Comments for the Record

Addressed to the

National Highway Traffic Safety Administration of the U.S. Department of Transportation

In response to the

Advance Notice of Proposed Rulemaking entitled:

"Advanced Impaired Driving Prevention Technology"

Docket ID No. NHTSA-2022-0079

RIN 2127-AM50

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Submitted by

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I am Steven G. Bradbury, a Distinguished Fellow at The Heritage Foundation,[1] and I am pleased to submit these comments in response to the following advance notice of proposed rulemaking (ANPRM) announced by the National Highway Traffic Safety Administration (NHTSA or the Agency) of the U.S. Department of Transportation:

> **"*Advanced Impaired Driving Prevention Technology*," Docket ID No. NHTSA-2022-0079, published in the Federal Register on January 5, 2024.**[2]

These comments are submitted in my personal capacity, and the views I express here should not be construed as representing the official position of The Heritage Foundation.

My comments will explain why NHTSA should not move forward at this time to promulgate any federal motor vehicle safety standard (FMVSS) mandating the installation of technology to detect and prevent impaired or drunk driving. None of the technologies discussed in the ANPRM satisfies the requirements of the law, and none of them should be forced on the American driving public.

The Legal Requirements and NHTSA's Options

Section 24220 of the Infrastructure Investment and Jobs Act (IIJA), in which Congress directed NHTSA to undertake this rulemaking,[3] includes several clear requirements that must be met before the Agency imposes such a mandate.

First, NHTSA must conclude that the criteria for a mandatory FMVSS under the Motor Vehicle Safety Act are met,[4] including that the deployment of the technology will be "reasonable, practicable, and appropriate."[5] That means (1) that the technology will work reliably at scale and is technically feasible, (2) that it will effectively advance safety, (3) that requiring its installation in new motor vehicles will be cost justified, and (4) that NHTSA is confident the driving public, by and large, will accept the technology and will

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[1] Before joining The Heritage Foundation, I served under President Trump and Secretary of Transportation Elaine L. Chao as the Senate-confirmed General Counsel of the U.S. Department of Transportation, as the Acting Deputy Secretary of Transportation (by designation of the President), and briefly as the Acting Secretary of Transportation. Previously, during the administration of George W. Bush, I served as the Acting Assistant Attorney General and Principal Deputy Assistant Attorney General for the Office of Legal Counsel in the U.S. Department of Justice.

[2] 89 FR 830 (Jan. 5, 2024), https://www.govinfo.gov/content/pkg/FR-2024-01-05/pdf/2023-27665.pdf.

[3] *See* Pub. L. No. 117-58, § 24220, 135 Stat. 429, 831-33 (Nov. 15, 2021), https://www.congress.gov/117/plaws/publ58/PLAW-117publ58.pdf.

[4] *See* 49 U.S.C. § 30111(a) & (b), https://www.law.cornell.edu/uscode/text/49/30111.

[5] *Id.* § 30111(b)(3).

not attempt to disable or override it, thereby potentially defeating the safety goals.[6] For the reasons discussed more fully below, those standards are not met here.

Second, section 24220 specifies that any impaired- or drunk-driving detection system mandated by NHTSA must operate "passively" and "accurately," including in detecting that the driver's blood-alcohol concentration (BAC) is above the legal limit. Accuracy is absolutely critical, and NHTSA should strive for 100% accuracy in considering any proposed detection technology in order to avoid a significant number of false positives. Even a success rate of 99.99% would not be acceptable, given the huge number of trips that Americans take in their personal vehicles.[7] A false-positive rate of no more than one in 10,000 would still result in millions of improperly disrupted trips for American drivers every year, potentially putting many Americans in danger if their vehicles suddenly stop working in heavy traffic or if they are left stranded on a dark or lonely byway—simply intolerable.

NHTSA should conclude that none of the BAC- or other impairment-detection technology identified in the ANPRM currently meets the necessary level of accuracy. With regard to BAC detection specifically, NHTSA states that it "is not aware of a passive and accurate .08 g/dL BAC detection technology available for production vehicles today, and hence the timeframe for fleet implementation may be an issue."[8]

Equally important is what section 24220 does *not* require. The law does not direct NHTSA to mandate any particular type of technology or combination of technologies. In particular, section 24220(b) leaves the Agency free to focus this rulemaking proceeding only on BAC-detection systems that would prevent a legally drunk person from starting the car's engine, if NHTSA finds that such systems are closer to meeting all of the requirements of the law. With regard to other systems less likely to satisfy the relevant requirements, including any other form of putative impairment detection technology and any system designed to stop or control the operation of a moving vehicle while on the road, NHTSA is free to set those forms of technology aside and not to consider any mandate relating to them in the current rulemaking.[9]

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[6] *See* 89 FR at 837 (recognizing these requirements, with citations to governing case law).

[7] AAA's latest survey reports that Americans made 227 billion driving trips in 2022, notwithstanding the dampening effects of the COVID pandemic on travel habits. *See* American Automobile Association Foundation for Traffic Safety, *American Driving Survey: 2022* (Driver Behavior & Performance Research Brief, September 2023), p. 1, https://aaafoundation.org/wp-content/uploads/2023/09/202309_2022-AAAFTS-American-Driving-Survey-Brief_v3.pdf.

[8] 89 FR at 851.

[9] Section 24220 directs NHTSA to issue an FMVSS requiring new passenger vehicles to be equipped with "advanced drunk and impaired driving prevention technology" if the legal requirements I have outlined are

If NHTSA finds, as urged in these comments, that no technology presently meets all of the requirements of the Motor Vehicle Safety Act and section 24220, the Agency is given express authority to delay the timing of this rulemaking, as set forth in section 24220(e). NHTSA should not hesitate to do so. In that event, section 24220 directs the Agency to submit periodic reports to the relevant committees of Congress explaining the state of the technology and the reasons for the delay, beginning with a report by the November 2024 deadline specified in section 24220. That would be an appropriate disposition of NHTSA's obligations under the statute.

Finally, the ANPRM indicates that NHTSA is tentatively considering treating "distracted driving" as a form of "impaired driving,"[10] but section 24220 is most reasonably interpreted not to permit that result. Within the context of section 24220, the concept of "impairment" or "impaired driving" is best read to encompass physical conditions (like intoxication) that prevent the driver from being able to operate the vehicle safely. Drivers who are distracted (for example, because they are focused on their phones while driving) are not physically unable to maintain or regain control of the vehicle. Rather, they are still capable of controlling their actions but have diverted their attention away from the operation of the vehicle. Doing so may be irresponsible and potentially negligent or reckless, but that does not mean the driver is functionally impaired.[11]

The problems of distracted driving and impaired driving are quite distinct, and it is plain that Congress sought to address only the latter in section 24220. Consistent with that conclusion, Congress separately directed NHTSA to study the problem of distracted driving in a different section of the IIJA, section 24209.[12]

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satisfied, § 24220(c), but, critically, it defines the phrase "advanced drunk and impaired driving prevention technology" *in the alternative* to mean *either* (1) a system that can passively and accurately detect when a driver's BAC exceeds the legal limit, *or* (2) one that can passively and accurately detect whether the driver "may be impaired," *or* (3) a combination of the two, § 24220(b)(1)(B)(ii) ("or"). Furthermore, it also defines such a system to mean one that can *either* prevent *or* limit the operation of the vehicle if the illegal BAC level or impairment is detected, § 24220(b)(1)(A)(ii) & (B)(ii) ("prevent or limit"). Accordingly, the statutory directive is optional in two ways: (1) It allows NHTSA to limit its rulemaking consideration to systems that detect the driver's BAC level and not to consider any system designed to detect other forms of impairment, and (2) it allows NHTSA to focus only on systems that would "prevent" the drunk driver from starting the car's engine and not to focus on any system designed to "limit" the operation of the vehicle during driving.

[10] *See* 89 FR at 835, 840.

[11] NHTSA recognizes as much when it observes in the ANPRM that only "*seven percent of cases of distraction also involve some form of impairment.*" *Id.* at 840 (emphasis added).

[12] *See* Pub. L. No. 117-58, § 24209, 135 Stat. at 823-24.

Concerns Over Freedom, Personal Responsibility, Privacy, and Data Security

A number of the impaired-driving detection technologies described in the ANPRM would involve systems for monitoring the behavior of drivers while operating their vehicles. These include systems that would rely on in-cabin cameras for constant video surveillance of drivers (recording and analyzing their every behavior, their movements, their facial expressions, etc.), other types of sensors that would monitor the driver's performance and detect whether the vehicle is swerving or otherwise being operated erratically, and sensors in the windshield or dash that would zero in directly on the driver's eyes and track eye movements to detect any potential inattention to the roadway.

Depending on whether some algorithmic or AI software program or some analyst or police officer in a control room somewhere who is closely monitoring the driver's behavior makes a judgment that the driver might be impaired, the system could potentially take control of the vehicle away from the driver and cause the vehicle to "limp home" at a slow speed or pull over and come to a stop, even in busy traffic.

If mandated by the government to be installed in all new vehicles, these systems would represent a profound encroachment on the personal freedom, responsibility, and privacy of Americans. It would move the surveillance state smack into the private space of every American's personal automobile—a sphere in which Americans ordinarily enjoy a reasonable expectation of privacy and therefore the protections of the Fourth Amendment (whether or not the vehicle is owned by the driver).[13] And any system of in-vehicle video surveillance would invade the privacy interests of passengers just as much as drivers.

Notice that many vehicle owners these days are opting for personal vehicles with darkly tinted windows that prevent other drivers and passersby from peering into this private space. That underscores the importance that many Americans place on maintaining the interior of their personal vehicles as a zone of privacy, free from prying eyes—including (if not especially) while they are occupying the vehicle.

Under some forms of the monitoring technology identified in the ANPRM, Big Brother (whether agents of the government or operatives of Big Tech) would have a virtual seat right next to you while you're driving, looking over your shoulder as you go about your personal business on the road. And your freedom to operate your vehicle could be taken away abruptly if the system judges you to be impaired, without any immediate opportunity for you to respond or explain yourself. Were you swerving to miss a pothole, were you attending to a screaming child in the backseat? The system may not perceive the full context, or it may be engineered not to care.

[13] *See Byrd v. United States*, 584 U.S. ___, 138 S. Ct. 1518 (2018) (rental car) (unanimous opinion); *Delaware v. Prouse*, 440 U.S. 648, 662 (1979).

In America, the personal vehicle has long been a freedom-and-prosperity machine, enabling individuals to control their own daily activities, giving them the means of efficient, self-directed mobility. Now, if NHTSA were to mandate installation of technologies that could, at any point, take over control of a vehicle on the road, all Americans' freedom to use their cars and trucks would be conditioned on the operation of that technology and could be snatched away, potentially through a false positive, depending on the functionality of the system.

Of course, drunk driving is a persistent national scourge, causing more than 13,000 highway deaths per year, and driving while under the influence of marijuana or other narcotics is also a serious and growing problem in America. We need more action, more public education, more resources, swifter and surer criminal process and penalties, and more tools and support for law enforcement to help address these challenges. But any proper public policy answer cannot neglect the central importance of individual responsibility and personal accountability. There is no technological panacea to eliminate human failings.

Is it fair that all law-abiding drivers and innocent passengers must lose a portion of their personal freedom, individual responsibility, and privacy because some drivers act irresponsibly and recklessly? That's un-American.

The great majority of drivers in this country are not going to accept this encroachment. I understand that some proponents point to surveys purportedly showing that a majority of Americans support the concept of mandating drunk- or impaired-driving prevention technology in some form, but survey results depend on who is polled and what questions are asked. I find it unbelievable that such positive survey results would hold for the most invasive systems described in the ANPRM. Did the survey questions specifically detail those types of technology? Did they ask whether the government or Big Tech should be permitted to monitor every moment of your driving and take away the control of your car if some algorithm or some official has an issue with your behavior? I doubt it.

Another serious concern with any system designed to monitor the driver's behavior while driving is cybersecurity. How, where, and for how long would the video or other data records for an individual driver be stored? Would the data be stored in the cloud on some remote server in a data center far away? Who would control the data and who would have access to it? The state or federal government? Law enforcement? With or without a warrant? Big Tech?

What about the possibility that an unfriendly foreign power, a criminal enterprise, or other malicious actors could hack into the system and expose private data records involving individual Americans (potentially millions of Americans) or, even worse, could gain control of the system and use it to bring traffic to a halt and cause chaos on our highways?

These concerns about loss of freedom, personal responsibility, privacy, and data security are not just matters of policy that push against the legislative judgment Congress made in enacting the IIJA. They are directly relevant to whether the contemplated FMVSS would be "reasonable, practicable, and appropriate" as required by the Motor Vehicle Safety Act, section 30111 of title 49. These are the primary concerns Americans will have with any mandated technology, and these are the very real concerns likely to determine whether America's drivers will accept any particular system or will act in large numbers to disable or override the functionality of the system, thus rendering it unreasonable, impracticable, and inappropriate as a matter of law.

Common sense tells us that Americans in general will revolt against the forced imposition of technologies that they perceive encroach significantly on their personal freedom and privacy interests or that raise serious data security concerns. NHTSA should recognize that fact and act upon it by refraining to advance any proposed FMVSS that would mandate such technologies.

Cost and Safety Considerations

As noted, under section 30111, NHTSA also must consider cost and safety factors in formulating any proposed FMVSS. These considerations weigh heavily against mandating most forms of the technology described in the ANPRM.

There is no doubt most of these systems will be expensive and will add considerable cost to a new motor vehicle. New cars and trucks in America are already more expensive than ever. Imposing a costly equipment requirement that appreciably raises the purchase price even higher would put more new vehicles beyond the affordability of many American families, a decidedly negative outcome under the Motor Vehicle Safety Act. As a result, more Americans, particularly lower-income Americans, would be stuck driving older and older used vehicles, and NHTSA's own statistics show that older vehicles are much less safe in a highway accident than new vehicles.[14] NHTSA should design its regulatory scheme to promote the affordability of new, safer vehicles.

NHTSA errs in suggesting that under section 30111, "Economic feasibility considerations focus [solely] on whether the cost on industry to comply with the standard would be prohibitive."[15] NHTSA must balance *all* of the likely economic effects of any new FMVSS, including the cost impact on vehicle purchasers, against the net safety benefits expected for the driving public. Where the cost of a new standard is likely to cause some fraction of

[14] *See* https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/newer-cars-safer-cars_fact-sheet_010320-tag.pdf.

[15] 89 FR at 837.

the public to forgo buying a new vehicle in favor of continuing to drive a used car, that must be taken into account in NHTSA's calculus.

The negative safety effects that would follow from a rise in new vehicle costs are not the only safety considerations implicated by the technologies described in the ANPRM.

Any system with the capability of limiting the operation of a vehicle on the road would obviously raise very significant safety concerns. Taking the vehicle out of the control of the driver and causing it to limp home in slow mode or suddenly slow down and pull over to the side of the road in busy traffic could be startling and disruptive for other drivers and could trigger collisions. Moreover, causing hapless drivers to be left stranded at the side of a busy highway, anywhere at night, or in an unfamiliar location far removed from assistance, perhaps in a high-crime area, would create dangerous scenarios.

Without a doubt, such situations would predictably lead to some number of tragic deaths and injuries, which NHTSA would have to estimate and weigh against any promised safety benefits of such systems.

Conclusion

For the foregoing reasons, I urge the Agency not to proceed to propose or finalize any FMVSS mandating the installation of advanced impaired-driving prevention technology at the present time.