-8 and V-6 engines, except at prices few can afford. The standards are therefore negatively affecting consumer choice. Indeed, depriving most consumers of choice is precisely the Administration’s goal: buy electric, or take the bus (or just stay home, like NHTSA’s employees).

The standards also affect car sales, creating a deadweight loss to society. Even ignoring the millions of electric cars considered in NHTSA’s “baseline,” NHTSA predicts an incremental 82,000 in lost car and light truck sales by model year 2032.¹²⁹ That’s a lot of lost sales, equivalent to billions of dollars in lost revenues for manufacturers.

Energy Conservation

As for energy conservation, NHTSA doesn’t show the Nation’s need to conserve energy is at all significant or pressing. By stark comparison with 2007, the United States is now a net exporter of primary energy, including petroleum, and it will remain so for the foreseeable future this century.¹³⁰ And the United States imports over half of its imported oil from Canada, hardly a national security threat.¹³¹

By contrast, the electric automobiles that NHTSA assumes—or rather, commands—rely on mineral and battery supply chains controlled by the Communist Party of China, a geopolitical rival. The transition NHTSA seeks therefore presents a far more serious national security threat.¹³² By essentially codifying these state mandates as federal law, NHTSA is affirmatively endangering

¹²⁸ *Public Citizen v. NHTSA*, 848 F.2d 256, 263 (1988).

¹²⁹ PRA 9-12.

¹³⁰ DOE FOTW 1310, <https://www.energy.gov/eere/vehicles/articles/fotw-1310-october-2-2023-united-states-has-been-positive-net-exporter>; *EIA: US to remain net exporter of petroleum products through 2050*, *Oil & Gas J.* (Mar. 23, 2023).

¹³¹ 88 Fed. Reg. at 56,317.

¹³² See C. Boyden Gray, *American Energy, Chinese Ambition, and Climate Realism*, 4 *American Affairs* 80, 87 (2021).

our national security and making us more dependent on China, not making things better for the United States.

NHTSA claims drivers are still subject to economic shocks from the volatility of oil prices. But NHTSA quantifies the benefit of addressing that externality at a mere \$0.1 billion, so the risk of an economic shock doesn't remotely justify the enormous costs of proceeding with this industrial plan.¹³³

Because the core energy conservation considerations that motivated fuel economy standards are extremely weak, NHTSA has resorted to mission creep. For some time, NHTSA has claimed it is *also* an environmental regulator. It has sneaked environmental considerations such as climate change into "the need to conserve energy." Indeed, in a *reductio ad absurdum*, NHTSA claims this factor somehow also includes this Administration's controversial notion of "environmental justice."¹³⁴ No, it doesn't.

There's already an environmental regulator charged with reducing air pollution: EPA. NHTSA's reading of the statute is precluded by *Massachusetts v. EPA*, which reasoned that EPA's obligation to regulate air pollution, including greenhouse gases is "wholly independent of [NHTSA's] mandate to promote energy efficiency."¹³⁵ If NHTSA is charged with regulating to protect the public from global climate change, then its mandate would not be "wholly independent." Case law holding NHTSA may consider climate change is therefore in serious conflict with Supreme Court precedent. Perhaps NHTSA thinks *Massachusetts v. EPA* was wrong. If so, it should tell EPA, and the Supreme Court. After all, as the Solicitor General has said, it's never too late to correct a mistaken statutory interpretation.¹³⁶

Even if the statute could be read to include climate change, and it can't, that presents a question of major economic and political significance, and NHTSA lacks clear authorization to consider climate change or environmental justice.¹³⁷

Regardless, even if climate change is part of the analysis, NHTSA can't use the *global* cost of carbon to determine "the need of the *United States* to conserve energy." Most of the global cost

¹³³ 88 Fed. Reg. at 56,341.

¹³⁴ 88 Fed. Reg. at 56,251.

¹³⁵ 549 U.S. 497, 532 (2007).

¹³⁶ See Tr. of Or. Arg. at 38:7–10, *United States v. Texas*, 143 S. Ct. 1964 (2023) (No. 22-58) ("I don't think it's ever too late for this Court to give the statute its proper construction when you actually look at its text, context, and history.") (Solicitor General Prelogar).

¹³⁷ *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

estimated by NHTSA would be avoided in foreign nations, such as Africa and East Asia.¹³⁸ But NHTSA's is supposed to make determinations based on the needs of the Nation, not the world. Congress didn't authorize NHTSA to dole out "foreign aid." And in any event, as shown above, climate change doesn't justify the rule, and the putative air quality benefits, as NHTSA concedes, are "small."¹³⁹ Indeed, they are trivial.

* * *

We end where we began. NHTSA's cost-benefit analysis "balances" all the relevant factors, and conclusively shows the balance tips decisively against any increase in the stringency of the passenger car standard. NHTSA needs clear authority to make society poorer in pursuit of its climate goals, and it has no clear authority. Indeed, finalizing the proposed rule would be arbitrary and capricious under ordinary principles of administrative law because, per *Michigan v. EPA*, it wouldn't be "rational . . . to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."¹⁴⁰ It would also run afoul of non-delegation principles and the major questions doctrine. If NHTSA has discretion to make society worse off to the tune of \$5 billion and codify a phase-out of internal combustion engines, then NHTSA's authority has no limiting principle.

2. *Light Truck Standards*

NHTSA wants to increase the light-truck standard by 4% each year. NHTSA estimates this will yield \$21.9 billion in net benefits, assuming a whopping \$53.7 billion in private welfare benefits.¹⁴¹ Of course, those numbers are way (*way*) wrong. As explained earlier, the private consumer benefits are a product of NHTSA's unfounded "feel[ings]." In a proper cost-benefit analysis, the \$46.5 billion in total costs should easily outweigh the net benefit. By that metric, the statutory balance favors doing nothing.

Other than that, the analysis is no different for light trucks, so we won't repeat the factor-by-factor analysis. But we briefly explain why the CAFE balance can't possibly support the proposal.

¹³⁸ See C. Boyden Gray, *American Energy, Chinese Ambition, and Climate Realism*, 4 *American Affairs* 80, 87 (2021). Only about 7 to 10% of the social cost of carbon is avoided in the United States, which reduces the social cost of carbon to less than \$10 per ton, as NHTSA has explained. 85 Fed. Reg. at 24,733–34.

¹³⁹ 88 Fed. Reg. at 56,330.

¹⁴⁰ 576 U.S. 743, 752 (2015).

¹⁴¹ 88 Fed. Reg. at 56,341–42, Tbl. V-9.

NHTSA’s “LT4” alternative would require an estimated average fuel economy standard for the light truck fleet of 54.5 miles per gallon.¹⁴² For reference, the average fleet performance in 2019 was 29.6 miles per gallon. The pace of change NHTSA imagines is staggering. From 2004 to 2019, light truck fuel economy standards increased by 29%. NHTSA now wants to increase it by 80% in ten years—from 2022 to 2032—at a point where manufacturers see diminishing marginal returns, as every improvement in fuel economy is more expensive and yields less fuel savings for drivers.

No suite of conventional spark-ignition or compression-ignition engine technologies can achieve the standard for light trucks. That’s why, even after manufacturers are assumed to forcibly sell millions of electric light trucks, NHTSA projects manufacturers will fail to meet the standard, and will pay enormous civil penalties.¹⁴³ Most regulators don’t treat violating the law as a “compliance strategy”—indeed, there’s nothing more frowned upon than an entity that treats law-breaking as just “a cost of doing business.” NHTSA apparently is an exception to this rule, suggesting that it’s not really a penalty, but a *de facto* tax on light trucks operated on fuels it doesn’t like.

As with passenger cars, NHTSA also expects the light truck standard will cause a decline in the share of efficient internal combustion engine configurations. By 2032, “advanced engines” fall by a staggering 25%. By contrast, hybrids increase by 15%, and light-weighting by 28%.¹⁴⁴ In other words, manufacturers will comply by discontinuing efficient gasoline engines and making more hybrids, electric cars, and reducing weight. This may not show technology infeasibility. But it does show economic impracticability. And as with passenger cars, nothing in the “need to conserve energy” outweighs this. NHTSA must not increase the stringency of the standards for light-duty trucks.

E. The Heavy-Duty Vehicle Standards Are Too Stringent

The proposed heavy-duty van and light truck standards are also unlawful, for multiple reasons.

1. NHTSA fails to give “3 full model years of regulatory stability”

When setting its heavy-duty standards NHTSA must give manufacturers “4 full model years of regulatory lead-time” and “3 full model years of regulatory stability.” 49 U.S.C. § 32902(k)(3). The term “regulatory stability” is not defined in the statute.

¹⁴² 88 Fed. Reg. at 56,137.

¹⁴³ 88 Fed. Reg. at 56,137.

¹⁴⁴ 88 Fed. Reg. at 56,332.

NHTSA interprets the requirement as “ensuring that manufacturers will not be subject to new standards in repeated rulemakings too rapidly, given that Congress did not include a minimum duration period for the [heavy-duty] standards.”¹⁴⁵ NHTSA “further interprets the statutory meaning as reasonably encompassing standards which provide for increasing stringency during the rulemaking time frame to be the maximum feasible.”¹⁴⁶ In other words, NHTSA believes “stability” means that “standards [must] remain in effect for three years before they may be increased by amendment. It does not prohibit standards that contain predetermined stringency increases.”¹⁴⁷

No. A regulatory standard is not “stable” if it continually ratchets up each year. One wouldn’t say that “interest rates have stabilized” if the Fed said they’d increase year over year. A child’s weight increases as they grow up, and while this is entirely predictable, one would not say that their weight was stable. This three-year period of regulatory stability for heavy-duty vehicles was enacted because heavy-duty vehicles have longer redesign cycles, and manufacturers would therefore have difficulty meeting standards that ratchet up every year. NHTSA’s interpretation of the law is therefore inconsistent with “regulatory stability.”

2. *The proposed standards are not “appropriate” or “cost effective”*

NHTSA must set standards “to achieve the maximum feasible improvement[s]” “that are appropriate, cost-effective, and technologically feasible.” 49 U.S.C. § 32902(k)(2).

As *Michigan v. EPA* holds, “appropriate” is “the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors.”¹⁴⁸ The term asks NHTSA to make an all-things considered judgment that the advantages outweigh the disadvantages.¹⁴⁹

Here, the standards are not appropriate. When NHTSA considers a more reasonable 60-month payback period, the standards have negative benefits. Therefore, the disadvantages outweigh the advantages.¹⁵⁰

¹⁴⁵ 88 Fed. Reg. 56,311.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Michigan*, 576 U.S. at 752.

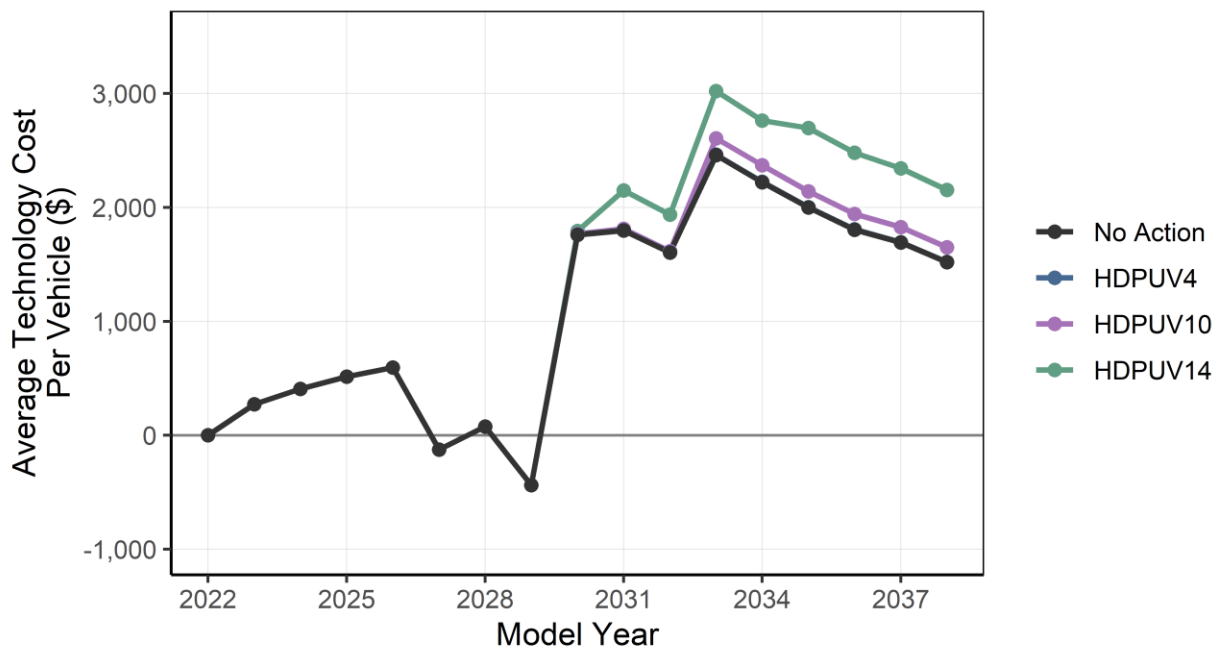
¹⁴⁹ *Id.* at 753.

¹⁵⁰ PRIA 2-8.

The term “cost-effective” is more restrictive. NHTSA reads “cost-effective” to mean multiple things at the same time, including that the rule has net benefits.¹⁵¹ But that broad reading would make the term “appropriate” surplusage, so context requires a narrower reading of cost-effective. In context, given the primary statutory goal of promoting fuel efficiency and thus energy savings, not solving climate change, cost-effective means the fuel savings must outweigh the regulatory cost over the lifetime of the model year vehicles.

NHTSA attempts to show the proposed standards satisfy this “cost-effective” metric by considering fuel savings for all vehicles cumulatively until 2050.¹⁵² That timeline is entirely inappropriate. NHTSA sets standards for each model year. To set the standard for a particular model year, NHTSA must show the standard would be cost-effective for the lifetime of the vehicles in that model year.

NHTSA makes that showing here, but again, only because it assumes an extremely low payback period, and because it relies on a familiar trick: blaming most of the technology costs on the regulatory “baseline.”



The baseline reflects the “Advanced Clean Trucks” rule adopted in several states, which mandates the electrification of the fleet. That’s a problem. Although the Advanced Clean Trucks rule

¹⁵¹ 88 Fed. Reg. at 56,320.

¹⁵² 88 Fed. Reg. at 56,353.

has received a waiver of preemption under the Clean Air Act,¹⁵³ EPA’s waiver is unlawful for multiple reasons that are still being litigated.¹⁵⁴

In any event, NHTSA strangely assumes manufacturers will decide to redesign their vehicles to be electric right before the model year when the rule kicks in, even if it does nothing.¹⁵⁵ This is not how manufacturers do business. The entire industry does not jointly redesign all vehicles in one model year. The industry typically spreads out the redesign and refresh schedules of their vehicles over several model years. NHTSA’s modeling of technology costs therefore has little basis in industry reality.

3. *The proposed standards unlawfully subsidize electric vehicles*

NHTSA must follow “appropriate . . . measurement methods” in its standard setting for heavy-duty vehicles. 49 U.S.C. § 32902(k)(2). But NHTSA arbitrarily assumes that electric heavy-duty trucks consume “0 gal/100 miles” which “significantly influences [NHTSA’s] modeling results.”¹⁵⁶ “This is an artifact of the mathematics of averaging, where including a ‘0’ value in the calculation effectively reduces other values by as much as 50 percent (depending on sample size).”¹⁵⁷

NHTSA is well aware, however, that electric vehicles don’t have an infinite fuel efficiency, as this assumption implies. Even ignoring the significant upstream losses in efficiency when fuel is combusted to produce electrical energy, electric vehicles don’t convert all energy stored in the battery into useful work.¹⁵⁸ And unlike gasoline cars, the efficiency of these vehicles is highly variable depending on charging patterns, and declines significantly in cold climates.¹⁵⁹ The assumption of perfect efficiency is therefore improper: an enormous subsidy for a particular technology; not the neutral efficiency performance standard Congress envisioned. This is inappropriate and arbitrary.

¹⁵³ 88 Fed. Reg. 20,668 (Apr. 6, 2023).

¹⁵⁴ *See Iowa v. EPA*, No. 23-1144 (D.C. Cir. filed June 5, 2023).

¹⁵⁵ PRIA 8-78.

¹⁵⁶ 88 Fed. Reg. 56,359.

¹⁵⁷ *Id.*

¹⁵⁸ Dep’t of Energy, Office of Energy Efficiency & Renewable Energy, *All-Electric Vehicles*, <https://www.fueleconomy.gov/feg/evtech.shtml#:~:text=Energy%20efficient.,to%20power%20at%20the%20wheels> (last visited Oct. 16, 2023).

¹⁵⁹ Joann Muller & Margaret Harding McGill, *The cold hard truth about electric vehicles in winter*, Axios (Mar. 4, 2022), <https://www.axios.com/2022/03/04/the-cold-hard-truth-about-electric-vehicles-in-winter>.

F. NHTSA's Process Violates the Administrative Procedure Act

NHTSA's notice also violates the Administrative Procedure Act (APA). The short comment window for an enormously complex set of three different rules, and NHTSA's prohibition on comments over 15 pages, means NHTSA fails to provide a meaningful opportunity for public comment. No statute authorizes NHTSA's page limit. And in any event, this document satisfies the rule because NHTSA's notice involves three separate rulemakings and an environmental impact statement, not just one rulemaking.¹⁶⁰

G. Ann Carlson Is Not "Acting Administrator"

The proposed rule is signed by "Ann Carlson, *Acting Administrator*."¹⁶¹ But no one by that name is Acting Administrator of NHTSA. It appears the proposal has been signed by a usurper. Therefore, the rule cannot move forward.

In a detailed letter to President Biden, several Senators have already explained why NHTSA has no current "Acting Administrator," especially not one named "Ann Carlson."¹⁶² We briefly summarize the problem.

"Officers of the United States" must be appointed by and with the consent of the Senate.¹⁶³ The Senate has not consented to the nomination of anyone named "Ann Carlson." So, it would seem, no one with that name can wield NHTSA's delegated power.

Sometimes, the President may temporarily appoint an acting officer to a vacant office under Federal Vacancies Reform Act (FVRA).¹⁶⁴ Using the FVRA to avoid Senate confirmation may be unconstitutional, at least in some instances.¹⁶⁵ But in any event, the FVRA prohibits appointing a person from serving as acting officer after "the President submits a nomination of such person to the Senate for appointment to such office," unless that person served as "the first assistant to the office" for at least 90 days.¹⁶⁶

¹⁶⁰ 49 C.F.R. § 553.21.

¹⁶¹ 88 Fed. Reg. at 56,390.

¹⁶² See Letter to the Honorable Joseph R. Biden, Jr., from Senator Ted Cruz et al. (Sept. 20, 2023), *available at* <https://www.commerce.senate.gov/services/files/796C3233-2110-4A65-ADA3-4CFA39FDE167>.

¹⁶³ U.S. Const. art. II, § 2, cl. 2.

¹⁶⁴ 5 U.S.C. § 3345(a)(3).

¹⁶⁵ See *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 311 (2017) (Thomas, J., concurring).

¹⁶⁶ 5 U.S.C. § 3345(b)(1)(A)-(B).

Here, the “first assistant” would be NHTSA’s Deputy Administrator.¹⁶⁷ No one named Ann Carlson was Deputy Administrator. So, no one named Ann Carlson was “first assistant.”

But, someone named “Ann Elizabeth Carlson” *was* nominated to be Administrator on March 27, 2023. That same Ann Carlson was then serving as the Acting Administrator. But once she was nominated by the President to be Administrator, she could no longer serve as Acting Administrator under the FVRA.¹⁶⁸

The President withdrew Ann Elizabeth Carlson’s nomination on May 30, 2023, because the Senate would not consent.¹⁶⁹ But, despite holding office in violation of the FVRA, and despite being rebuffed by a Senate controlled by the President’s party, it appears “Ann Carlson” continues to act as NHTSA’s “Acting Administrator.”

Perhaps the theory is that the FVRA’s prohibition ceased applying after the President withdrew Ann Carlson’s unsuccessful nomination. But the FVRA’s ban on appointing nominees doesn’t expire after a nomination tanks. Once the President “submits a nomination of such person” to the Senate, the person “may not serve as an acting officer” for that position.

This problem is serious. It means NHTSA’s actions have no force or effect.¹⁷⁰ This means NHTSA hasn’t provided notice, as required by the APA.¹⁷¹ A final rule, even one signed by a Senate-confirmed NHTSA Administrator, would therefore be procedurally defective. And, of course, any final rule executed by Ann Carlson would be fatally defective.

/s/

Marc Marie

President

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¹⁶⁷ 49 U.S.C. § 105(b); 49 C.F.R. § 501.4(a).

¹⁶⁸ 5 U.S.C. § 3345(b)(1)(A)-(B).

¹⁶⁹ Cong. Rec. S1812 (May 20, 2023), <https://www.congress.gov/118/crec/2023/05/30/169/92/CREC-2023-05-30-pt1-PgS1812-2.pdf>.

¹⁷⁰ 5 U.S.C. § 3348(d). *Cf. Norton v. Shelby Cnty.*, 118 U.S. 425, 442 (1886) (“It would be a misapplication of terms to call one an ‘officer’ who holds no office, and a public office can exist only by force of law. This seems to us so obvious that we should hardly feel called upon to consider any adverse opinion on the subject....” “An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.”).

¹⁷¹ 5 U.S.C. § 553(b).