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THE FUTURE OF THE SAFE RULE AND ACHIEVING MORE CLIMATE-FRIENDLY CAFE REGULATIONS

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THE FUTURE OF THE SAFE RULE AND ACHIEVING MORE CLIMATE- FRIENDLY CAFE REGULATIONS

MAXIMO LACERCA-DESROSIERS¹

I. INTRODUCTION

On April 30, 2020, the Environmental Protection Agency (“EPA”) and the National Highway Traffic Safety Administration (“NHTSA”) issued a final rule called the “Safer Affordable Fuel-Efficient Vehicles Rule for Model Years 2021-2026 Passenger and Light Trucks” (“SAFE Rule”) to amend the Corporate Average Fuel Economy (“CAFE”) ratings.² CAFE standards are regulations first enacted nearly fifty years ago to promote greater fuel efficiency in car manufacturing through a system of incentives and penalties.³ While the CAFE standards have been revised many times over the years, the SAFE Rule rolled back the more stringent 2012 CAFE standards that sought to align fuel efficiency with broader strategies to reduce greenhouse gas (“GHG”) emissions to address global climate change.⁴ Now that President Biden has taken office, the SAFE Rule is undergoing review, which may result in a return to more stringent standards.⁵ However, even with a regulatory fix, the

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² The Safer Affordable Fuel Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (April 30, 2020) [hereinafter SAFE Vehicles Rule].

³ UNION OF CONCERNED SCIENTISTS, *A Brief History of US Fuel Efficiency Standards* (Dec. 6, 2017), <https://www.ucsusa.org/resources/brief-history-us-fuel-efficiency>.

⁴ 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed Reg. 62,624 (Oct. 15, 2012) [hereinafter 2012 CAFE Standards].

⁵ See Press Release, The White House, Fact Sheet: List of Agency Actions for Review (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/>.

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use of CAFE standards to combat climate change is likely to remain problematic.

The impact of the CAFE standards relates to how they work. In a nutshell, CAFE standards regulate vehicle manufacturers based on the average fuel economy of the entire fleet of vehicles they produce in a given year rather than regulating individual cars or even specific models.⁶ As long as the average fuel efficiency of a car manufacturer's fleet (as weighted by sales in a given year) meets the CAFE standards, the manufacturer is deemed compliant.⁷ If the average fuel efficiency of the fleet exceeds the standard, the offending manufacturer must pay a penalty proportionate to its divergence from the standard.⁸ While this description omits much of the nuance that makes the standards complex, it is sufficient to convey a basic understanding of how the regulatory scheme uses incentives and penalties to influence the automobile industry to improve fuel efficiency.

The CAFE regulations also have profound secondary impacts, beyond just fuel economy.⁹ For example, more stringent standards can speed up the rate of technological innovation by incentivizing greater investment in research and development of green technologies.¹⁰ This in turn can reduce GHG emissions and reduce consumer demand for oil and gas.¹¹ Additionally, changing technologies can also affect the number and types of jobs in the automotive industry. Due to the far-reaching consequences of the regulation, it is important to understand why CAFE was enacted and how specific standards like those in the new SAFE Rule are likely to influence the complex nexus of CAFE objectives and secondary outcomes.

The SAFE Rule is controversial for a variety of reasons.¹² First, the SAFE Rule proposed to weaken the standards and reduce vehicle fuel economy, based on the rationale that the previous rule had set the maxi-

⁶ SAFE Vehicles Rule, 85 Fed. Reg. at 24,181.

⁷ UNION OF CONCERNED SCIENTISTS, *supra* note 3.

⁸ NHTSA, Corporate Average Fuel Economy, <https://www.nhtsa.gov/laws-regulations/corporate-average-fuel-economy> (last visited Apr. 4, 2021).

⁹ Kenneth Small, *The Elusive effects of CAFE standard*, SCIENCE DIRECT, (2018) <https://www.sciencedirect.com/science/article/pii/B9780128126202000110>.

¹⁰ U.S. DEP'T OF TRANSP., *Corporate Average Fuel Economy (CAFE) Standards* (Aug. 11, 2014), <https://www.transportation.gov/mission/sustainability/corporate-average-fuel-economy-cafe-standards> (last visited Apr. 4, 2021).

¹¹ *Id.*

¹² See Benjamin J. Hulac & Jessica Wehrman, *Final Rule on Fuel Economy Rollback Opens Door for Lawsuits*, ROLL CALL (Mar. 31, 2020, 1:37 PM), <https://www.rollcall.com/2020/03/31/final-rule-on-fuel-economy-rollback-opens-door-for-lawsuits/>; Julia Stein, *Still Not SAFE*, LEGAL PLANET (Mar. 28, 2020), <https://legal-planet.org/2020/03/28/still-not-safe/>.

most feasible standards too high for car manufacturers to meet.¹³ The SAFE Rule also eliminated a longstanding waiver program under the Clean Air Act that had authorized California to establish more stringent standards that other states could adopt as an alternative to the federal standards.¹⁴

The rule can also be seen as a politically motivated move by the Trump administration to undo a key policy of the Obama administration and to pander to the political influence of the fossil fuel industry. The 2012 CAFE standards were one of President Trump's first targets for deregulation when he took office. On March 22, 2017, newly appointed EPA Administrator Scott Pruitt and Secretary of Transportation Elaine Chao issued a public notice that the EPA would re-examine its Mid-term Determination concerning the continued adequacy of the 2012 standards because NHTSA had not completed its evaluation.¹⁵ After a notice and comment period, the EPA formally withdrew the previous Mid-term Determination in April 2018, stating that the 2012 standards had been based on "outdated information" and were "not appropriate."¹⁶ The controversial move to suddenly switch course on CAFE under the auspices of a president who openly challenged the validity of climate change sent shockwaves through the environmental community.¹⁷

The Notice of Proposed Rulemaking that introduced SAFE in August 2018 received more than 750,000 public comments—more comments than any other vehicle emissions rule had ever received.¹⁸ One of the key reasons that the proposal received so much attention was that it announced a plan to freeze the CAFE ratings for model years 2021-2026, allowing car manufacturers to remain at current levels of average fuel efficiency indefinitely.¹⁹ Not only was this a significant departure from

¹³ Proposed Rule, SAFE Vehicles Rule for Model Years 2021-2026, 835 Fed. Reg. 42,986, 42,990-91 [hereinafter Proposed SAFE Vehicles Rule]; SABIN CENTER FOR CLIMATE CHANGE LAW, *Five Important Points About the EPA's "SAFE Vehicle Rule,"* EARTH INSTITUTE (August 7, 2018), <https://blogs.ei.columbia.edu/2018/08/07/five-points-epa-safe-vehicle-rule/>.

¹⁴ The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310 [hereinafter One National Program Rule].

¹⁵ Notice of Intention to Reconsider the Final Determination of the Mid-term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light Duty Vehicles, 82 Fed. Reg. 14,671 (March 22, 2017). The original Mid-Term Evaluation was finalized on January 12, 2017, just before President Obama left office, after EPA completed an extensive technical report that included a notice and comment period. *California v. EPA*, 940 F.3d 1342, 1347 (D.C. Cir. 2019).

¹⁶ Withdrawal Notice, Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light-Duty Vehicles, 83 Fed. Reg. 16,077.

¹⁷ Hulac & Wehrman, *supra* note 12; Miranda Green, *EPA submits final controversial car emissions rule to the White House*, THE HILL (Aug. 5, 2019), <https://thehill.com/policy/energy-environment/456206-epa-submits-final-controversial-car-emissions-rule-to-the-white>.

¹⁸ SAFE Vehicles Rule, 85 Fed. Reg. at 24,181.

¹⁹ Proposed SAFE Vehicles Rule, 83 Fed. Reg. at 42,988.

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the previous CAFE standards that aimed to increase vehicle fuel efficiency, it also obstructed efforts to address climate change by reducing GHG emissions from vehicles.²⁰ The final rule, however, did not include this controversial CAFE freeze but instead required a modest annual increase of 1.5 mpg, a figure the NHTSA and EPA claimed was much more reasonable than the previous standards.²¹

While frustrating, it is possible that this move by the EPA and NHTSA is completely legal. A recent case challenging the withdrawal of the Mid-term Determination, *California v. EPA*, was dismissed by the D.C. Circuit because it determined that the withdrawal was not a final agency action and thus not ripe for judicial review.²² The EPA's decision to withdraw its prior "final" determination did not set new standards but simply reopened the analysis to determine what the EPA deemed would be more appropriate CAFE standards.²³ Meanwhile, the guidelines that the NHTSA follows when determining CAFE standards are defined by statute,²⁴ and nothing directs the agency to consider environmental impacts as a primary factor in its analysis. Additional legal challenges are ongoing and it remains to be seen whether the current SAFE standards will be set aside or upheld.²⁵

With President Biden in office, a future where SAFE remains in place seems increasingly unlikely. Recently, President Biden announced that his administration will look into replacing SAFE.²⁶ However, until the administration takes action, the SAFE Rule will remain in place. Whether car manufacturers will take advantage of this and slow their efforts to improve vehicle efficiency remains unknown, but the rate at which fossil fuels are consumed could easily see an uptick as compared to projections under the Obama CAFE standards.²⁷ Although this might pose less of a problem if the states were still allowed to set their own, more-stringent fuel economy and emissions standards, the SAFE Rule expressly preempts state standards and rescinds California's Clean Air Act waiver²⁸—a waiver that allowed California to set stronger standards

²⁰ SABIN CENTER FOR CLIMATE CHANGE LAW, *supra* note 13.

²¹ SAFE Vehicles Rule, 85 Fed. Reg. at 24,188.

²² *California v. EPA*, 940 F.3d 1342, 1353 (D.C. Cir. 2019).

²³ *Id.*

²⁴ 49 U.S.C. § 32902.

²⁵ *E.g.*, Petition for Review, Union of Concerned Scientists et al. v. NHTSA, Case No. 19-1230 (D.C. Cir. Oct. 28, 2019).

²⁶ Jennifer A. Dlouhy & Stephan Lee, *EPA Chief Vows Tougher Tailpipes Rules by July, Unwinding Trumps*, BLOOMBERG LAW (April 6, 2021), <https://news.bloomberglaw.com/environment-and-energy/epa-chief-vows-tougher-tailpipe-rules-by-july-unwinding-trumps>.

²⁷ SABIN CENTER FOR CLIMATE CHANGE LAW, *supra* note 13.

²⁸ One National Program Rule, 84 Fed. Reg. 51,310.

that other states could then adopt.²⁹ While the new EPA can perhaps change the rules and re-issue that waiver, there is no guarantee that it will last under a different presidential administration. For these reasons, the future of SAFE has far broader implications than whether cars will be more fuel-efficient in the years to come.

This comment will explore the history of the CAFE standards and the SAFE Rule as they relate to efforts to promote fuel efficient vehicles and reduce GHG emissions. This begins with a brief overview of the CAFE standards, including the roles of the EPA and the NHTSA in administering the standards, why the CAFE standards were created, and how this relates to the regulation of GHG emissions to address climate change. Next, this comment will evaluate how past legal challenges have influenced the CAFE regulations and how the SAFE Rule fits into the resulting regulatory and legal framework. Finally, this comment will discuss how the Biden administration can respond to the SAFE Rule, and what this might mean for the future of fuel-efficient vehicles and the increasingly urgent need to reduce GHG emissions to address climate change.

II. BACKGROUND

In order to understand the implications and legality of the SAFE Rule, some background on the origin and purpose of the CAFE program is necessary. This section will explore the distinct mandates of the two federal agencies responsible for the program, how this relates to the government's stance on climate change, and how the CAFE standards have changed during the four decades since their creation. This section will also explore the history of the Clean Air Act waiver and the origins of the new One National Program introduced by the SAFE Rule.

A. THE EPA, NHTSA, AND THE FEDERAL GOVERNMENT'S STANCE ON CLIMATE CHANGE

The story of the CAFE standards begins with an explanation of how the program came to be administered by two distinct agencies with very different mandates. The program has gradually changed over the years as new administrations updated the regulations, and in response to legal challenges and new laws enacted by Congress.

²⁹ U.S. EPA, *Vehicle Emissions California Waivers and Authorizations*, <https://www.epa.gov/state-and-local-transportation/vehicle-emissions-california-waivers-and-authorizations> (last visited Apr. 6, 2021).

1. *EPA Origins*

The EPA was created in 1970 with the purpose of establishing a federal agency dedicated to taking on the federal government's environmental responsibilities.³⁰ This initiated a new era of government regulation aimed at protecting the environment. With the passage of the Clean Air Act of 1970, Congress directed the EPA "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."³¹ This gave the agency power to regulate and prevent air pollution. Initially, the Clean Air Act's regulation of vehicle emissions was more limited in scope and covered only some of the air pollutants that are now recognized as harmful.³² But the Act's expansive mandate also empowered the EPA Administrator to revise the standards "from time to time" to address such additional pollutants and types of vehicles "which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."³³ The Act also defined key elements of the regulatory structure that would be incorporated into the future CAFE standards.³⁴ This regulatory structure would change somewhat in the decades that followed as a result of amendments, court decisions, new research, and changing conditions that gradually expanded the scope of the Act.³⁵

Under section 202(a)(1) of the Clean Air Act, the EPA Administrator is required to regulate and prescribe standards for any "air pollutant" from motor vehicles.³⁶ According to the Act, an air pollutant is "any physical, chemical, biological, radioactive . . . substance or material which is emitted into or otherwise enters the ambient air."³⁷ Additionally, section 209 of the Clean Air Act permits the EPA to grant waivers authorizing states whose regulatory programs predated the act to continue setting their own standards.³⁸ The only state that qualified was

³⁰ President Richard Nixon, Reorganization Plan No. 3 of 1970 (July 9, 1970); William D. Ruckelshaus, Initial Organization of the EPA, EPA Order 1110.2, (Dec. 4, 1970).

³¹ Clean Air Amendments (Clean Air Act) of 1970 § 101(b)(1), Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7590).

³² 42 U.S.C. § 7521(b).

³³ 42 U.S.C. § 7521(a).

³⁴ See 42 U.S.C. § 7521 (e.g., regulating manufacturers' fleet-wide averages for model years).

³⁵ E.g., Clean Air Act Amendments, Nov. 15, 1990, Pub. L. 101-549, 104 Stat. 2399 (expanding requirements for new vehicles and promoting use of cleaner fuels).

³⁶ 42 U.S.C. § 7521(a)(1).

³⁷ 42 U.S.C. § 7602(g).

³⁸ 42 U.S.C. § 7543(b)(1).

California,³⁹ which in 1966 had established the nation's first program to regulate tailpipe emissions.⁴⁰

Until the late 1990s, regulation of vehicle emissions was primarily concerned with reducing smog, acid rain, and toxic pollution from leaded gasoline and other chemical additives.⁴¹ This changed in the wake of the 1997 Kyoto Protocol, which brought widespread attention to the role of increasing GHG emissions as a key driver of climate change.⁴² Then a dispute arose over whether GHG emissions constituted an air pollutant under the Clean Air Act.⁴³ The issue came to a head in 2007 with *Massachusetts v. EPA*, where the Court found that GHG emissions did meet the definition of an air pollutant as defined by the Clean Air Act, and that the EPA was therefore obligated to establish appropriate regulations to prevent harm to the public welfare.⁴⁴ As a result of *Massachusetts v. EPA*, the EPA became more involved in regulating the GHG released by tailpipe emissions.

2. NHTSA Origins

The National Highway Transportation Safety Administration was established in 1970 for the purpose of ensuring vehicle safety on the nation's highways.⁴⁵ Housed within the Department of Transportation ("DOT"), NHTSA's first order of business was investigating safety defects in motor vehicles.⁴⁶ Over time, NHTSA's duties expanded as the DOT delegated additional responsibilities, including the CAFE program, to its subagency.⁴⁷

The CAFE program was created in 1975 by the Energy Policy and Conservation Act ("EPCA")⁴⁸ "to provide for improved energy efficiency of motor vehicles."⁴⁹ As discussed below, the purpose of the legislation was to promote increased vehicle fuel efficiency as a means to

³⁹ See *Chamber of Commerce of the U.S. v. EPA*, 642 F.3d 192, 196 (D.C. Cir. 2011).

⁴⁰ CALIFORNIA AIR RESOURCES BOARD, *History*, <https://ww2.arb.ca.gov/about/history> (last visited Apr. 9, 2021).

⁴¹ ROBERT V. PERCIVAL ET. AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY* 526 (8th ed. 2018).

⁴² *Id.* at 531-32.

⁴³ *Id.*

⁴⁴ *Massachusetts v. EPA*, 549 U.S. 497, 507 (2007).

⁴⁵ Highway Safety Act of 1970 § 201(a), Pub. L. 91-605, 84 Stat. 1740 (codified at 23 U.S.C. §§ 401-412).

⁴⁶ NHTSA, *A Drive Through Time*, <https://one.nhtsa.gov/nhtsa/timeline/index.html> (last visited Mar. 7, 2021).

⁴⁷ *Id.*

⁴⁸ 42 U.S.C. §§ 6201-6422; Energy Policy Conservation Act (EPCA) §§ 501-503, Pub. L. 94-163, 89 Stat. 872 (Dec. 22, 1975).

⁴⁹ 42 U.S.C. § 6201(5).

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prevent gas shortages.⁵⁰ Pursuant to EPCA, the Department of Transportation, through NHTSA, is responsible for determining the “maximum feasible” standards for CAFE as part of its effort to establish a regulatory “floor.”⁵¹ This simply means that the federal government sets the minimum bar that vehicle manufacturers must meet, but requires this target to be feasible.⁵² DOT delegates this responsibility to NHTSA,⁵³ which is required by statute to consider four specific factors when making CAFE determinations:

[The Agency] shall consider [1] technological feasibility, [2] economic practicability, [3] the effect of other motor vehicle standards of the Government on fuel economy, and [4] the need of the United States to conserve energy.⁵⁴

Notably, environmental protection is not among the factors that Congress enumerated for consideration in setting CAFE standards. This is also evident in the text of the SAFE Rule, which states that the new rules “represent a reasonable balance . . . given the foreseeable state of the global oil market and minimal effect on the climate between finalizing [the implemented standard] versus more stringent standards.”⁵⁵

In short, CAFE standards were never about protecting the environment—they were about protecting the U.S. from facing additional fuel shortages. This directive expanded over time as CAFE has evolved into a more complex regulatory scheme, but the language found in the SAFE Rule indicates where NHTSA’s mission really lies. Although EPA has a duty to regulate GHG emissions pursuant to *Massachusetts v. EPA*, this duty is not shared by NHTSA and not encompassed by the scope of the CAFE regulatory scheme.

3. Federal Climate Change Policies

Unlike gas shortages and exhaust fumes, the issue of climate change did not emerge as a matter of broad public concern until the late 1980s.⁵⁶ And even then, policy emerged slowly in an era of increasingly divisive

⁵⁰ See discussion *infra* at section II. B.

⁵¹ 49 U.S.C. § 32902(a).

⁵² Baruch Feigenbaum & Julian Morris, *CAFE Standards in Plain English*, REASON (Jan. 13, 2017), <https://reason.org/e-brief/cale-standards-in-plain-english/>.

⁵³ U.S. DEP’T OF TRANSP., *supra* note 10.

⁵⁴ 49 U.S.C. § 32902(f).

⁵⁵ SAFE Vehicles Rule, 85 Fed. Reg. at 24,176.

⁵⁶ Patrick J. Egan & Megan Mullin, *Climate Change: US Public Opinion*, 20 ANN. REV. POL. SCIENCE 209, 210-11 (May 2017), <https://doi.org/10.1146/annurev-polisci-051215-022857>.

politics and growing backlash against environmental regulations.⁵⁷ These historical factors have continued to influence the federal response to climate change, which helps explain the government's stance on climate change.⁵⁸

While the majority of people in the U.S. recognize climate change as an important issue, there remains a significant number of Americans who deny the veracity of climate change science for various reasons.⁵⁹ Despite a broad scientific consensus on the facts and causes of climate change, as well as the urgently increasing risks from the effects of climate change, some have refused to recognize this critical issue. Science aside, the government's position has been deeply influenced by partisan politics and resistance of different kinds, depending on the political makeup of Congress and the sitting president.⁶⁰ Notably, the fossil fuel industry has helped fuel doubts and encouraged politicians to resist taking action that could limit extraction and consumption of fossil fuels.⁶¹

Scientists have reported a steady rise in the average temperature of the earth for decades.⁶² For example, a study released by the National Academy of Sciences in North America in 2006 showed that the average global surface temperature of the earth increased by one degree Celsius in the last 150 years,⁶³ which, if continued, would lead to catastrophic consequences unless the leading countries in the world were to undertake immediate action. A decade later, 196 countries stepped up to the challenge by signing onto the "Paris Agreement," an international treaty aimed at coordinating GHG emissions reductions across every continent in an effort to stabilize the climate.⁶⁴

In short, the EPA and NHTSA each have independent reasons to regulate tailpipe emissions that originated long before the Trump administration. After GHG emissions were recognized as an air pollutant, the EPA had its own reasons for increasing fuel efficiency that were not

⁵⁷ *Id.* at 217-18, 221.

⁵⁸ Percival, Robert V., *Regulatory Evolution and the Future of Environmental Policy*, UNIV. CHI. LEGAL F. 159, 164-65 (1997).

⁵⁹ Cary Funk & Brian Kennedy, *How Americans See Climate Change and the Environment in 7 Charts*, PEW RESEARCH CTR. (Apr. 21, 2020), <https://www.pewresearch.org/fact-tank/2020/04/21/how-americans-see-climate-change-and-the-environment-in-7-charts/>.

⁶⁰ Egan & Mullin, *supra* note 56, at 219-20.

⁶¹ Emily Holden, *How the oil industry has spent billions to control the climate change conversation*, GUARDIAN, (Jan. 8, 2020). <https://www.theguardian.com/business/2020/jan/08/oil-companies-climate-crisis-pr-spending>.

⁶² James Hansen et. al., *Global temperature change*, 103 PNAS 14288-93 (2006), <https://www.pnas.org/content/103/39/14288.short>.

⁶³ *Id.*

⁶⁴ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

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encompassed by the purpose of the CAFE program. Additionally, the government's stance on climate change has been strongly influenced by political divisions. Understanding these agencies and the government's stance helps us better understand how SAFE came to be.

B. A BRIEF HISTORY OF THE CAFE STANDARDS

As noted above, the CAFE standards were originally a Congressional response to a severe gas shortage that brought the U.S. economy to a standstill in the 1970s. Midway through the fall of 1973, the Organization of Petroleum Exporting Countries ("OPEC") placed an embargo on oil exports to the United States and other allies.⁶⁵ This embargo on oil was the first of several in the years to come, and it fundamentally changed the landscape of the global economy in both the short and long term.⁶⁶ The embargo caused the price of oil to quadruple within a year and led to acute gasoline shortages.⁶⁷ In many places, rationing was introduced that limited drivers to odd or even days (depending on the last digit of their license plate) as the only days that they could pump gas.⁶⁸ Lines around the corner were not uncommon, and many gas stations began the practice of flying green, yellow, or red flags to broadcast the corresponding amount of gasoline they had left.⁶⁹ Gas was so difficult to come by that a national speed limit of fifty-five miles per hour was established in an attempt to conserve precious fuel.⁷⁰

In the wake of the crisis there was a broad national demand for the federal government to take action to prevent another dire episode.⁷¹ This was also a period of environmental concern and tolerance for increased regulation to protect shared resources and public health.⁷² These factors set the stage for national legislation to address the crisis.

As noted above, the CAFE standards were created by Congress when it enacted EPCA in 1975 with the primary goal to improve fuel

⁶⁵ UNION OF CONCERNED SCIENTISTS, *supra* note 3.

⁶⁶ OFFICE OF THE HISTORIAN, U.S. DEP'T OF STATE, *Oil Embargo, 1973-1974*, <https://history.state.gov/milestones/1969-1976/oil-embargo> (last visited Mar. 12, 2021).

⁶⁷ Michael Corbett, *Oil Shock of 1973-74*, FEDERAL RESERVE HISTORY, <https://www.federalreservehistory.org/essays/oil-shock-of-1973-74>.

⁶⁸ Greg Myre, *Gas Lines Evoke Memories of Oil Crises in the 1970s*, NPR (Nov. 10, 2012, 5:19 PM), <https://www.npr.org/sections/pictureshow/2012/11/10/164792293/gas-lines-evoke-memories-oil-crises-in-the-1970s>.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ OFFICE OF THE HISTORIAN, *supra* note 66.

⁷² Percival, Robert V., *Regulatory Evolution and the Future of Environmental Policy*, UNIV. CHI. LEGAL F. 159, 164-65 (1997).

efficiency to prevent or ameliorate the risk of future acute shortages.⁷³ The first standards, implemented in 1978, placed requirements on passenger vehicles and light trucks were included a year later.⁷⁴ These CAFE ratings were designed to act as a floor, establishing the maximum feasible threshold for car manufacturers, but otherwise allowing more fuel-efficient vehicles to be sold in the U.S.⁷⁵

The first decade of the program saw a steady improvement in CAFE ratings until 1986, when minimum CAFE requirements were frozen at 26 miles per gallon.⁷⁶ They were then improved to 27.5 miles per gallon four years later in 1990 during the first Bush administration.⁷⁷ However, the CAFE requirements would remain dormant at this level for the next twenty years during both the Clinton and Bush II administrations.⁷⁸ While the standards were still reviewed from time to time, there was no requirement to change them unless the NHTSA determined new standards were needed.⁷⁹

In 2006, the NHTSA issued new standards that introduced the concept of a vehicle footprint to adjust standards for different size categories of vehicles.⁸⁰ These regulations were ultimately set aside for procedural reasons as the result of a legal challenge,⁸¹ but the new footprint approach would resurface in the next iteration.⁸² Meanwhile, in 2007, a shift in the balance of Congress led to the passage of the Energy Independence and Security Act (“EISA”), which amended the CAFE program as part of a sweeping effort to promote renewable energy.⁸³ This was around the same time that *Massachusetts v. EPA* was decided, giving the EPA a new directive to regulate vehicle GHG emissions.⁸⁴ Under EISA, the NHTSA was directed to consult with EPA and the De-

⁷³ UNION OF CONCERNED SCIENTISTS, *supra* note 3.

⁷⁴ *Id.*

⁷⁵ SAFE Vehicles Rule, 85 Fed. Reg. at 24,181.

⁷⁶ U.S. DEP’T OF TRANSP., *Summary of Fuel Economy Performance* (Dec. 15, 2014), <https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/performance-summary-report-12152014-v2.pdf>.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Average Fuel Economy Standards for Light Trucks Model Years 2008-2011, 71 Fed. Reg. 17,566 (Apr. 6, 2006).

⁸¹ *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008) (finding NHTSA failed to conduct an adequate environmental analysis under the Nat’l Env’t Policy Act (NEPA) and failed to comply with CAFE requirements at 49 USCS § 32902).

⁸² Average Fuel Economy Standards, Passenger Cars and Light Trucks; Model Years 2011-2015, 73 Fed. Reg. 24,351 (July 1, 2008).

⁸³ Energy Independence and Security Act (EISA) of 2007, 110 P.L. 140, 121 Stat. 1492 (codified as amended at 42 U.S.C. §§ 17001-17386 (2007)).

⁸⁴ *Massachusetts v. EPA*, 549 U.S. 497, 507 (2007).

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partment of Energy when implementing new CAFE standards.⁸⁵ This is also when aligning agency goals to reduce the burden on vehicle manufacturers of having to follow multiple standards emerged as an issue.

In the meantime, opposition to CAFE regulations had begun to grow during the 1980s and 1990s. Opponents worried that more-stringent standards would result in greater compliance costs, and those costs would be defrayed to customers who would have to pay higher prices for more fuel-efficient cars.⁸⁶ Due to the nature of car manufacturing, any type of regulation that aims to set rules for how cars can be produced must give enough lead time for the car manufacturers to reasonably make changes and achieve compliance. This means retooling factories and sinking money into research and development in order to make more fuel-efficient cars.⁸⁷ Or it means producing fewer big cars that are less fuel-efficient and a greater number of smaller cars that are more fuel-efficient. Because new standards place a burden on the industry to adjust, new CAFE regulations must be published at least eighteen months in advance of the affected model year to provide car manufacturers with time to achieve compliance.⁸⁸

During President Obama's first year in office, he was tasked with completing the Bush administration's 2008 CAFE requirements, as well as reconciling various problems that had arisen with the introduction of the footprint model and the passage of EISA.⁸⁹ Originally, CAFE ratings were formulated using a simple mathematical equation,⁹⁰ but with the introduction of the footprint model with different standards for different sizes of vehicles, calculating fuel efficiency became more complicated.⁹¹ There was also the issue of dealing with the three separate standards for fuel emission regulation established by the EPA, the NHTSA, and the state of California.⁹² Having three separate guidelines made compliance and enforcement more difficult for agencies and car manufacturers.

In 2009, the Obama administration responded to these challenges by announcing a new joint rulemaking that would seek to resolve many of these issues. The EPA and NHTSA issued a Notice of Intent for an up-

⁸⁵ EISA § 102 (b).

⁸⁶ Jerry Taylor & Peter Van Doren, *Don't Raise CAFE standards*, CATO INSTITUTE (Aug. 1, 2007), <https://www.cato.org/commentary/dont-raise-cafe-standards>.

⁸⁷ Feigenbaum & Morris, *supra* note 52.

⁸⁸ 49 U.S.C. § 32902(a).

⁸⁹ Energy Independence and Security Act (EISA) of 2007, 110 P.L. 140, 121 Stat. 1492 (codified as amended at 42 U.S.C. §§ 17001-17386 (2007)).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² The Bush EPA had denied California's request for a new waiver in 2005, but in 2009 Obama's EPA granted the waiver. *See Chamber of Commerce v. EPA*, 642 F.3d 192, 197 (D.C. Cir. 2011).

coming joint rulemaking, by which the agencies would collaborate on the next iteration of CAFE standards.⁹³ This effort culminated in the 2010 CAFE standards, which represented a first attempt to integrate the regulation of fuel efficiency and GHG emissions in a single standard.⁹⁴ These regulations also introduced a new *national program* to provide a single set of standards that aligned state and federal regulations.⁹⁵

In 2012, the Obama Administration further refined these standards.⁹⁶ President Obama's new guidelines for car manufacturers raised the CAFE ratings from 27.5 miles per gallon to 38.5 miles per gallon over the course of seven years.⁹⁷ The 2012 rule also projected raising fuel economy standards in phased increments through the year 2025 to as high as 50 MPG and eliminated the need for compliance with three separate standards by negotiating a single national standard.⁹⁸ It also reaffirmed California's Clean Air Act waiver, allowing the state to create more-stringent guidelines if it so desired.⁹⁹ The 2012 standards were in effect when President Trump took office in January 2017.

Early in 2017, the Trump administration began taking steps to reverse course and reduce the stringency of the Obama Era guidelines in an effort to promote fuel consumption, protect jobs in the automotive industry, and ostensibly make cars "safer."¹⁰⁰ After declaring the intent to freeze the 2012 Rule, President Trump announced the proposed SAFE Rule for model years 2021-2026,¹⁰¹ which, as noted above, was highly controversial. Litigation was initially focused on the rescission of the Clean Air Act waivers, and then on the SAFE Rule once it was issued.

In light of the history of CAFE, it is easier to understand why the EPA and NHTSA are jointly responsible for the SAFE Rule. Under EISA the agencies were required to consult before NHTSA issued new standards, which encouraged them to work together to release one rule covering both agency mandates to make compliance less burdensome on

⁹³ Notice of Upcoming Joint Rulemaking To Establish Vehicle GHG Emissions and CAFE Standards, 74 Fed. Reg. 24,007 (May 22, 2009).

⁹⁴ Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; 75 Fed. Reg. 25,324 (May 7, 2010).

⁹⁵ See 75 Fed. Reg. at 25,326-29.

⁹⁶ 2012 CAFE Standards, 77 Fed. Reg. 62,624 (Oct. 15, 2012).

⁹⁷ Press Release, White House Office of the Press Sec'y, Obama Administration Finalizes Historic 54.5 MPG Fuel Efficiency Standards, WHITE HOUSE (Aug. 28, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/08/28/obama-administration-finalizes-historic-545-mpg-fuel-efficiency-standard>.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Notice of Intention to Reconsider the Final Determination of the Mid-term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light Duty Vehicles, 82 Fed. Reg. 14,671 (Mar. 22, 2017).

¹⁰¹ *Id.*

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manufacturers. This would enable car manufacturers to meet the requirement for improving fuel economy and the requirement for reducing GHG emissions through compliance with a single set of standards.¹⁰²

C. ONE NATIONAL PROGRAM AND WAIVER

As mentioned earlier, the effort to align agency standards into a single national program emerged after the enactment of EISA in 2007 and became an element of the Obama administration's 2010 CAFE Rule.¹⁰³ Under the 2010 Rule and subsequent 2012 Rule, the alignment of standards was negotiated between the agencies and several states that had previously adopted more stringent standards.¹⁰⁴ To understand how the SAFE Rule impacts state standards requires understanding one more chapter of CAFE history.

When the Clean Air Act was adopted in 1970, there was one state in the union that had already developed its own air pollution regulatory program for tailpipe emissions – California. Under section 209 of the Clean Air Act, the EPA can allow California to continue these independent efforts so long as its standards are not weaker than the new federal standards.¹⁰⁵ In addition, section 177 of the Act allows other states to adopt California's more stringent standards as an alternative to the federal standards.¹⁰⁶

Clean Air Act section 209 requires California to request a new waiver each time it modifies its standards.¹⁰⁷ Beginning in 2005, California undertook an ambitious effort to review all of its state programs to develop a comprehensive strategy to respond to climate change.¹⁰⁸ This led the state to realize that vehicle emissions accounted for approximately forty percent of GHG emissions, which made reducing emissions a major priority for the state.¹⁰⁹ However, when the state applied for a waiver from the Bush administration, it was denied.¹¹⁰ The state sued,

¹⁰² One National Program Rule, 84 Fed. Reg. 51,310.

¹⁰³ Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; 75 Fed. Reg. 25,324 (May 7, 2010).

¹⁰⁴ 2012 CAFE Standards, 77 Fed. Reg. 62,624, 62,624.

¹⁰⁵ 42 U.S.C. § 7543(b).

¹⁰⁶ 42 U.S.C. § 7507.

¹⁰⁷ 42 U.S.C. § 7543(b).

¹⁰⁸ See California Gov. Arnold Schwarzenegger, Exec. Order No. S-3-05 (June 1, 2005); AB 32: The California Global Warming Solutions Act of 2006. 2006 Cal. Stat. 488.

¹⁰⁹ Chamber of Commerce v. EPA, 642 F.3d 192, 197 (D.C. Cir. 2011).

¹¹⁰ *Id.*

but after Obama was elected, the EPA granted the waiver in 2009.¹¹¹ This enabled other states to adopt California's ambitious new standards.¹¹² In 2011, California was granted another waiver to set its own fuel economy and zero emission vehicle (ZEV) standards under the Clean Air Act.¹¹³

In the meantime, California also began facing legal challenges by parties opposed to "stricter" emissions regulations. For example, in *Central Valley Chrysler-Jeep v. Goldstene*, car manufacturers sued the state of California in an effort to repeal its more stringent standards, which they feared would result in higher compliance costs and slimmer profit margins.¹¹⁴ The car manufacturers argued unsuccessfully that California was preempted from establishing its own standards under the Energy Policy and Conservation Act (EPCA).¹¹⁵ The court disagreed, however, holding that once a state had been granted a valid waiver by the EPA Administrator, that state had the power to set its own vehicle emissions standards.¹¹⁶ The court thus reaffirmed the proposition that California and other states that adopt California's standards had the legal authority to issue their own vehicle emissions standards.¹¹⁷

However, the Trump EPA reversed course again and rescinded the waiver as part of the new SAFE Rule. The One National Program, a subrule within the SAFE Rule, expressly preempted California and section 177 states from setting their own standards.¹¹⁸ This purported to be an effort to promote compliance with the SAFE Rule but was likely done to enjoin states from setting more rigorous vehicle emissions standards.

This series of reversals highlights the precarious nature of Clean Air Act waivers, by which state authority to regulate vehicle emissions is subject to the discretion of the current EPA administrator. Without a valid section 209 waiver, California cannot set its own vehicle emissions standards, even when its standards would achieve greater fuel economy

¹¹¹ 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. 32744 (July 8, 2009).

¹¹² 42 U.S.C. § 7507.

¹¹³ California State Motor Vehicle Pollution Control Standards; Within the Scope Determination and Waiver of Preemption Decision for Amendments to California's Zero-Emission Vehicle (ZEV) Standards, 76 Fed. Reg. 61095 (Oct. 3, 2011).

¹¹⁴ *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007).

¹¹⁵ Energy Policy Conservation Act (EPCA) §§ 501-03, Pub. L. 94-163, 89 Stat. 872 (Dec. 22, 1975).

¹¹⁶ *Cent. Valley Chrysler-Jeep*, 529 F. Supp. 2d at 1189.

¹¹⁷ *Id.*

¹¹⁸ One National Program Rule, 84 Fed. Reg. 51,310, 51,361-62 (codified at 49 C.F.R. § 531.7 and 49 C.F.R. pt. 531 app. B).

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than the federal standards.¹¹⁹ Without California standards, other states have no alternative to the federal standards.¹²⁰ This poses an obstacle for states who are positioned and willing to take the lead in the fight against climate change but are held back by regressive policies that force compliance with national standards that preempt state regulations. For this reason, establishing uniform standards for fuel efficiency without a place for state regulation has had a huge impact on states' efforts to reduce GHG emissions.

III. THE SAFE RULE MAY BE LEGAL BUT THAT DOESN'T MAKE IT ENVIRONMENTALLY SOUND LAW

Simply put, the SAFE Rule amends CAFE by setting new standards. The scope of this rule can be divided into three broad areas: (i) greenhouse gas emissions regulation, (ii) corporate average fuel economy regulation, and (iii) the creation of a nationalized and uniform CAFE regulation that rescinds California's Clean Air Act waiver.¹²¹

The reason this rule was jointly proposed by both EPA and the NHTSA goes back to the Energy Security and Independence Act of 2007 ("EISA"),¹²² and the watershed case *Massachusetts v. EPA* that was decided that same year.¹²³ EISA mandated the creation of CAFE standards until the year 2030.¹²⁴ EISA also called for the agencies to make a greater effort to harmonize their distinct and independent efforts to regulate air pollution and fuel efficiency.¹²⁵

Prior to 2007, the EPA was tasked with determining standards for regulating the emission of "air pollutants" from motor vehicles under the Clean Air Act,¹²⁶ while the NHTSA was tasked with determining fuel efficiency under the CAFE program.¹²⁷ Additionally, section 209 of the Clean Air Act allowed the EPA to grant California a waiver allowing it to set more stringent state regulatory standards,¹²⁸ which other states could then adopt pursuant to section 177.¹²⁹

¹¹⁹ 42 U.S.C. § 7543.

¹²⁰ 42 U.S.C. § 7507.

¹²¹ SAFE Vehicles Rule, 85 Fed. Reg. at 24,181.

¹²² Energy Independence and Security Act (EISA) of 2007, § 102, Pub. L. No. 110-140, 121 Stat. 1492 (codified as amended at 42 U.S.C. §§ 17001-17386); 49 U.S.C. § 32902(b)(2)(B).

¹²³ *Massachusetts v. EPA*, 549 U.S. 497 (2007).

¹²⁴ EISA § 102(b)(2)(B) (codified at 49 U.S.C. § 32902(b)(2)(B))

¹²⁵ EISA § 102(b)(1) (codified at 49 U.S.C. § 32902(b)(1)) (requiring DOT (NHTSA) to consult with Department of Energy and EPA prior to prescribing new CAFE standards).

¹²⁶ 42 U.S.C. § 7521(a).

¹²⁷ 49 U.S.C. § 32902.

¹²⁸ 49 U.S.C. § 7543.

¹²⁹ 49 U.S.C. § 7507.

When the SAFE Rule is viewed against this backdrop of regulatory history, its overall impact on the CAFE program and efforts to address climate change can be assessed more readily. This section will consider the implications of the SAFE Rule on both these objectives. It will also consider how the outcome of past legal challenges to the CAFE standards might inform potential legal challenges to SAFE. Finally, this section will also evaluate possible actions that the Biden administration could take to respond to SAFE and address climate change.

A. SAFE REVISITED: FOUR FACTORS & THE LITIGATION OPTION

An understanding of the legal challenges that SAFE and CAFE have faced are crucial to evaluating and determining the efficacy of each of these options. This begins with a recap of how CAFE works and where some of its shortcomings lie.

Under the federal fuel economy program, Congress directs the NHTSA and the EPA to issue CAFE ratings according to a list of four factors: technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and need of the U.S. to conserve fuel.¹³⁰ The key to understanding these factors is recognizing that they are aimed at conserving fuel to wean America off of its oil dependency on foreign nations. This design reflects primarily economic concerns by weighing economic factors heavily, while ignoring associated effects, such as environmental, social, and health costs. For example, while CAFE regulations are tasked with considering how much fuel is forecasted to cost in the next decade, little weight is given to considering how many Americans will risk suffering some kind of respiratory illness from increased carbon pollution resulting from weak CAFE regulations that promote greater fuel consumption. This illustrates that while CAFE's purpose is laser focused on economics, its impact is felt far beyond the economy and has consequences on the lives of all Americans. The statute implicitly relegates such impacts to secondary status, as incidental or unrelated to the purpose of CAFE, thus limiting the program's usefulness as a tool for addressing climate change and public health.

Almost from the beginning, opponents have attacked government efforts to regulate GHG emissions. Even before this affected new CAFE standards, opponents argued that the EPA lacked authority under the Clean Air Act to regulate GHG emissions—a major byproduct of fuel consumption—as an “*air pollutant*.”¹³¹ At first, the opponents of regu-

¹³⁰ 49 U.S.C. § 32902(f).

¹³¹ 42 U.S.C. § 7521(b).

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lating GHG emissions had some success in arguing that the Clean Air Act did not encompass GHG emissions,¹³² however this would change after the Supreme Court's decision in the now famous case of *Massachusetts v. EPA*.¹³³

In *Massachusetts v. EPA*, the Court found that the administrator of the EPA had a duty to regulate GHG emissions if these were determined to be an "air pollutant" as defined by the Clean Air Act.¹³⁴ The Court found that EPA had determined that GHG emissions were clearly an air pollutant that had a strong likelihood of harming the welfare of Americans in strong enough concentrations.¹³⁵ Though the 5-4 decision was a close one, the Court ultimately did not allow the EPA to disregard evidence of the harmful consequences of GHG pollution.¹³⁶ The case also established that Massachusetts, and potentially other states, had a material interest in trying to mitigate the effects of climate change where failure to do so would result in tangible harm to the state's property.¹³⁷ While critics of *Massachusetts v. EPA* may have worried that the majority was inappropriately taking a stance on climate change, the actual decision was narrowly tailored and only reinforced EPA's duty to comply with its Congressional mandate.¹³⁸

After *Massachusetts v. EPA*, the CAFE regulatory scheme gained in importance and power as a means to address GHG emissions. But increasing standards also placed a heavier burden on car manufacturers.¹³⁹ Car manufacturers found an ally in President Trump who, in a bid to temporarily bolster the automotive industry, issued the less stringent SAFE standards.¹⁴⁰ Trump's actions were a little victory for car manufacturers, who stood to save millions of dollars in compliance costs from new standards that were easier to meet. While the SAFE Rule may obstruct the EPA from aggressively regulating GHG emissions, it does not thereby conflict with the four factors of the CAFE statute.

Earlier legal challenges to CAFE standards are also informative. One of the first major legal challenges to CAFE standards was *Center for Auto Safety v. NHTSA*, decided in 1986 by the United States Court of

¹³² *Massachusetts v. EPA*, 549 U.S. 497, 510-14 (2007) (describing EPA's denial of petitions to regulate GHG emissions and prior success in litigation upholding this decision).

¹³³ *Id.* at 533-34.

¹³⁴ *Id.* at 528.

¹³⁵ *Id.* at 532.

¹³⁶ *Id.* at 526.

¹³⁷ *Id.* at 533-34.

¹³⁸ *Id.* at 534-35.

¹³⁹ 2012 CAFE Standards, 77 Fed. Reg. at 62,624.

¹⁴⁰ SAFE Vehicles Rule, 85 Fed. Reg. 24,174.

Appeals for the District of Columbia Court.¹⁴¹ In this case, the court found that the NHTSA did not have to weigh consumer demand any greater than other factors in its analysis when determining appropriate CAFE standards.¹⁴² Notably, this decision came just two years after the Court established *Chevron* deference,¹⁴³ which made it more difficult for petitioners to prevail in challenging the NHTSA's actions. In *Chevron U.S.A. v. NRDC*, the Court held that courts must defer to an agency's reasonable interpretation of a statute if the intent of Congress was ambiguous in that statute.¹⁴⁴ As a result, agencies like the NHTSA have a great deal of authority when deciding how to interpret statutes, including where to set the standards and how to weigh each of its statutorily mandated factors.

The NHTSA's authority in setting CAFE standards was further elaborated in 1990 by a subsequent case, *Competitive Enterprise Institution v. NHTSA*.¹⁴⁵ In this case, appellants sought judicial review of the agency's decision to lower CAFE standards after Congress "set the maximum feasible standard to 28 mpg."¹⁴⁶ The court ruled that NHTSA acted reasonably and within its authority when it reduced the maximum feasible standards for specific model years, and the agency's decision to lower the CAFE standard was not "arbitrary or capricious."¹⁴⁷ The court went on to reject an additional claim brought under the National Environmental Policy Act (NEPA), finding that appellants lacked standing because the alleged environmental harm they had suffered from NHTSA's lowering of the standards was merely speculative.¹⁴⁸

Competitive Enterprise and *Center for Auto Safety* both demonstrate that CAFE standards are difficult to challenge in light of *Chevron* deference—which requires courts to grant the agencies considerable leeway in their decision-making. The fact that CAFE requires the agency to balance many factors of a technical nature further underscores the importance of agency expertise and strengthens the rationale for deference. In addition, balancing competing interests will almost always result in one or more parties being unhappy with the outcome. To allow legal challenges to influence how the agency interprets its duty to make CAFE

¹⁴¹ *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 793 F.2d 1322 (D.C. Cir. 1986).

¹⁴² *Id.* 1338.

¹⁴³ *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984).

¹⁴⁴ *Id.*

¹⁴⁵ *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107 (D.C. Cir. 1990).

¹⁴⁶ *Id.* at 110-11.

¹⁴⁷ *Id.* at 111, 121-22.

¹⁴⁸ *Id.* at 124.

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determinations could have profound implications on NHTSA's authority to make such decisions. To address this, courts must consider separation of powers issues and refrain from intruding on the domain of the executive and legislative branches. For these reasons, there has not been a successful challenge to CAFE regulations on the basis of how the agency decides to balance its varied and often competing interests, even when the CAFE standards were lowered, as with the SAFE Rule.

While *Chevron* deference remains an important consideration in any judicial review of an agency action, there is an argument for a solution on the legislative side. If Congress directed the NHTSA to consider environmental costs as a primary factor alongside other factors, then NHTSA would have more of an incentive to do so, which could prevent CAFE standards from backsliding and a rule like SAFE might never be passed. As of this moment, the agency is free to revise its CAFE standards and continue to issue rules like SAFE that loosen restrictions and take regulatory power away from the states. Under the current statute, agency deference means that agencies like the NHTSA and the EPA might never be compelled to issue environmentally protective CAFE standards. A revision of the NHTSA's congressional mandate could thus be instrumental in requiring the agency to consider environmental and public health consequences in future CAFE rules.

While the SAFE Rule characterizes the move to preempt the states as a necessary step forward in ensuring CAFE compliance,¹⁴⁹ this move jeopardizes state autonomy in regulating GHG emissions and promoting green technologies. The One National Program is not the first deregulatory rule of its kind. In fact, the Trump administration was marked by an overall embrace of deregulation in the realm of environmental law.¹⁵⁰ The reason that SAFE is uniquely in a class of its own is because in seeking to harmonize CAFE standards it completely eliminates the regulatory power of the states to set stronger standards to protect the health and welfare of their citizens from the adverse impacts of vehicle emissions.

Most of the legal challenges to the SAFE Rule and the One National Program are still in progress.¹⁵¹ One case that has been decided is *California v. EPA*, which sought to challenge the EPA's rollback of Obama's

¹⁴⁹ One National Program, 84 Fed. Reg. 51,310, 51,311.

¹⁵⁰ See Center for Law, Energy & the Environment (CLEE), *Reversing Environmental Rollbacks*, BERKELEY L., <https://www.law.berkeley.edu/research/clee/rollback-tracker/> (last visited Apr. 10, 2021).

¹⁵¹ See, e.g., *Union of Concerned Scientists v. Nat'l Highway Traffic Safety Admin.*, No. 19-1230, (D.C. Cir. Oct. 28, 2019); *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, No. 20-1145 (D.C. Cir. May 1, 2020).

2012 CAFE Rule.¹⁵² In this case, California and other states challenged the Trump EPA's decision to withdraw and revise the previous administration's Midterm Determination that the 2012 Rule should remain in effect, arguing that the agency acted in an arbitrary and capricious manner.¹⁵³ Ultimately, California and the other states lost because the D.C. Circuit Court of Appeals found that the agency's withdrawal and reopening of its prior determination did not constitute a "judicially reviewable final action."¹⁵⁴ In sum, the EPA acted within its power when it reopened its determination and subsequently found that the 2012 CAFE standards were no longer feasible.

The jury is still out on whether other recent legal challenges to the SAFE Rule will be more successful. Because the EPA Administrator has considerable discretion in determining whether to grant Clean Air Act waivers,¹⁵⁵ EPA's decision to rescind California's waiver could be difficult to challenge. However, there is no question that both the One National Program Rule and SAFE Rule are final agency actions, so that at least is unlikely to be a barrier to a decision on the merits. Whatever the outcome, it's clear that California and the section 177 states will remain in a precarious position, subject to the whim of a federal agency to determine their powers, even when the administration is willing to cooperate.

With a new president in office, there is some hope that the federal government will return regulatory power to the states. For all of these reasons, President Biden is under pressure to take action on the SAFE Rule to address its shortcomings.

B. POTENTIAL ACTIONS

Newly elected President Biden has an opportunity to rectify some of the outstanding issues with CAFE, such as restoring the Clean Air Act waiver and placing stricter standards on fuel efficiency to reduce GHG emissions. This section will outline three of the possible avenues that the president can take: (1) President Biden can choose to do nothing and allow the SAFE Rule to remain in place until it runs out in 2026; (2) President Biden can overturn the SAFE Rule by enacting a new CAFE standard while leaving the CAFE regulatory scheme mostly untouched; or (3) President Biden can scrap the whole CAFE regulatory scheme in favor of a new regulatory scheme.

¹⁵² California v. EPA, 940 F.3d 1342, 1353 (D.C. Cir. 2019).

¹⁵³ *Id.* at 1349.

¹⁵⁴ *Id.* at 1353.

¹⁵⁵ 42 U.S.C. § 7543.

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First, if President Biden chooses to do nothing about SAFE, this will clearly be the path of least action. Here, President Biden need not do anything during the duration of his term as the SAFE Rule will expire in 2026 when the last model year standard becomes obsolete.¹⁵⁶ Proponents for this course of inaction may argue that the NHTSA and the EPA have used their best judgement in determining feasible CAFE standards and that a yearly increase of 1.5 MPG is reasonable. However, President Biden would be wise to look beyond the arguments about the reasonableness of this modest increase because the One National Program's impact on states and the SAFE Rule's regressive stance on climate change both make it untenable.

Fortunately, the no action approach seems unlikely given that President Biden has already begun to take action to stay litigation in a case challenging the SAFE Rule.¹⁵⁷ In a recent development in a case currently before the D.C. Circuit, *Competitive Enterprise Institute v. NHTSA*, the federal defendant filed and was granted motion to stay litigation to reassess its position.¹⁵⁸ This litigation is an effort to overturn the SAFE Rule on grounds that the agencies improperly weakened the CAFE standards.¹⁵⁹ Thus, it appears safe to assume that President Biden's administration will not simply stand back and allow the rule to expire. If the Biden Administration's initial action in this litigation is any indication of what is to come, then a course of inaction in regard to SAFE seems unlikely.

Second, the Biden administration can choose to undo SAFE while leaving the CAFE regulatory scheme intact. Much like the EPA did with their redetermination of the 2012 standards, President Biden's EPA can reverse course and reconsider the SAFE Rule. This will have additional procedural requirements now that a final agency action has issued, but the agency may be able to suspend the rule while it formulates a new one.¹⁶⁰ The automotive and fossil fuel industries will likely push back on this course of action, as they are generally opposed to more stringent CAFE standards and the SAFE Rule is much more favorable to car manufacturers than the previous 2012 rule.

¹⁵⁶ 49 U.S.C. § 32902(b)(3)(B) (limiting particular CAFE regulations to a maximum of five model years).

¹⁵⁷ Thomas Richichi et. al., *D.C. Circuit Stays Litigation over EPA Recission of California Waiver to Regulate Vehicle Emissions*, JDSUPRA (Feb. 11, 2021), <https://www.jdsupra.com/legalnews/d-c-circuit-stays-litigation-over-epa-1845485/>.

¹⁵⁸ Order [Granting Motion to Hold in Abeyance], *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, No. 20-1145 (D.C. Cir. Apr. 2, 2012).

¹⁵⁹ *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, No. 20-1145 (D.C. Cir. May 1, 2020).

¹⁶⁰ 5 U.S.C. §§ 704-706.

Because CAFE is a regulatory scheme that promotes greater fuel conservation, it necessarily militates against the consumption of fuel. Thus, the automotive industry and other industries promoting fossil fuel consumption will likely continue to lobby against any regulatory scheme that takes money out of their pockets and forces compliance on them.

President Biden could also modify the One National Program to eliminate the preemption policy but keep the joint rulemaking approach intact. This would be more like Obama's National Program where a unified regulatory approach was achieved by negotiating a standard that the states and the vehicle manufacturers could all agree on.¹⁶¹ Recent statements by the new EPA Administrator, Michael Regan, make this approach seem quite possible.¹⁶² Regan not only endorsed consensus-building, but said he was "a firm believer in the state's statutory authority to lead, in California being the leader."¹⁶³ He also indicated that the EPA will be proposing a new CAFE Rule as early as July 2021.¹⁶⁴ This news appears to confirm that Biden will not allow the SAFE Rule or preemption policy to remain in place for long.

Lastly, the most extreme course of action, and perhaps the least plausible of President Biden's options, involves scrapping the CAFE regulations in favor of developing another framework with Congress's cooperation. While this may seem unlikely, former President Trump's efforts to roll back environmental regulations during his presidential term¹⁶⁵ opens up the possibility that President Biden will seek to foreclose such maneuvers by amending the statutory framework of CAFE. While this course of action is the most work, and not without risk, there are some arguments for a new regulatory scheme that cannot be perfunctorily dismissed.

For starters, the CAFE regulatory scheme is primarily focused on reducing fuel consumption, but does not aim to eliminate fuel consumption altogether. This can be inferred from the fact that if fuel prices are forecasted to fall, the CAFE factors allow for less stringent fuel economy standards, as was the case with SAFE. Additionally, CAFE's failure to recognize adverse impacts on the environment sometimes puts it at odds with efforts to mitigate climate change. As with SAFE, less stringent

¹⁶¹ See *Chamber of Commerce v. EPA*, 642 F.3d 192, 198 (D.C. Cir. 2011) (describing how the 2010 Rule arrived at a single standard by reaching an agreement between the federal government, California, and the major automobile manufacturers).

¹⁶² Dlouhy & Lee, *supra* note 26.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Cayli Baker, *The Trump administration's major environmental deregulations*, BROOKINGS (Dec. 15, 2020), <https://www.brookings.edu/blog/up-front/2020/12/15/the-trump-administrations-major-environmental-deregulations/>.

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fuel economy standards are likely to have the secondary effect of greater fuel consumption, and thus greater quantities of GHG emissions. The failure of CAFE to address environmental impacts and adverse health effects is a serious shortcoming that speaks to the possible benefit of undertaking a whole new approach. Alternatively, an amendment to the four factors might offer a middle ground. In sum, while this course of action seems extreme, it is not completely out of the picture, and it is not unthinkable that, by the end of President Biden's term, a new regulatory scheme could be well on its way to replacing CAFE.

Figuring out the future of CAFE is a tricky problem. On one hand, CAFE's laser focus on the economy makes it a useful tool for conserving fuel and nudging car manufacturers in a more environmentally sustainable direction. On the other hand, as a regulatory scheme that does not consider the environment as a primary factor in its analysis, CAFE can take less stringent approaches, such as the one taken by SAFE, without having to worry about environmental impact. Ultimately, regulating car manufacturers, creating an environmentally sustainable America, and balancing these two major counterpoints is an area of rulemaking that is far too complex to be resolved by any one president or administration. Perhaps CAFE's issues will never be resolved, or perhaps CAFE will give way to another regulatory scheme. What is clear is that SAFE was not built on sound reasoning and does not agree with the values and objectives of the NHTSA and EPA which is to promote the greatest achievable level of fuel conservation and to protect Americans from GHG emissions. President Biden and his administration will have to make the tough decision of deciding whether to replace SAFE, do nothing at all, or perhaps choose a middle ground that restores the California waiver and strengthens the standards without a major overhaul of the whole program.

IV. CONCLUSION

The SAFE Vehicles Rule was an attempt to reconcile stringent 2012 CAFE standards with an automotive industry that did not want to face steep compliance costs. The former presidential administration allied itself with car manufacturers and challenged the notion that the government should be involved in regulating climate change, which produced the SAFE Rule. Now that a new president has taken office, the future of SAFE is in serious question.

The debate over how best to regulate the automotive industry is an important question that will not be easily resolved, nor should it be resolved by the mere election of a new president. The circumstances that

inform CAFE regulatory decisions are constantly changing and a strong regulatory scheme must be able to respond to an ever-adapting world. As climate change becomes an increasingly important concern, regulatory schemes like CAFE will take on greater importance, as their outcomes not only effect economy but also the environment. Already, CAFE is a powerful tool for encouraging car manufacturers to reduce fuel consumption with an incidental effect of potentially promoting the adoption of greener technologies in an effort to remain compliant. A rule like SAFE backslides on this mission in an effort to make compliance easier for car manufacturers, which is part of the problem. SAFE's proponents unabashedly flaunt that it will result in greater fuel consumption, more car sales, and more jobs in the automotive industry.¹⁶⁶ They hardly mention that it will result in more pollution, no autonomy for the states to regulate emissions standards, and reduced incentives to produce more fuel-efficient vehicles.

But the solution might not be as simple as replacing the SAFE Rule and restoring the states' Clean Air Act waivers. A long-term solution could require reimagining SAFE or replacing it wholesale. Given the back and forth, Congressional action might be needed to really solve the problem. Whether that is possible remains to be seen.

President Biden and his team will have to weigh the benefits and costs of replacing the SAFE Rule and how best to go about it. He should also consult with allies in Congress and the leadership of the states. While the best avenue forward may not be clear, it is certain is that the future of SAFE will reveal how the United States approaches the issue of climate change, and how far it is willing to go in ensuring a sustainable future. Ultimately, it is the responsibility of the people to ensure that every step is taken to preserve the environment for future generations, even if it economically disadvantages industries dependent on the consumption of fossil fuels. Economic benefits and outdated frameworks must not stand in the way of responsibly evaluating the environmental consequences of future CAFE standards.

¹⁶⁶ Press Release, NHTSA, U.S. DOT and EPA Put Safety and American Families First with Final Rule on Fuel Economy Standards (March 31, 2020), <https://www.nhtsa.gov/press-releases/safe-final-rule>.

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