ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1145

Consolidated with Nos. 20-1167, 20-1168, 20-1169, 20-1173, 20-1174, 20-1176, 20-1177, and 20-1230

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMPETITIVE ENTERPRISE INSTITUTE, *ET AL.*, *Petitioners,*

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *Respondent,*

ALLIANCE FOR AUTOMOTIVE INNOVATION, *ET AL.*, *Respondent-Intervenors.*

On Petitions for Review of Final Agency Action by the National Highway Traffic Safety Administration and the U.S. Environmental Protection Agency

BRIEF OF *AMICI CURIAE* SENATOR TOM CARPER, CHAIRMAN OF THE SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE, AND REPRESENTATIVE FRANK PALLONE, JR., CHAIRMAN OF THE HOUSE COMMITTEE ON ENERGY AND COMMERCE, IN SUPPORT OF COORDINATING PETITIONERS

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January 21, 2021

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*

All parties, intervenors, and *amici* appearing before this Court are listed or referenced in the Initial Briefs of Petitioners, with the exception of *Amici* Senator Tom Carper, Chairman of the Senate Environment and Public Works Committee, and Representative Frank Pallone, Jr., Chairman of the House Committee on Energy and Commerce, and any other *amici* who had not yet entered an appearance as of the filing of Petitioners' Initial Briefs.

B. Rulings Under Review

References to the rulings at issue appear in Petitioners' Initial Briefs.

C. Related Cases

References to related cases appear in Petitioners' Initial Briefs.

D. Corporate Disclosure Statement

Pursuant to Fed. R. App. P. 26.1 and 29(a)(4)(A), *Amici* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

/s/ Cara Horowitz
CARA A. HOROWITZ
JANUARY 21, 2021

RULE 29 STATEMENTS

All parties in the consolidated action have indicated their consent to the filing of this brief. *See* Case No. 20-1145, ECF No. 1876643 (Dec. 21, 2020).

Pursuant to Fed. R. App. P. 29(a)(4)(E), undersigned counsel for *Amici* states that no party or party's counsel authored this brief in whole or in part, and no other person besides *Amici* or their counsel contributed money intended to fund preparing or submitting the brief.

Pursuant to D.C. Cir. R. 29(d), undersigned counsel for *Amici* states that a separate brief is necessary due to *Amici*'s distinct expertise and interests. *Amici* are members of Congress with personal experience and expertise regarding the legislation that authorizes and requires Respondents to regulate fuel economy and vehicle emissions, as well as legislation imposing procedural requirements on federal agencies when promulgating regulations. *Amici* have a unique capacity to aid the Court in understanding the legislative intent behind statutory provisions at the center of the issues in this case. Furthermore, as described in detail in the brief, *Amicus* Senator Tom Carper led a thorough investigation into the facts and circumstances surrounding the promulgation of the challenged agency rule, providing *Amici* with the opportunity to explain the investigative results to this Court. No other *amici* of which we are aware share this perspective or address these

specific issues. Accordingly, *Amici*, through counsel, certify that filing a joint brief would not be practicable.

/s/ Cara Horowitz
CARA A. HOROWITZ
JANUARY 21, 2021

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GLOSSARY OF ABBREVIATIONS

CAA	Clean Air Act of 1970
DOT	U.S. Department of Transportation
EISA	Energy Independence and Security Act of 2007
EPA	U.S. Environmental Protection Agency
EPCA	Energy Policy and Conservation Act of 1975
GHG	Greenhouse Gas
JA	Joint Appendix
NHTSA	National Highway Traffic Safety Administration
OMB	White House Office of Management and Budget

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in Petitioners' Opening Briefs.

SUMMARY OF ARGUMENT AND *AMICI CURIAE*'S STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

In "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks," 85 Fed. Reg. 24,174 (Apr. 30, 2020) (JA__-__[85Fed.Reg.24174-25278]) (the "Rule"), the U.S. Environmental Protection Agency ("EPA") and the National Highway Traffic Safety Administration ("NHTSA") step far outside the roles that Congress has defined for them. EPA undermines its mission to protect the public health and welfare by replacing existing vehicle emission standards with standards that its own analysis shows are less protective of public health, without justification. Similarly, NHTSA disregards its obligation to prioritize energy conservation and weakens fuel economy standards to the point of irrelevance, requiring less of automakers than industry would achieve on its own if standards were never increased beyond 2020 levels. In the process, the agencies violate statutory requirements and long-established rulemaking procedures and principles.

Amici Curiae—Senator Tom Carper, Chairman of the Senate Environment and Public Works Committee, and Representative Frank Pallone, Jr., Chairman of the House Committee on Energy and Commerce—are members of Congress who are concerned with the agencies' unprecedented deviations from statutory mandates. *Amici* offer their unique legislative experience to aid the Court's understanding of the statutory provisions central to this case. This brief demonstrates that the Rule does not accord with congressional intent underlying the enabling laws.

First, EPA fails to uphold its obligation to protect the public health and welfare under the Clean Air Act of 1970 (the "CAA") by finalizing less stringent vehicle emissions standards for greenhouse gases ("GHGs") than it adopted in 2012, without justification. As demonstrated by statutory and legislative history, Congress's primary directive to EPA in regulating vehicle emissions is to reduce harms to public health and welfare. Instead, the Rule increases GHG emissions and other air pollution without regard to—or even serious analysis of—the health consequences and other societal costs that result from worsening climate change. The Rule fails to explain how weakening emission standards adequately carries out EPA's responsibility to protect the public, when more ambitious standards remain feasible, would save lives, and would yield greater economic benefit.

Second, NHTSA sets new fuel economy standards that are not the "maximum feasible" as required by the Energy Policy and Conservation Act of 1975 ("EPCA"). When enacting the federal fuel economy program in EPCA, and when amending the program in the Energy Independence and Security Act of 2007 ("EISA"), Congress explained that the central purpose of fuel economy standards is to conserve fuel and transition the U.S. toward energy independence. NHTSA has apparently decided, as a policy matter, that such stringent conservation measures are no longer necessary, relying on recent fluxes in domestic petroleum production as the primary basis to reject the 2012 augural standards. Although those standards remain technologically feasible and economically practicable, NHTSA adopts weaker standards that require less fuel economy improvement than it forecasts industry would achieve on its own if standards were frozen after 2020, and less year-over-year improvement than industry has reliably achieved over the last decade. This is a far cry from the "maximum feasible" standards that EPCA requires. The result is excess consumption of 84 billion gallons of fuel and additional costs to consumers of up to $300 billion.

Third, the agencies failed to abide by fundamental administrative rules when preparing the Rule. As established by *Amicus* Senator Carper's thorough evidentiary investigation, EPA abandoned its duty to exercise independent judgment during the

rulemaking process, instead allowing NHTSA to take the lead on substantive issues committed to EPA's sole discretion. Moreover, EPA attempted to obscure its abdication of its statutory responsibilities by intentionally withholding key documents from the rulemaking docket, violating its statutory obligation under the CAA to ensure transparency and accountability.

In sum, the substance of the Rule—and the procedures by which it was adopted—dispel any notion that EPA and NHTSA faithfully carried out their duties consistently with Congress's directives.

ARGUMENT

I. The Rule Fails to Protect Public Health and Welfare to the Degree Required by the CAA.

The CAA protects the public against motor vehicle pollutants that endanger public health and welfare by requiring EPA to create standards limiting the emission of those pollutants. But the Rule defeats and turns that mandate on its head. The Rule endangers public health by relaxing motor vehicle emission standards for GHGs despite overwhelming evidence that climate change is a growing threat; that more stringent standards are feasible; and that stronger standards would save significantly more lives and money. Moreover, it increases traditional air pollutants that cause respiratory disease and distress during a respiratory viral pandemic whose

effects the Rule will exacerbate. For these reasons, the Rule is wholly inconsistent with the CAA, Congressional intent, and common sense.

A. Greenhouse Gas Emissions from Motor Vehicles Pose a Serious Public Health Threat that the CAA Is Meant to Protect Against.

The United States faces a climate change emergency that threatens the health and safety of communities across the country. Its effects are being felt first and hardest by vulnerable populations, including children, the elderly, people with preexisting health conditions, communities of color, and low-income communities. U.S. Global Change Res. Program, Fourth National Climate Assessment, Vol. II: Impacts, Risks, and Adaptation in the United States, at 546-48 (rev. Feb. 2020) [hereinafter National Climate Assessment]. As temperatures increase, so do extreme weather events such as heat waves, wildfires, hurricanes, floods, and droughts; exposure to allergenic and pathogen-borne diseases; and sea level rise, all of which lead to more deaths, illnesses, and injuries. *Id.* at 543-46. Indeed, we are already seeing devastating and unparalleled effects of climate change in the U.S. Nine of the 20 largest fires in California's history occurred between December 2017 and November 2020. CalFire, Top 20 Largest California Wildfires (Nov. 3, 2020). Gulf Coast and East Coast communities have experienced an unprecedented number of destructive hurricanes in recent years. In 2017, damages from weather and climate disasters reached a record high, totaling $306.2 billion. National Climate

Assessment at 766. Climate change will contribute to more intense and damaging storms. *Id.* at 692 ("[T]he strongest hurricanes are anticipated to become both more frequent and more intense in the future . . . ."). The science is clear: Climate change endangers human health, and further climate change will intensify these harms.

The cars and light-duty trucks regulated by the Rule are the largest source of GHG emissions within the sector responsible for the largest share of those emissions in the U.S. *See* EPA, Inventory of U.S. GHG Emissions and Sinks: 1990-2018, at 2–32 (Apr. 13, 2020) (as of 2018, the transportation sector is "the largest contributor of GHG emissions"); *see also* *Fast Facts on Transportation Greenhouse Gas Emissions*, EPA (last updated July 29, 2020) (light-duty vehicles are responsible for 60% of transportation sector emissions). Indeed, EPA's own 2009 recognition of the significant dangers to public health posed by these sources' contribution to climate change triggered the agency's regulation of vehicle GHGs. *See* 74 Fed. Reg. 66,496, 66,497-99 (Dec. 15, 2009).

EPA's central charge in this rulemaking, as mandated by the CAA, is to protect public health and welfare against these pollutants. *See* Pub. L. No. 91–604, § 6, 84 Stat. 1676, 1690 (1970) (adding § 202 to the CAA); 42 U.S.C. § 7521; *see also Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) ("If EPA makes a finding of endangerment, the [CAA] requires the Agency to regulate emissions of the

deleterious pollutant from new motor vehicles."). Section 202(a)(1) requires EPA to create effective, health-based emission standards "to prevent reasonably anticipated endangerment from maturing into concrete harm." *Coal. for Responsible Regul., Inc. v. EPA*, 684 F.3d 102, 122 (D.C. Cir. 2012), *aff'd in part*, *rev'd in part sub nom. Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014). Such emission standards "must be based on the degree of emission control needed to protect the public health and welfare." S. Rep. No. 91-1196, at 59 (1970) (concerning the addition of § 202).[1] In other words, EPA's primary task is to assess what is necessary to protect the public from the threat it has identified and to reduce that harm. While EPA considers factors including the cost of compliance and lead time necessary for compliance in setting standards, see 42 U.S.C. § 7521(a)(2), its flexibility is limited by the CAA's primary purpose to protect public health and welfare, see *id.*

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[1] Indeed, the standards should be technology forcing, if public health requires. *Id.* at 24 (explaining that Congress "expected [EPA] to press for the development and application of improved technology rather than be limited by that which exists. In other words, standards should be a function of the degree of control required, not the degree of technology available today."); *see also Nat. Res. Def. Council, Inc. v. EPA*, 655 F.2d 318, 328 (D.C. Cir. 1981); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. N.Y. Dep't of Envtl. Conservation*, 17 F.3d 521, 536 (2d Cir. 1994) ("The [CAA] is concededly a 'technology forcing' law.").

§ 7401(b)(1). *See also Coal. for Responsible Regul.*, 684 F.3d at 127 (referring to "the limited flexibility available under Section 202(a)(2)").

In promulgating the Rule, EPA loses sight of its primary task. Instead of protecting public health, the Rule increases GHG emissions without regard to—or even serious analysis of—the health and other societal consequences that result from worsening climate change, as detailed below.

B. Rather than Protect Public Health and Welfare, EPA's Lax Standard Will Result in Hundreds of Premature Deaths, Tens of Thousands of Sick People, and Dirtier Air.

The Rule's failure to prioritize the public as the CAA requires is demonstrated by its woeful health outcomes. EPA acknowledges that by weakening existing emission standards, the Rule will result in many more people dying and falling ill. JA__[85Fed.Reg.25112-13].

As compared to the 2012 standards, EPA concedes that the Rule is projected to result in up to 1,000 additional premature deaths; 22,000 cases of upper and lower respiratory symptoms; 16,000 cases of asthma exacerbations; 720 acute bronchitis cases; 450 non-fatal heart attacks; 225 hospital admissions for cardiovascular and respiratory issues; and 260 emergency room visits for respiratory issues. *Id.* EPA also expects the Rule to result in an additional 61,000 work loss days for the public. JA_[85Fed.Reg.25113]. Together, this represents

hundreds of additional deaths and tens of thousands of cases of preventable illness. And these already high numbers likely seriously underestimate the Rule's true health consequences; one independent analysis using the EPA's own modeling tools estimated the Rule would cause 18,500 premature deaths, 250,000 more asthma attacks, 350,000 new cases of other respiratory ailments, and 1 million lost workdays. *See* Envtl. Def. Fund, Trump Administration Moves Ahead with Harmful Clean Cars Rollback (Mar. 2020).

Remarkably, EPA's assessment of public health harms does not even meaningfully analyze the harms that will stem from the Rule's contributions to a worsening climate. Though EPA acknowledges that the Rule will increase GHG emissions, it fails to address how increased GHG emissions—and the associated climate change harms—will affect public health. *See* JA__[85Fed.Reg.25111-13]. This failure is, itself, unlawful and arbitrary. EPA cannot have fulfilled its mission to reduce climate change harms from vehicle emissions if it has failed to assess the Rule's effect on those harms to any meaningful extent.

EPA also fails to grapple with the incongruity of its decision to increase traditional air pollutants that cause respiratory disease and distress during a respiratory viral pandemic. Public health outcomes from COVID-19 are significantly worsened by exposure to some of the very air pollutants that will be

increased by the Rule. *See* Wu *et al.*, *Air Pollution and COVID-19 Mortality in the United States: Strengths and Limitations of an Ecological Regression Analysis*, SCI. ADVANCES (Nov. 2020) (finding an association between increased levels of particulate matter pollution and higher COVID-19 mortality rates). Although the World Health Organization declared COVID-19 a global pandemic in early March, weeks before the Rule was finalized, EPA makes no reference to the pandemic in the Rule except in two oblique footnotes related to economic downturn.[2]

C. EPA Fails to Justify Replacing Feasible, Health-Protective Emission Standards with Weaker Standards that Cost More.

The Rule replaces and weakens EPA's 2012 GHG emission standards, despite the fact that those standards are admittedly feasible, result in greater economic benefits, and are more protective of public health. JA__[85Fed.Reg.25107,25111-12]. One assessment estimates the Rule will add 1.5 billion metric tons of climate pollution by 2040; even the Trump administration concedes a significant increase in GHG emissions will result. *See* Envtl. Def. Fund, Trump Administration Moves Ahead with Harmful Clean Cars Rollback (Mar. 2020); *see* NHTSA, Final Environmental Impact Statement, at 5–35 (Mar. 2020)*; see also*

[2] *See* JA__[85Fed.Reg.25170,25178].

JA__[85Fed.Reg.25111]. EPA has failed to justify its reversal of position and substitution of a weaker rule for a stronger one.

In January 2017, EPA completed its Midterm Evaluation of the Model Year 2022-2025 Light-Duty Vehicle GHG Emission Standards and determined the standards remained appropriate. *See* EPA, Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation, at 1 (Jan. 2017). At that time, EPA concluded that the technology needed to meet the standards was already available. *Id*. at 4. The midterm evaluation also showed that technologies that were developed after the 2012 standards were set would provide manufacturers with additional paths to complying with the 2022-2025 standards and that compliance cost projections were lower than when the standards were set. *Id*. at 20.

EPA now justifies the Rule's rollback by focusing on compliance costs associated with the standards and the lead-time the auto industry needs to comply. JA__[85Fed.Reg.25108]. However, EPA's own evidence continues to support the feasibility of the prior standards, including their affordability and achievability in the relevant timeframe. In promulgating the Rule, EPA acknowledged that the technologies needed to comply with the prior standards "have already been developed, have been commercialized, and are in-use on vehicles today."

JA__[85Fed.Reg.25107]; *see also* JA__[85Fed.Reg.25108] ("[M]anufacturers today are capable of building vehicles that can meet the [2012] standards . . . .").

But even if it did need extra time to meet the 2012 standards, industry can already handily exceed what the Rule requires of it. Five major auto manufacturers—Ford, Honda, BMW, Volkswagen, and Volvo—have signed legally binding agreements with the State of California to reduce emissions significantly beyond the levels required in the Rule. *See* *Framework Agreements on Clean Cars*, CAL. AIR RES. BD. (Aug. 17, 2020). These auto manufacturers represent approximately 30% of the U.S. auto market. *See* Coral Davenport, *Defying Trump, 5 Automakers Lock in a Deal on Greenhouse Gas Pollution*, N.Y. TIMES (Aug. 17, 2020). Their willingness to voluntarily take on more stringent legally binding standards further supports the conclusion that more stringent standards are technologically feasible and that associated compliance costs are not overly burdensome.

Nor can EPA's retreat from the prior, stronger rule be justified by reference to the goals of saving consumers money or lowering total societal costs. To the contrary, the Rule is both more expensive to consumers and more costly to society as a whole than its predecessor. The agencies' own cost-benefit analysis projects that "the net benefits [of the Rule] straddle zero"—even after manipulating

economic assumptions to achieve a result more favorable to the agencies—and that the Rule's standards could result in up to $22 billion in net societal costs. JA__[85Fed.Reg.24176-77]. In contrast, the 2012 rule was estimated to produce $326 billion to $451 billion in net benefits. 77 Fed. Reg. 62,624, 62,627 (Oct. 15, 2012) (describing net benefits over the lifetime of vehicles sold in model years 2017-2025). The Rule itself shows net costs to consumers, see JA___[85Fed.Reg.24180-81,24991-98], including increased fuel costs of around $175 billion as compared to the 2012 standards, see JA__[85Fed.Reg.24203]. And independent estimates show that the Rule will cost consumers an additional $300 billion, largely from increased vehicle and fuel costs, while providing far fewer environmental and health benefits. Chris Harto & Shannon Baker-Branstetter, *The Un-SAFE Rule Update: Weakening Fuel Economy and Emissions Standards Costs Consumers Money in Every State*, CONSUMER REPORTS, at 5 (Nov. 2019) [hereinafter *Un-SAFE Rule Update*]. The Rule's economic analysis downplays these costs, justifying them as an intra-U.S. transfer of wealth from American consumers to predominantly American oil companies, while ignoring the harmful distributional effects of large companies benefitting at the expense of individual Americans. JA__[85Fed.Reg.24724]. More fundamentally, weakening public health protections and raising consumer costs in order to cater to industry's bottom line is antithetical to the CAA's core mandate.

In sum, the Rule harms public health and welfare, fuels climate change, ignores readily available technology, and raises costs for consumers and society as a whole. These standards are incompatible with Congress's directives to EPA under the CAA.

II. NHTSA's Fuel Economy Standards Are Not the "Maximum Feasible" as Required to Conserve Energy under EPCA.

NHTSA's final fuel economy standards ignore EPCA's primary purpose of energy conservation and are not the "maximum feasible" standards required by law, instead resulting in significant additional fuel consumption and increased consumer costs compared to the 2012 augural standards.

A. The Rule Undermines EPCA's Statutory Purpose to Conserve Energy.

NHTSA justifies the Rule by asserting that adhering to the 2012 augural standards "would place undue weight on the need of the U.S. to conserve energy while being beyond economically practicable." JA__[85Fed.Reg.25122]. According to NHTSA, the U.S. has a diminished need to conserve energy because of recent increases in domestic petroleum production. JA__[85Fed.Reg.25141-43]. But de-prioritizing fuel conservation based on short-term shifts in petroleum production contravenes EPCA's purpose. "It is axiomatic that Congress intended energy conservation to be a long term effort [under EPCA] that would continue

through temporary improvements in energy availability." *Ctr. for Auto Safety v. NHTSA*, 793 F.2d 1322, 1340 (D.C. Cir. 1986); H.R. Rep. No. 94-340, at 3 (1975). EPCA's statutory and legislative history confirms that Congress intended for the federal fuel economy program to maximize gains in fuel efficiency, irrespective of short-term changes in the petroleum market. NHTSA cannot substitute its own policy preferences for this clear Congressional priority.

EPCA was enacted in the wake of the 1973 petroleum crisis. *See* Greg Dotson, *State Authority to Regulate Mobile Source Greenhouse Gas Emissions, Part 2: A Legislative and Statutory History Assessment*, 32 GEORGETOWN ENVTL. L. REV. (Forthcoming 2021), at 7. Subsequently, Presidents Nixon and Ford requested that Congress pursue energy legislation to reduce future exposure to energy shortages and oil price shocks. *Id.* at 7-9. In response, Congress passed EPCA in 1975, identifying as the law's central purpose "[conservation of] energy supplies through energy conservation programs and, where necessary, the regulation of certain energy uses." Pub. L. No. 94-163, § 2(4), 89 Stat. 871, 874 (1975). A vital component of the law is "to provide for improved energy efficiency of motor vehicles." *Id.* § 2(5), 89 Stat. at 874; 42 U.S.C. § 6201(5). EPCA established the federal fuel economy program, requiring NHTSA to set "maximum feasible" average fuel economy standards for model years after 1980, in furtherance of this objective. Pub. L. No.

94-163, § 301, 89 Stat. at 903 (adding § 502(b) to the Motor Vehicle Information and Cost Savings Act); 49 U.S.C. § 32902(a).

This Court has acknowledged that fuel conservation is the "overarching goal" of EPCA's fuel economy program. *Ctr. for Auto Safety*, 793 F.2d at 1340. EPCA's legislative history underscores this fact. Multiple committee reports highlight the energy efficiency purpose of the fuel economy standards,[3] and the bill's final text clearly differentiates between efforts to improve fuel efficiency—including the fuel economy standards—and efforts related to domestic oil supply. *See* Pub. L. No. 94-163, 89 Stat. at 871-72.

Congress reaffirmed NHTSA's obligation to set "maximum feasible" average fuel economy standards when passing EISA's amendments to EPCA. Pub. L. No. 110-140, 121 Stat. 1492, 1492 (2007); *id.* § 102, 121 Stat. at 1499; 49 U.S.C. § 32902(b)(2)(B). Following the EISA amendments, the Ninth Circuit echoed this Court's understanding that "energy conservation is the fundamental purpose of" fuel

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[3] *See, e.g.*, H.R. Rep. No. 94-340, at 1 (the fuel economy program's purpose is to save energy "by improving the efficiency of . . . the cars we drive"); S. Rep. No. 94-179, at 7 (1975) (identifying "the overwhelming need to achieve maximum energy savings" from vehicles); S. Rep. No. 94-516, at 118 (1975) (Conf. Rep.) (categorizing fuel economy standards as "Energy Conservation Programs," which are "designed to encourage the maximum efficient utilization of domestic energy resources").

economy standards. *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1205 (9th Cir. 2008).

NHTSA's analysis in the Rule ignores Congress's clear and consistent conservation objectives. Congress never intended fuel conservation to be a temporary goal that would fade away if the U.S. became a net exporter of petroleum, as NHTSA concludes. *See* JA__[85Fed.Reg.25170-71]. Rather, Congress created a permanent program to achieve "maximum feasible" reductions in fuel consumption, irrespective of short-term increases in domestic petroleum production. *See* S. Rep. No. 94-516, at 117 (1975) (Conf. Rep.) (noting the long-term goals to "decrease dependence upon foreign imports, enhance national security, [and] achieve the efficient utilization of scarce resources"). Although NHTSA has discretion to balance "the need of the Nation to conserve energy" with other factors when determining "maximum feasible" fuel economy standards, it may do so only "as long as NHTSA's balancing does not undermine the fundamental purpose of the EPCA: energy conservation." *Ctr. for Biological Diversity*, 538 F.3d at 1195 (citing *Ctr. for Auto Safety*, 793 F.2d at 1338); *see also* Pub. L. No. 94-163, § 301, 89 Stat. at 905 (adding § 502(e)); 49 U.S.C. § 32902(f).

Ignoring the statute's core objective, NHSTA erroneously posits that "the need of the Nation to conserve energy" militates against more stringent standards in

this case. In NHTSA's view, increased domestic oil production "tips our balancing away from the most stringent standards." JA__[85Fed.Reg.25174]; *see also* JA__[85Fed.Reg.25122]. NHTSA's approach deviates from Congress's intent that consideration of "the need of the Nation to conserve energy" should weigh in favor of stringent standards to "encourage the maximum efficient utilization of" vehicle fuels. S. Rep. No. 94-516, at 118. The Rule prioritizes purported costs to industry instead of what EPCA mandates: centering energy conservation as paramount. *See Ctr. for Auto Safety*, 793 F.2d at 1340 ("[I]t would clearly be impermissible for NHTSA to rely on consumer demand to such an extent that it ignored the [fuel economy program's] overarching goal of fuel conservation.").

Notably, the record does not support NHTSA's conclusion about the waning importance of energy conservation. Nearly 15 years after EISA's enactment, the energy security concerns that have always underpinned fuel economy standards persist. The Rule concedes that the U.S. still imports significant quantities of foreign oil. JA__[85Fed.Reg.25143]. It further concedes, and oil market experts emphasize, that global events could still trigger domestic oil price fluctuations, exposing consumers to exactly the kinds of price shocks Congress intended ambitious fuel economy standards to minimize. JA__[85Fed.Reg.25150]; *see* Comment of Jason Bordoff, Docket No. NHTSA-2018-0067, at 3 (Oct. 22, 2018) (explaining how

"geopolitical risk remains a factor affecting oil prices" and noting significant recent price fluctuations). NHTSA's own sources project the U.S. will be a net importer of petroleum and other liquid energy sources by 2050. *See* U.S. Energy Info. Admin., Annual Energy Outlook 2019, at 13 (Jan. 24, 2019) (relied on by NHTSA in assessing future petroleum supplies, at JA___[85Fed.Reg.24887,25143]); *see also* U.S. Energy Info. Admin., Annual Energy Outlook 2020, at 11 (Jan. 29, 2020). These facts belie NHTSA's conclusion that "the need of the U.S to conserve energy does not, at present, appear to counsel toward higher stringency." JA__[85Fed.Reg.25187]. More fundamentally, however, Congress has consistently instructed NHTSA to prioritize conservation of energy in setting "maximum feasible" fuel economy standards, rather than chase market fluctuations, and the agency has no power to reconsider that mandate as it has done here.

B. NHTSA's Failure to Set "Maximum Feasible" Fuel Economy Standards Results in 84 Billion Gallons of Additional Fuel Consumption and Up to $300 Billion in Additional Consumer Fuel Expenditures.

It is difficult to conceive of more dispositive evidence that NHTSA's final standards fall short of what is "maximum feasible" than the fact that NHTSA's own analysis reveals that those standards require *less* of automakers than what automakers would achieve even if the Rule required no stringency increases at all.

Rather than pursuing energy conservation as Congress intended, NHTSA instead harms the economy and consumers with the Rule.

By failing to take seriously its duty to advance energy conservation, NHTSA has weakened fuel economy standards to the point of irrelevance. The Rule requires less stringent fuel economy improvements than what NHTSA itself models automakers would achieve if standards were frozen after 2020. *See* NHTSA & EPA, Final Regulatory Impact Analysis, at 1370 (Mar. 2020) (forecasting average fuel economy of 40.7 mpg for model year 2026 under a freeze of standards compared to the Rule's lower 40.4 mpg requirement for that model year). It also requires lower efficiency gains than automakers have consistently achieved over many years. *See* EPA, 2019 EPA Automotive Trends Report, at 11 (Mar. 2020) (average industry-wide fuel economy for combined fleets improved over 2% annually since 2005). This contravenes Congress's intent for standards to generate fuel economy improvements beyond what the market would produce. *See Ctr. for Auto Safety*, 793 F.2d at 1339 ("Congress rejected market forces as the *sole* means of improving energy conservation" under the fuel economy program, which is "intended to be technology forcing") (emphasis in original); S. Rep. No. 94-179, at 9 (1975) ("[M]arket forces . . . may not be strong enough to bring about the necessary fuel conservation which a national energy policy demands."); *id.* (fuel economy

standards "create[] the necessary climate for investment in automotive technology leading to substantial energy conservation").

That the Rule takes this do-nothing approach even as NHTSA concedes the stronger augural standards are still technologically feasible, see JA__[85Fed.Reg.25129-31], is nonsensical. Nor does NHTSA ever explain how its earlier determination that the augural standards are economically practicable, see 77 Fed. Reg. at 62,629, was inaccurate, or how those standards would severely harm the auto industry. *See Ctr. for Biological Diversity*, 538 F.3d at 1198 n.42 (criticizing NHTSA's balancing of EPCA's factors because "NHTSA has provided no evidence that the auto industry would suffer severe economic consequences" from higher standards). Simply put, the Rule does not set "maximum feasible" standards because far more stringent standards are achievable.

Nor has NHTSA justified imposing additional costs on consumers and settling on a Rule with fewer benefits. In contrast to the augural standards' projected net benefits of between $220 billion and $293 billion for model years 2022-2025, see 77 Fed. Reg. at 63,086, NHTSA admits that its new standards offer no meaningful net benefits, see JA__[85Fed.Reg.24176]—and that is without even considering serious climate-change related costs that would arise from the new standards. *See* JA__[85Fed.Reg.24732-34] (rejecting consideration of the global social cost of

carbon under the Rule); *Ctr. for Biological Diversity*, 538 F.3d at 1198-1203 (holding that NHTSA should have considered benefits of reductions of carbon emissions in its cost-benefit analysis for fuel economy standards).

Indeed, even using a highly flawed cost-benefit analysis, NHTSA acknowledges that the Rule could increase fuel costs for consumers on the order of $185.1 billion, equivalent to 84 billion gallons of unnecessary fuel consumption compared to the augural standards. JA__[85Fed.Reg.24176,24180]. Independent analyses show that NHTSA's predictions of consumer costs are understated. *See Un-SAFE Rule Update* at 5 (NHTSA's final standards could impose up to $300 billion in net costs to consumers nationwide); Hannah Pitt & Maggie Young, *A Step Closer to a Rollback of Fuel Economy Standards*, RHODIUM GRP. (Feb. 13, 2020) (estimating that NHTSA's final standards would increase U.S. oil demand by 2.2 billion barrels—or 92.4 billion gallons—by 2035, resulting in $231 billion in increased fuel costs for consumers). These facts contradict NHTSA's position that its final standards are the "maximum feasible."

In sum, the Rule fails to prioritize energy conservation, replacing the technologically feasible 2012 augural standards with new fuel economy standards that require below-market fuel economy improvements, instead of the "maximum feasible" standards EPCA requires. For these reasons, the Rule flouts Congress's

intent in establishing the federal fuel economy program, imposes unnecessary harms on consumers, and is arbitrary and capricious.

III. The Rule Resulted from an Unlawful Process that Undermined Bedrock Administrative Principles.

This rulemaking process was fundamentally flawed. EPA violated its statutory duties by (1) relying on NHTSA's error-filled analysis instead of its own expert judgment in setting vehicle GHG emission standards, and (2) intentionally excluding key documents from the rulemaking docket and hindering public participation. These failures render this rulemaking arbitrary, capricious, and contrary to law.

A. EPA Unlawfully Delegated Its Statutory Duty by Failing to Exercise Independent Judgment Throughout the Rulemaking Process.

EPA has a non-delegable statutory duty to set GHG emission standards for new light-duty vehicles that is "wholly independent of [the Department of Transportation ('DOT')]'s mandate to promote energy efficiency" under EPCA. *Massachusetts v. EPA*, 549 U.S. at 532-33; *see also Coal. for Responsible Regul.*, 684 F.3d at 114; 74 Fed. Reg. at 66,499; 42 U.S.C. § 7521(a)(1). Although agencies can receive outside input when regulating, they cannot "blindly adopt the conclusions" of another agency. *City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006). Here, EPA abdicated its duty to regulate vehicle emissions, arbitrarily

and capriciously relying on NHTSA's "facially-flawed" analysis instead of its own judgment. *See Ergon-West Va., Inc. v. EPA*, 896 F.3d 600, 610-12 (4th Cir. 2018) (citing *City of Tacoma*, 460 F.3d at 75-76).

Evidence of this unsound regulatory process has been painstakingly gathered by the office of *Amicus* Senator Carper, then-Ranking Member of the Senate Environment and Public Works Committee. Senator Carper's office reviewed more than 1,000 pages of documents revealing EPA's comments on the draft Rule's flaws, which were not included in the rulemaking docket. Those documents show that NHTSA "was the sole author of most, if not all, of the draft final [R]ule" submitted in January 2020 to the White House Office of Management and Budget ("OMB"), and that EPA Principal Deputy Assistant Administrator Anne Austin (née Idsal) was aware that the draft final Rule was not "an EPA-co-authored product." Letter from Thomas R. Carper, Ranking Member, Senate Comm. on Env't & Pub. Works, to Sean O'Donnell, Inspector Gen., EPA, at 3 (May 18, 2020) [hereinafter "Carper Letter"], Exhibit to ECF No. 1858308. Based on the documents, Senator Carper concluded that "DOT exercised near-complete control over the preparation and finalization of both the fuel economy rule promulgated under its own statutory authority *and* the greenhouse gas emissions rule promulgated under EPA's statutory authority." *Id.* (emphasis in original). He further assessed that this rulemaking "may

be the most procedurally problematic process my office has ever reviewed." *Id.* at 2.

Instead of applying its own judgment to set emission standards, EPA acceded to NHTSA's determinations even when it knew those determinations erred. It allowed the Rule's GHG standards to be set relying on NHTSA's Corporate Average Fuel Economy model instead of using EPA's own Optimization Model for Reducing Emissions of Greenhouse Gases from Automobiles, known as the OMEGA model, designed to comport with CAA requirements. *See* JA__[85Fed.Reg.24227-30,24890]. It did so even though NHTSA's model is not designed to comply with CAA mandates, and observers repeatedly noted flaws in the modeling that materially impacted the standard-setting process. *See, e.g.*, Ctr. for Biological Diversity *et al.*, Petition for Reconsideration of EPA's Final Rule—The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, at 10 (June 29, 2020) [hereinafter Petition for Reconsideration] (compiling comments, including interagency review documents indicating that "EPA's OMEGA modeling found costs half that of NHTSA's findings").

In fact, EPA knew NHTSA's model and overall rulemaking approach erred, and EPA staff repeatedly sounded alarm bells—to no avail. *See, e.g.*, Attachment 2 to E-mail from William Charmley, EPA, to Chandana L. Achanta *et al.*, OMB, at 1

(June 18, 2018) (EPA proposing "substantial" revisions to NHTSA's Corporate Average Fuel Economy modeling, which were never implemented); Attachment to E-mail from Chandana L. Achanta, OMB, to Tia Sutton & Brittany Bolen, EPA (July 12, 2018) (NHTSA declining to revise modeling despite EPA's concerns); *see also* Carper Letter at 5 (detailing a string of basic errors in the rulemaking that EPA repeatedly identified but that NHTSA failed to correct). An EPA Office of Transportation and Air Quality presentation to Ms. Austin details EPA's significant disagreements with much of NHTSA's technical analysis. EPA, SAFE Final Rule: OTAQ Review of the Preamble Submitted to OMB, at 3 (Jan. 30, 2020) [hereinafter EPA OTAQ Review]. That presentation concludes that NHTSA misrepresented EPA's technical work and modeling tools and made factually incorrect statements. *Id.* at 3, 8.

EPA's failure to assert its independent expert judgment in the face of these disagreements materially affected the stringency of the Rule's GHG emission standards. As commenters pointed out, using NHTSA's modeling instead of its own OMEGA model "vastly inflated the projected compliance costs for the previous standards, creating the false appearance that a dramatic weakening of those standards was justified in order to avoid those costs." Petition for Reconsideration at 10. Nevertheless, EPA continued to rely on NHTSA's model.

EPA abdicated other significant elements of the rulemaking process to NHTSA, too. The Preliminary Regulatory Impact Assessment—which is a critical tool used to evaluate the consequences of the Rule by analyzing its costs and benefits—was drafted by NHTSA alone, failing to account for EPA's own assessments of the Rule. EPA disclaimed any responsibility for the document, telling OMB that the Preliminary Regulatory Impact Assessment "is a work product of DOT and NHTSA, and was not authored by EPA" and that EPA "[relied] upon the technical analysis performed by DOT-NHTSA for the Notice of Proposed Rulemaking." Attachment to E-mail from William Charmley, EPA, to Chandana L. Achanta *et al.*, OMB, at 2 (July 12, 2018); *see also* NHTSA & EPA, Preliminary Regulatory Impact Analysis, at 6 (Oct. 16, 2018). By the end of the rulemaking process, EPA appears to have entirely abdicated to NHTSA its exercise of statutory authority. The great majority of the Rule's preamble was "new material that [EPA] did not have an opportunity to review prior to OMB submissions" and was "not EPA's analysis – EPA [was] relying upon the assessment performed by NHTSA." EPA OTAQ Review at 3-4.

Federal agencies cannot delegate their statutory decision-making authority to outside parties—including other federal agencies. *See Ergon-West Va.*, 896 F.3d at 610-12; *City of Tacoma*, 460 F.3d at 76; *Nat. Res. Def. Council, Inc. v. Reilly*, 983

F.2d 259, 273 (D.C. Cir. 1993); *G.H. Daniels III & Assocs., Inc. v. Perez*, 626 F. App'x 205, 212 (10th Cir. 2015) (holding agency delegation to a non-subordinate agency improper in the absence of congressional authorization). But that is exactly what EPA did by unlawfully abandoning its independent CAA rulemaking obligations, while NHTSA "exercised near-complete control over the preparation and finalization of . . . the greenhouse gas emissions rule promulgated under EPA's statutory authority." Carper Letter at 3. The Rule therefore fails to conform to statutory requirements and is arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *City of Tacoma*, 460 F.3d at 76.

B. EPA Unlawfully Withheld Its Comments on the Rule's Flaws from the Rulemaking Docket and Hid Key Decisions from Public Review.

Section 307 of the CAA requires EPA to include in the rulemaking docket "all [] written comments . . . all documents accompanying [drafts of the final rule], and written responses thereto." 42 U.S.C. § 7607(d)(4)(B)(ii). Congress intended for Section 307(d) to impose "thorough and careful procedural safeguards that insure an effective opportunity for public participation in the rulemaking process." H.R. Rep. No. 94-1175, at 260 (1976); H.R. Rep. No. 95-294, at 319 (1975) (same); *see also Am. Petroleum Inst. v. Costle*, 609 F.2d 20, 23-24 (D.C. Cir. 1979) (noting that Section 307(d)'s procedural requirements "promote[] public participation in

rulemaking . . .”). And Congress was clear that EPA “has at least as great an obligation to include any such documents that contradict its position as it does to include those that support it.” H.R. Rep. No. 94-1175, at 261; H.R. Rep. No. 95-294, at 319-20 (same). Nonetheless, EPA purposefully withheld its comments on and concerns about the final Rule from the rulemaking docket, violating Congress’s mandate. Carper Letter at 3-5.

Key omissions from the docket include EPA’s February and March 2020 comments on the draft rule; a January 30, 2020 briefing that provided “a breakdown of EPA’s technical concerns with the draft final rule”; and a February 4, 2020 briefing that “described the organization of EPA’s comments that would be provided to [NHTSA], with red comments identifying edits to ‘factually incorrect’ items, brown comments identifying edits to items that were ‘unnecessarily denigrating EPA work or inappropriate/unprofessional tone’ and blue comments identifying edits to items that would ‘improve clarity.’” *Id.*; *see also* Attachment to Carper Letter. These documents, “including EPA’s technical feedback, were only provided in hard copy to [NHTSA], outside the formal interagency review process.” Carper Letter at 4. Senator Carper’s office also learned that EPA’s General Counsel Matt Leopold overruled EPA career lawyers’ belief that the missing materials “were legally required to be placed into the rulemaking docket.” *Id.*

EPA also shielded from public review other information essential to understanding the development of the Rule. It refused to make its key OMEGA model public until forced to do so by court order, months after public comment on the Rule had closed. *See Nat. Res. Def. Council, Inc. v. EPA*, 954 F.3d 150 (2d Cir. 2020) (holding that EPA had illegally withheld the OMEGA model and must disclose it). And EPA took the highly unusual step of making significant substantive changes to the Rule *after* the Rule was signed but before it was published in the Federal Register—with the effect of depriving the public of any meaningful opportunity to assess and object to those changes. *See* Carper Letter at 6-8.

These decisions violate Section 307 of the CAA and significantly impair the transparency of the rulemaking, raising serious concerns about EPA's accountability and integrity and highlighting the arbitrariness and capriciousness of the rulemaking. *See Sierra Club v. Costle*, 657 F.2d 298, 398 (D.C. Cir. 1981) (docketing key documents too late for meaningful public participation violates "both the structure and spirit of section 307"); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 550 (D.C. Cir. 1983) (Congress intended public participation pursuant to Section 307 to be "more, not less, extensive" than under the Administrative Procedure Act) (citing H.R. Rep. No. 95-294, at 319).

CONCLUSION

For reasons stated herein, the Court should grant Coordinating Petitioners' Petitions for Review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitations set forth in D.C. Cir. R. 32(e)(3) and Fed. R. App. P. 29(a)(5) because this brief contains 6,494 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1). The foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman font.

/s/ Cara Horowitz
CARA A. HOROWITZ

January 21, 2021

CERTIFICATE OF SERVICE

I hereby certify that, on this 21st day of January, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system, which will send notice of such filing to all counsel who are CM/ECF registered users.

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January 21, 2021