

**ORAL ARGUMENT NOT YET SCHEDULED**  
**No. 19-1230 (consolidated with 19-1239, 19-1241, 19-1242, 19-1243,  
19-1245, 19-1246, 19-1249, 20-1175, 20-1178)**

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**United States Court of Appeals  
for the District of Columbia Circuit**

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UNION OF CONCERNED SCIENTISTS, et al.,  
*Petitioners,*

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,  
*Respondent.*

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COALITION FOR SUSTAINABLE AUTOMOTIVE REGULATION, et al.,  
*Intervenors for Respondent.*

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On Petition for Review of Agency Action by the  
National Highway Traffic Safety Administration, No: NHTS-84FR51310

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**PROOF BRIEF OF PETITIONERS NATIONAL COALITION FOR  
ADVANCED TRANSPORTATION, CALPINE CORPORATION,  
CONSOLIDATED EDISON, INC., NATIONAL GRID USA, NEW YORK  
POWER AUTHORITY, POWER COMPANIES CLIMATE COALITION,  
AND ADVANCED ENERGY ECONOMY**

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), Petitioners National Coalition for Advanced Transportation, Calpine Corporation, Consolidated Edison, Inc., National Grid USA, New York Power Authority, Power Companies Climate Coalition, and Advanced Energy Economy (in Nos. 19-1242, -1245, -1249, 20-1175) state as follows:

**A. Parties and Amici****Petitioners:**

No. 19-1230: Union of Concerned Scientists, Center for Biological Diversity, Conservation Law Foundation, Environment America, Environmental Defense Fund, Environmental Law and Policy Center, Natural Resources Defense Council, Inc., Public Citizen, Inc., Sierra Club.

No. 19-1239: States of California (by and through Governor Gavin Newsom, Attorney General Xavier Becerra, and the California Air Resources Board), Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington, and Wisconsin; the Commonwealths of Massachusetts, Pennsylvania, and Virginia; the People of The State of Michigan; the District of Columbia; the Cities of Los Angeles and New York.

No. 19-1241: South Coast Air Quality Management District, Bay Area Air Quality Management District, and Sacramento Metropolitan Air Quality Management District.

No. 19-1242: National Coalition for Advanced Transportation.

Nos. 19-1243, 20-1178: Sierra Club, Center for Biological Diversity, Chesapeake Bay Foundation, Inc., Communities for a Better Environment, Conservation Law Foundation, Environment America, Environmental Defense Fund, Environmental Law and Policy Center, Natural Resources Defense Council, Inc., Public Citizen, Inc., Union of Concerned Scientists.

No. 19-1245: Calpine Corporation, Consolidated Edison, Inc., National Grid USA, New York Power Authority, Power Companies Climate Coalition.

No. 19-1246: City and County of San Francisco.

No. 19-1249: Advanced Energy Economy.

No. 20-1175: National Coalition for Advanced Transportation, Advanced Energy Economy, Consolidated Edison, Inc., Calpine Corporation, National Grid USA, New York Power Authority, Power Companies Climate Coalition.

**Respondents:**

No. 19-1230: National Highway Traffic Safety Administration.

Nos. 19-1239, -1242, -1246: Andrew Wheeler (in his official capacity as Administrator, United States Environmental Protection Agency Respondent), U.S.

Environmental Protection Agency, Elaine L. Chao (in her official capacity as Secretary, United States Department of Transportation), United States Department of Transportation, James C. Owens (in his official capacity as Acting Administrator, National Highway Traffic Safety Administration), National Highway Traffic Safety Administration.

No. 19-1241: U.S. Environmental Protection Agency, Andrew Wheeler (in his official capacity as Administrator, U.S. Environmental Protection Agency), National Highway Traffic Safety Administration, James Owens (in his official capacity as Acting Administrator, National Highway Traffic Safety Administration).

Nos. 19-1243, -1249: U.S. Environmental Protection Agency, Andrew Wheeler (in his official capacity as Administrator, United States Environmental Protection Agency).

Nos. 19-1245, 20-1175: U.S. Environmental Protection Agency, United States Department of Transportation, National Highway Traffic Safety Administration.

No. 20-1178: U.S. Environmental Protection Agency, National Highway Traffic Safety Administration.

**Intervenors:**

Automotive Regulatory Council, Inc., Coalition for Sustainable Automotive Regulation, American Fuel & Petrochemical Manufacturers, State of Alabama, State

of Alaska, State of Arkansas, State of Georgia, State of Louisiana, State of Missouri, State of Nebraska, State of Ohio, State of South Carolina, State of Texas, State of Utah, State of West Virginia, State of Indiana.

**Amici Curiae:**

No individuals or entities have sought leave to participate as amicus curiae. On May 26, 2020, all parties in these consolidated cases consented to the filing of amicus briefs provided amici comply with Federal Rule of Appellate Procedure 29, District of Columbia Circuit Rule 29, and applicable orders of this Court.

**B. Ruling Under Review**

This case involves a challenge to final actions by the United States Environmental Protection Agency and Administrator Andrew R. Wheeler and the separate final action of respondents United States Department of Transportation, Secretary Elaine L. Chao, National Highway Traffic Safety Administration, and Deputy Administrator James C. Owens (collectively referred to herein as “NHTSA”) published as “The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program” at 84 Fed. Reg. 51,310 on September 27, 2019.

**C. Related Cases**

By Orders on November 19, 2019, November 20, 2019, November 25, 2019, November 27, 2019, December 2, 2019, and June 3, 2020, this Court consolidated the cases filed by the petitioners listed above in Nos. 19-1239, 19-1241, 19-1242,

19-1243, 19-1245, 19-1246, 19-1249, 20-1175 and 20-1178 into Lead No. 19-1230.

The U.S. District Court for the District of Columbia has consolidated and stayed three cases in which petitioners in this case challenged the same action of NHTSA.

*California v. Chao*, No. 19-cv-2826-KBJ (filed Sept. 27, 2019). Petitioners are not aware of any other related cases.

Dated: June 26, 2020

Respectfully submitted,

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**RULE 26.1 CORPORATE DISCLOSURE STATEMENT FOR  
PETITIONER NATIONAL COALITION FOR ADVANCED  
TRANSPORTATION**

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Petitioner National Coalition for Advanced Transportation (“Transportation Coalition”) states as follows:

The National Coalition for Advanced Transportation is a coalition of companies and non-profit organizations that supports electric vehicle and other advanced transportation technologies and related infrastructure, including business leaders engaged in energy supply, transmission, and distribution; vehicle and component design and manufacturing; and charging infrastructure production and implementation, among other activities. The Transportation Coalition is an unincorporated association and does not have a parent corporation. No publicly-held entity owns 10% or more of the Transportation Coalition.

The Transportation Coalition currently has the following members<sup>1</sup>:

- Atlantic City Electric
- Baltimore Gas & Electric
- ChargePoint

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<sup>1</sup> Transportation Coalition member Center for Climate and Energy Solutions is not participating in this litigation, because the organization does not participate in litigation as a matter of general practice.



- Commonwealth Edison Company
- Delmarva Power
- Edison International
- EVgo
- Exelon Corporation
- Pacific Gas and Electric Company
- PECO
- PEPCO
- Plug In America
- Portland General Electric
- Rivian Automotive
- Sacramento Municipal Utility District
- Tesla, Inc.

Dated: June 26, 2020

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**RULE 26.1 DISCLOSURE STATEMENT FOR  
PETITIONER ADVANCED ENERGY ECONOMY**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Petitioner Advanced Energy Economy provides the following disclosure statement.

**Advanced Energy Economy** (“AEE”) certifies that AEE is a not-for-profit business association dedicated to making energy secure, clean, and affordable. AEE does not have any parent companies or issue stock, and no publicly held company has a 10% or greater ownership interest in AEE.

Dated: June 26, 2020

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**RULE 26.1 DISCLOSURE STATEMENT FOR PETITIONERS CALPINE CORPORATION, CONSOLIDATED EDISON, INC., NATIONAL GRID USA, NEW YORK POWER AUTHORITY, AND POWER COMPANIES CLIMATE COALITION**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Petitioners Calpine Corporation, Consolidated Edison, Inc., National Grid USA, New York Power Authority, and Power Companies Climate Coalition provide the following disclosure statements.

**Calpine Corporation** (“Calpine”) certifies that it is a privately held corporation. CPN Management, LP owns 100 percent of the common stock of Calpine. Volt Parent GP, LLC is the General Partner of CPN Management, LP. Energy Capital Partners III, LLC owns the controlling interest in Volt Parent GP, LLC. Calpine is among America’s largest generators of electricity from natural gas and geothermal resources, with 77 power plants in operation or under construction in 16 U.S. states and Canada, amounting to nearly 26,000 megawatts of generating capacity. Calpine also provides retail electric service to customers in competitive markets throughout the U.S., including an additional seven states (beyond those in which it operates generation resources), through its subsidiaries Calpine Energy Solutions and Champion Energy Services.

**Consolidated Edison, Inc.** (“Con Edison”) states that it is a holding company that owns several subsidiaries, including Consolidated Edison Company of New York, Inc., which delivers electricity, natural gas and steam to customers

in New York City and Westchester County, Orange & Rockland Utilities, Inc., which together with its subsidiary, Rockland Electric Company, delivers electricity and natural gas to customers primarily located in southeastern New York State and Northern New Jersey, and Con Edison Clean Energy Business, Inc., which, through its subsidiaries, develops, owns, and operates renewable and energy infrastructure projects and provides energy-related products and services to wholesale and retail customers and has more than 2,600 megawatts of utility-scale solar and wind generation capacity in service, with a footprint spanning 17 states. Con Edison has outstanding shares and debt held by the public and may issue additional securities to the public. Con Edison has no parent corporation and no publicly held company has a ten percent or greater ownership interest in it.

**National Grid USA** states that it is a holding company with regulated direct and indirect subsidiaries engaged in the transmission, distribution and sale of electricity and natural gas and the generation of electricity. It is the direct or indirect corporate parent of several subsidiary electric distribution companies, including Massachusetts Electric Company, Nantucket Electric Company, Niagara Mohawk Power Corporation and The Narragansett Electric Company. National Grid USA is also the direct corporate parent of National Grid Generation LLC, which supplies capacity to, and produces energy for, the use of customers of the Long Island Power Authority. All of the outstanding shares of common stock of National Grid USA are

owned by National Grid North America Inc. All of the outstanding shares of common stock of National Grid North America Inc. are owned by National Grid (US) Partner 1 Limited. All of the outstanding ordinary shares of National Grid (US) Partner 1 Limited are owned by National Grid (US) Investments 4 Limited. All of the outstanding ordinary shares of National Grid (US) Investments 4 Limited are owned by National Grid (US) Holdings Limited. All of the outstanding ordinary shares of National Grid (US) Holdings Limited are owned by National Grid plc. National Grid plc is a public limited company organized under the laws of England and Wales, with ordinary shares listed on the London Stock Exchange, and American Depositary Shares listed on the New York Stock Exchange. No publicly held corporation directly owns more than 10 percent of National Grid plc's outstanding ordinary shares.

**New York Power Authority** (“NYPA”) states that it is a New York State public-benefit corporation. It is the largest state public power utility in the United States, with 16 generating facilities and more than 1,400 circuit-miles of transmission lines. NYPA sells electricity to more than 1,000 customers, including local and state government entities, municipal and rural cooperative electric systems, industry, large and small businesses and non-profit organizations. NYPA has no parent corporation and no publicly held company owns greater than 10 percent ownership interest in it.

**Power Companies Climate Coalition** states that it is an unincorporated association of companies engaged in the generation and distribution of electricity and natural gas, organized to advocate for responsible solutions to address climate change and reduce emissions of greenhouse gases and other pollutants, including through participation in litigation concerning federal regulation. Its members include the Los Angeles Department of Water and Power (“LADWP”), Seattle City Light, NYPA, as well as Con Edison, National Grid USA and each of their respective subsidiaries, as enumerated and described elsewhere in this disclosure statement.<sup>2</sup>

**LADWP** states that it is a vertically integrated publicly-owned electric utility of the City of Los Angeles, serving a population of over 4 million people within a 465 square mile service territory covering the City of Los Angeles and portions of the Owens Valley. LADWP is the third largest electric utility in the state, one of five California balancing authorities, and the nation’s largest municipal utility. LADWP owns and operates a diverse portfolio of generation, transmission, and

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<sup>2</sup> Other members of Power Companies Climate Coalition, including Exelon Corporation and its subsidiaries (Atlantic City Electric Company, Baltimore Gas and Electric Company, Commonwealth Edison Company, Constellation, Delmarva Power, Exelon Generation Company, PECO, and Potomac Electric Power), Pacific Gas and Electric Company, and Sacramento Municipal Utility District, are participating in litigation challenging these actions as members of the National Coalition for Advanced Transportation. Power Companies Climate Coalition members Public Service Enterprise Group Incorporated and its subsidiaries (PSEG Energy Resources & Trade, PSEG Fossil, PSEG Nuclear, PSEG Power, and Public Service Electric and Gas Company) are not participating in this litigation.

distribution assets across several states. LADWP's diverse portfolio includes electricity produced from natural gas, hydropower, coal, nuclear, wind, biomass, geothermal, and solar energy resources. LADWP owns and/or operates the majority of its conventional generating resources, with a net dependable generating capacity of 7,967 megawatts. Its transmission system, which includes more than 3,700 circuit-miles of transmission lines, transports power from the Pacific Northwest, Utah, Wyoming, Arizona, Nevada, and elsewhere within California to the City of Los Angeles. LADWP's mission is to provide clean, reliable water and power in a safe, environmentally responsible, and cost-effective manner.

Dated: June 26, 2020

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## GLOSSARY

Actions	Respondents' final actions under review, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, published at 84 Fed. Reg. 51,310 (Sept. 27, 2019)
EPA	United States Environmental Protection Agency
EPCA	Energy Policy and Conservation Act
Industry Petitioners	National Coalition for Advanced Transportation, Calpine Corporation, Consolidated Edison, Inc., National Grid USA, New York Power Authority, Power Companies Climate Coalition, and Advanced Energy Economy
NHTSA	National Highway Traffic Safety Administration
Primary Brief	Brief of State and Local Government Petitioners and Public Interest Petitioners
Transportation Coalition	National Coalition for Advanced Transportation

## **JURISDICTIONAL STATEMENT**

Industry Petitioners adopt the Jurisdictional Statement appearing in the brief of State and Local Government Petitioners and Public Interest Petitioners (“Primary Brief”).

## **ISSUES PRESENTED**

Industry Petitioners adopt the Primary Brief’s Issues Presented.

## **STATUTES AND REGULATIONS**

Pertinent statutes and regulations are reproduced in the Addendum.

## **STATEMENT OF THE CASE**

Industry Petitioners adopt the Primary Brief’s Statement of the Case.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

Industry Petitioners have invested billions with the well-founded expectation that increased demand for electric vehicles would be propelled by California and the Section 177 States’ continued ability to drive technology innovation and emission reductions. By withdrawing these states’ authority to enforce standards that incentivize the deployment of electric vehicles, Respondent United States Environmental Protection Agency’s (“EPA’s”) actions contradict Congress’ intent, and arbitrarily devalue Petitioners’ reasonable investments in electric vehicle technology and supporting infrastructure. Separately, Respondent National Highway Traffic Safety Administration (“NHTSA”) exceeds its statutory authority

by purporting to preempt state zero-emission vehicle standards. For these reasons and those explained in the Primary Brief, Respondents' actions are unlawful.

### STANDING

Advanced Energy Economy, National Coalition for Advanced Transportation (“Transportation Coalition”) and Power Companies Climate Coalition (collectively “Industry Petitioners”) each have standing to challenge Respondents' final actions under review (collectively “Actions”) because their members would have such standing, their interests are germane to their purpose and the claims asserted do not require participation of individual members. *See Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002).

Industry Petitioners seek to redress actual and imminent injury caused by the Actions, and the requested relief would remedy that injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). California and the Section 177 States' greenhouse gas and zero-emission vehicle standards (the “State Standards”) play a critical role in driving investments in zero or low greenhouse gas emissions vehicles and related infrastructure. *See, e.g., Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1111 (D.C. Cir. 1979) (California's standards have acted as a “laboratory for innovation”). Industry Petitioners collectively have invested, or are in the process of investing, billions of dollars in electric vehicle technology and



infrastructure. *See, e.g.*, Peterman Decl. ¶¶ 7-8 (ADD17-18)<sup>3</sup>; Lau Decl. ¶¶ 4-5 (ADD2-3); Mendelson Decl. ¶¶ 8-9 (ADD9-11); Sutley Decl. ¶¶ 4-5 (ADD22-23); JA\_\_\_[Transportation\_Coalition\_Comments\_2]. The Actions undermine the value of such investments and impose additional costs on Industry Petitioners. *See, e.g.*, Peterman Decl. ¶¶ 11-13 (ADD19-20); Lau Decl. ¶¶ 8-9 (ADD4-5); Sutley Decl. ¶ 9 (ADD24). Respondents recently issued new, weaker federal light-duty vehicle greenhouse gas emissions standards and corporate average fuel economy standards. 85 Fed. Reg. 24,174 (Apr. 30, 2020). As a result of the Actions, these weakened federal standards undermine incentives to develop and deploy electric vehicles and related technologies. *See Chamber of Commerce of the U.S. v. EPA*, 642 F.3d 192, 200 (D.C. Cir. 2011) (imminent future harm sufficient to show standing). Moreover, electric vehicle manufacturers earn and sell tradable compliance credits under the State Standards. *See, e.g.*, Cal. Code Regs. tit. 13, § 1962.2(d); Mendelson Decl. ¶¶ 8, 14 (ADD9-10, 13). The Actions purport to preempt the State Standards, and thus eliminate state credit transactions and associated revenue. *See* JA\_\_\_[84Fed.Reg.51314].

Finally, Transportation Coalition member Tesla, Inc. manufactures all-electric vehicles that are sold in California and the Section 177 States, and is thus

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<sup>3</sup> Industry Petitioners submit declarations in support of standing in the separate Addendum filed herewith at ADD1-25. *See* D.C. Cir. R. 28(7).

directly subject to the State Standards. *See* Mendelson Decl. ¶ 7 (ADD9); *cf.* Cal. Code Regs. tit. 13, §§ 1962.2, 1961.3(a). If a petitioner “is ‘an object of the [agency] action (or forgone action) at issue’ . . . there should be ‘little question’” regarding the petitioner’s standing. *Sierra Club*, 292 F.3d at 900 (quoting *Lujan*, 504 U.S. at 561-62).

## ARGUMENT

### **I. EPA’s Withdrawal of the California Waiver Is Contrary to the Clean Air Act**

For more than half a century and through major revisions of the Clean Air Act, Congress, the Courts and EPA have consistently affirmed California’s role in successfully incubating groundbreaking vehicle pollution technology. Now, EPA has unilaterally reversed course, trampling on California’s unique authority and, in so doing, stifling the innovation that Section 209 was intended to foster.

The Clean Air Act does not authorize EPA to withdraw a Section 209 waiver, for the reasons explained in the Primary Brief. To the contrary, as explained below, the legislative history of Section 209 shows that Congress took pains to preserve California’s authority to enforce its own pioneering emissions standards. The Clean Air Act is a technology-forcing statute, and the waiver provision must be read consistently with its structure and purpose. Moreover, EPA acted arbitrarily and capriciously by unilaterally reopening a settled adjudication and withdrawing the

waiver based solely upon a change in Administration policy, without regard for industry's significant reliance on the agency's original decision.

**A. EPA's waiver withdrawal contravenes Congress's intention to preserve California's authority to enforce its own technology-forcing emissions standards and its role as a laboratory of innovation**

EPA's waiver withdrawal ignores a fundamental structural element of the Clean Air Act: it is designed to be "technology-forcing." *Union Elec. Co. v. EPA*, 427 U.S. 246, 258 (1976); *Train v. NRDC*, 421 U.S. 60, 90 (1975). The 1970 amendments were "expressly designed to force regulated sources to develop pollution control devices that *might at the time appear to be economically or technologically infeasible.*" *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 491-92 (2001) (Breyer, J., concurring) (citation omitted)).

Section 209, in particular, reflects Congress's cooperative-federalist vision that California was "in short, to act as a kind of laboratory for innovation." *Motor & Equip. Mfrs. Ass'n, Inc.*, 627 F.2d at 1111; cf. S. Rep. No. 90-403 at 33 (1967), <https://nepis.epa.gov/Exe/ZyPDF.cgi/20016B46.PDF?Dockey=20016B46.PDF> ("The Nation will have the benefit of California's experience with lower standards, which will require new control systems and design."). Withdrawing California's waiver here contravenes Congress's intent that Section 209 would enable California and the Section 177 States to drive the development of pollution-reducing technologies.

EPA's assertion of "inherent authority," JA\_\_\_[84Fed.Reg.51331], to withdraw California's waiver contradicts congressional intent. EPA's argument rests on a single snippet from the 1967 legislative history, which suggests that the EPA Administrator has the "right . . . to withdraw the waiver at any time [if] . . . he finds that the State of California no longer complies with that waiver." S. Rep. No. 90-403, at 34. However as EPA previously recognized, "Congress meant to ensure by the language it adopted that the Federal government would not second guess the wisdom of state policy here." 40 Fed. Reg. 23,103, 23,103 (May 28, 1975).

Regardless, that legislative snippet has been superseded. The 1977 amendments to Section 209 were expressly intended "to ratify and strengthen" the waiver provision and to "afford California the broadest possible discretion" to design and implement its own standards. H.R. Rep. No. 95-294, at 301-02, 1977 U.S.C.C.A.N. 1077, 1380-81 (1977).<sup>4</sup> EPA ignores this superseding history and disregards Congress's instruction that the Administrator "is not to overturn California's judgment lightly" or "substitute his judgment for that of the State." *Id.*

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<sup>4</sup> In addition to placing California's judgment—not EPA's—at the center of Section 209, the 1977 amendments strengthened California's role in another regard. Congress added Section 177, which allows other states to adopt California's standards, addressing the view that the Clean Air Act's preemption provision "interfere[d] with legitimate police powers of States, prevent[ed] effective protection of public health, [and] limit[ed] economic growth and employment opportunities." H.R. Rep. 95-294, at 309.

at 302; *see also Ford Motor Co. v. EPA*, 606 F.2d 1293, 1297 (D.C. Cir. 1979) (“Congress consciously chose to permit California to blaze its own trail with a minimum of federal oversight.”).

**B. EPA fails to justify its unilateral reversal of its prior decision and disregards significant industry reliance interests**

This Court recently held, “[a]n agency cannot ignore its prior factual findings that contradict its new policy nor ignore reliance interests.” *Nat’l Lifeline Ass’n v. FCC*, 921 F.3d 1102, 1111 (D.C. Cir. 2019). EPA has done both here.

Granting a waiver request has traditionally been considered an informal adjudication, not a rulemaking. 74 Fed. Reg. 32,744, 32,781 (July 8, 2009). While agencies may, sometimes, “correct judgments which contain clerical errors or judgments which have issued due to inadvertence or mistake,” agencies may not reopen already-decided adjudications simply “because the wisdom of those decisions appears doubtful in the light of changing policies.” *Am. Trucking Ass’ns v. Frisco Transp. Co.*, 358 U.S. 133, 145-46 (1958).

EPA argues that “[a]n agency has the inherent power to reconsider and change a decision *if it does so within a reasonable period of time.*” JA\_\_\_[84Fed.Reg.51333] (emphasis added) (quoting *Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977)). However, as the Court decided in *Mazaleski*, “absent unusual circumstances,” a “reasonable period of time” “would be measured in weeks, not years.” 562 F.2d at 720. By this standard, EPA’s withdrawal cannot

be considered reasonable: EPA granted California's waiver *more than six years* before purporting to withdraw it. *See also Am. Methyl Corp. v. EPA*, 749 F.2d 826, 835 (D.C. Cir. 1984) (An agency may only reconsider its decision “within the period available for taking an appeal.”).

EPA cites two inapposite examples when it previously suggested reconsideration might be appropriate: the first involved California's post-waiver modification of standards; the second suggested that a manufacturer might petition EPA for reconsideration if California's lead time projections were overly optimistic. JA \_\_\_ - \_\_\_ [84Fed.Reg.51332-33].<sup>5</sup> Here, by contrast, EPA exceeded its statutory role by unilaterally initiating revocation.<sup>6</sup>

EPA fails to explain its departure from prior findings that California's program was necessary to address extraordinary and compelling conditions and that the regulations underlying this waiver are technically feasible. EPA's withdrawal is also highly disruptive to the regulatory certainty it claims to promote. Innovation in the transportation sector requires billions of dollars and significant advance planning. *E.g.*, JA \_\_\_ [Tesla\_Comments\_30]. In the years since EPA granted

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<sup>5</sup> EPA also cites to its reconsideration of a waiver denial. 74 Fed. Reg. at 32,747. This analogy is inapposite; reconsideration of a waiver denial implicates none of the reliance interests implicated by withdrawal of a granted waiver.

<sup>6</sup> Notably, EPA disclaims that recent actions taken by California with respect to its regulations are “necessary predicates” for its withdrawal action, which it says it “would be taking . . . even in their absence.” JA \_\_\_ [84Fed.Reg.51334].

California's waiver, the State Standards have spurred billions of dollars of investment in electric vehicle manufacturing and infrastructure. *See supra* at 2-3. EPA must address these significant industry reliance interests if it now wishes to reverse course—especially at this late date. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (“Agencies are free to change their existing policies . . . [but] [i]n explaining its changed position, an agency must also be cognizant that longstanding policies may have ‘engendered serious reliance interests that must be taken into account.’” (citation omitted)). There is no basis for EPA's bald and patently false assertion that “no cognizable reliance interests have accrued sufficient to foreclose EPA's ability to [revoke the waiver] here.” JA\_\_\_[84Fed.Reg.51331]. Indeed, the Supreme Court recently found arbitrary and capricious an agency's failure, before rescinding the Deferred Action on Childhood Arrivals program, to properly assess the existence and strength of recipients' reliance interests, weigh those interests against competing policy concerns and consider its flexibility to accommodate those interests. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, No. 18-587, 2020 WL 3271746, at \*14 (June 18, 2020).

## II. NHTSA's Preemption Regulation Is Contrary to EPCA

NHTSA's preemption regulation exceeds its authority and is arbitrary and capricious for the reasons discussed in the Primary Brief.<sup>7</sup> It is also contrary to the statute because it purports to preempt standards that mandate that a certain percentage of sales be zero-emission vehicles, such as electric or hydrogen fuel cell vehicles. The Energy Policy and Conservation Act's ("EPCA's") text and purpose do not support NHTSA's overbroad assertion of preemption.

EPCA preempts a state "law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter." 49 U.S.C. § 32919(a). Pushing that provision beyond the bounds of reason, NHTSA promulgated a regulation deeming any state law or regulation that "regulates or prohibits tailpipe carbon dioxide emissions from automobiles" to be "relate[d] to average fuel economy standards," 49 C.F.R. pt. 531 app. B § (a)(1), and thus preempted under EPCA, including standards for zero-emission vehicles that "eliminate the use of fossil fuel," JA\_\_\_[84Fed.Reg.51320]. This interpretation is patently inconsistent with the text and structure of the statute.

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<sup>7</sup> Industry Petitioners agree that the challenge to NHTSA's preemption regulation must be heard in district court. *See* Primary Brief.



First, EPCA defines fuel and fuel economy to expressly exclude zero-emission vehicle technologies. “[F]uel” is “gasoline;” “diesel oil; or” “other liquid or gaseous fuel.” 49 U.S.C. § 32901(a)(10). “[F]uel economy” means “the average number of miles traveled by an automobile for each gallon of gasoline (or equivalent amount of other fuel) used.” *Id.* § 32901(a)(11). “[A]lternative fuels” is a distinct category, not included in calculating fuel economy. *Id.* § 32901(a)(1), (a)(1)(G) (hydrogen), (a)(1)(J) (electricity).

Further, EPCA prohibits NHTSA from considering the availability of alternative fuel vehicles in determining the maximum feasible average level of fuel economy. *Id.* § 32902(h)(1) (prohibiting consideration of dedicated alternative fuel vehicles), (h)(2) (limiting consideration of dual fuel vehicles to gasoline or diesel fuel use). Although the statute incentivizes manufacture of alternative fuel vehicles, *id.* § 32905, and allows calculation of electric vehicles for determining overall fleet compliance, *id.* § 32904(a)(2), the only statutory mandates for alternative fuel vehicles relate to public disclosure of information regarding those vehicles, *id.* § 32908.

A statutory framework that prohibits consideration of alternative fuel technologies in setting “fuel economy standards” cannot expressly preempt zero-emission vehicle standards. “‘The purpose of Congress is the ultimate touchstone’ in every pre-emption case,” and courts must examine that purpose based on the

“structure and purpose of the statute as a whole” and “the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996) (internal citations omitted). In EPCA, Congress mandated reduced oil consumption through “improved energy efficiency for motor vehicles.” Pub. L. No. 94-163, § 2(5), 89 Stat. 871, 874 (1975). But it precluded NHTSA from including alternative fuel vehicle technology in setting fuel economy standards. *See supra* at 11. State zero-emission vehicle standards unequivocally require adoption of alternative fuel technologies, including electric drive, hydrogen or compressed air. *See* JA\_\_\_[Transportation\_Coalition\_Comments\_55]. No degree of “fuel economy” can be applied to achieve these standards, so they cannot be expressly preempted by EPCA.

Nor can EPCA be read to impliedly preempt zero-emission vehicle standards. Conflict preemption occurs where it is “impossible for a private party to comply with both state and federal requirements.” *Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472, 480 (2013) (citation omitted). NHTSA relies on conflict preemption, asserting that zero-emission vehicle mandates “directly conflict” with EPCA’s objectives, JA\_\_\_[84Fed.Reg.51314], “appear[] to conflict directly with Congress’s intent that [fuel economy] standards be performance-based rather than design mandates,” JA\_\_\_[83Fed.Reg.43239], and “apply irrespective of” the statutory factors for

setting fuel economy standards, “including technological feasibility and economic practicability,” JA\_\_\_[84Fed.Reg.51314]. These arguments are misplaced. Zero-emission vehicle standards are performance-based, focused on emissions output, in contrast to EPCA’s fuel economy standards, which define performance through efficiency of vehicles’ use of “fuel” and expressly exclude alternative fuel. *See supra* at 11. And of course, state zero-emission vehicle standards do not take into account the statutory factors for setting fuel economy standards—they are unrelated to fuel economy as defined in EPCA, and Congress expressly excluded alternative fuel vehicle technologies from consideration in standard-setting. *See supra* at 11. These State Standards support, rather than frustrate, EPCA’s primary purpose of conserving energy.

Although NHTSA elsewhere has recognized the statutory prohibition on considering alternative fuel technologies in standard setting,<sup>8</sup> the agency made no attempt to reconcile this prohibition with its preemption regulation. None of NHTSA’s arguments for preemption address this issue. *See, e.g.*, 49 C.F.R. pt. 531 app. B § (a)(1)(A)-(B) (“fuel economy is directly and substantially related to automobile tailpipe emissions of carbon dioxide”; “[c]arbon dioxide is the natural

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<sup>8</sup> JA\_\_\_[83Fed.Reg.43212] (“NHTSA also cannot consider the use of alternative fuels by dual fuel vehicles nor the availability of dedicated alternative fuel vehicles in any model year.”).

by-product of automobile fuel consumption”). NHTSA simply claimed it is “not dispositive” that zero-emission vehicle mandates are not expressed in relation to gasoline or equivalent fuel identified in EPCA. JA \_\_\_ - \_\_\_ [84Fed.Reg.51321-22]. NHTSA did not (and could not) explain how statutory authority to prescribe average fuel economy standards could reasonably be read to preempt mandates for zero-emission vehicles that are expressly excluded from standard setting and that require use of an entirely different source of energy than “fuel.” *See supra* at 11. Instead, NHTSA discounts the relevance of such vehicles, claiming that “[a]lmost all technologically feasible reduction of tailpipe emissions of carbon dioxide is achievable through improving fuel economy.” JA \_\_\_ [84Fed.Reg.51315] (alteration in original) (quoting 49 C.F.R. pt. 531 app. B § (a)(1)(D)). That is irrelevant to the question of preemption and is wrong. The considerable record before the agency demonstrates the widespread consumer demand for and adoption of alternative fuel, zero-emission vehicles that reduce greenhouse gas emissions. JA \_\_\_ - \_\_\_, \_\_\_ - \_\_\_ [Transportation\_Coalition\_Comments\_9-19; Tesla\_Comments\_9-14]. Thus, NHTSA’s “explanation for its decision . . . runs counter to the evidence before the agency,” fails to consider an important aspect of the problem and is therefore arbitrary and capricious. *See Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). NHTSA’s attempt to extend

preemption's reach into a realm of alternative fuel technology not regulated by fuel economy standards must fail.

## CONCLUSION

For the foregoing reasons, the Court should grant the Petitions for Review.

Dated: June 26, 2020

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of the Court's Order filed May 20, 2020 (Doc. # 1843712) because it contains 2,984 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

This brief complies with the typeface and type style requirements of Rules 32(a)(5) and 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in proportionally spaced, 14-point Times New Roman typeface using Microsoft Word 2016.

/s/ Stacey L. VanBellegem  
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**ORAL ARGUMENT NOT YET SCHEDULED**  
**No. 19-1230 (consolidated with 19-1239, 19-1241, 19-1242, 19-1243,  
19-1245, 19-1246, 19-1249, 20-1175, 20-1178)**

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**United States Court of Appeals  
for the District of Columbia Circuit**

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UNION OF CONCERNED SCIENTISTS, et al.,  
*Petitioners,*

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,  
*Respondent.*

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COALITION FOR SUSTAINABLE AUTOMOTIVE REGULATION, et al.,  
*Intervenors for Respondent.*

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On Petition for Review of Agency Action by the  
National Highway Traffic Safety Administration, No: NHTS-84FR51310

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**SEPARATE ADDENDUM OF PETITIONERS NATIONAL COALITION  
FOR ADVANCED TRANSPORTATION, CALPINE CORPORATION,  
CONSOLIDATED EDISON, INC., NATIONAL GRID USA, NEW YORK  
POWER AUTHORITY, POWER COMPANIES CLIMATE COALITION,  
AND ADVANCED ENERGY ECONOMY**

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**ORAL ARGUMENT NOT YET SCHEDULED****IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

UNION OF CONCERNED SCIENTISTS,  
*et al.*,

*Petitioners,*

v.

NATIONAL HIGHWAY TRAFFIC  
SAFETY ADMINISTRATION,

*Respondent,*

COALITION FOR SUSTAINABLE  
AUTOMOTIVE REGULATION, *et al.*,

*Intervenors for Respondent.*

Case Nos. 19-1230,  
and consolidated cases

**DECLARATION OF PAUL LAU**

I, Paul Lau, do hereby declare that the following statements made by me under oath are true and accurate to the best of my knowledge, information and belief:

1. I am the Chief Grid Strategy and Operations Officer at the Sacramento Municipal Utility District. I am responsible for operation of the Sacramento Municipal Utility District's power markets, transmission, and distribution grids, including the Balancing Authority of Northern California, the development of a

holistic smart grid strategy, and overseeing our utility's research and development programs.

2. Created by voters in 1923, the Sacramento Municipal Utility District is the nation's sixth-largest community-owned electric service provider, serving over 1.5 million people in Sacramento, California.

3. The Sacramento Municipal Utility District is a member of the National Coalition for Advanced Transportation.

4. The Sacramento Municipal Utility District supports strong greenhouse gas emissions standards for vehicles, including California's authority to have its own greenhouse gas and Zero Emission Vehicle standards under the Clean Air Act, which have been adopted by other states. These state standards have provided significant incentives for the development and deployment of electric vehicle technology and supporting infrastructure, including in California. The Sacramento Municipal Utility District's interest supporting California's standards and opposing a reduction in the stringency of the United States Environmental Protection Agency's ("EPA") light-duty vehicle greenhouse standards stems primarily from the Sacramento Municipal Utility District's direct financial investments in infrastructure and in special electricity rates to foster electric vehicle growth.

5. The regulatory certainty of California's existing greenhouse gas and Zero Emission Vehicle standards, along with the federal greenhouse gas and

corporate average fuel economy standards, has allowed the Sacramento Municipal Utility District to model projected electric vehicle penetration in the Sacramento Municipal Utility District's service territory, budget for needed infrastructure investments, and offer incentives to encourage electric vehicle adoption that will scale the Sacramento Municipal Utility District's investments. Between 2000 and 2017, the Sacramento Municipal Utility District spent over \$27 million on its internal electric vehicle research and development program, and is on track to spend an additional \$7.3 million by 2021. In addition since 2000, the Sacramento Municipal Utility District has spent \$10.5 million to support electric vehicle charging infrastructure, outreach and education, and incentives for electric vehicles. The Sacramento Municipal Utility District has relied on California's existing greenhouse gas and Zero Emission Vehicle standards in planning for these programs.

6. The Sacramento Municipal Utility District participated in EPA's and the National Highway Traffic Safety Administration's ("NHTSA") regulatory process for the proposed Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, submitting comments to the agencies through the National Coalition for Advanced Transportation.<sup>1</sup>

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<sup>1</sup> Comments of the National Coalition for Advanced Transportation on the proposed Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, Docket Nos. NHTSA-2018-0067, EPA-HQ-OAR-2018-0283, NHTSA-2017-0069 (Oct. 26, 2018), <https://www.regulations.gov/document?D=NHTSA-2018-0067-11969/>.

7. In September 2019, EPA and NHTSA issued The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program (“Actions”).<sup>2</sup> The Actions include EPA’s withdrawal of the Clean Air Act waiver granted to California for state greenhouse gas and Zero Emission Vehicle standards, and NHTSA’s regulation declaring that these state standards are preempted by the Energy Policy and Conservation Act.

8. EPA’s and NHTSA’s Actions have created substantial uncertainty by purporting to remove California’s legal authority for its vehicle greenhouse gas and Zero Emission Vehicle standards. These Actions have undermined confidence in and/or altered the market projections that the Sacramento Municipal Utility District uses to determine the appropriate level of investment in electric vehicle infrastructure and the value of the rates it has offered to electric vehicle customers. EPA’s and NHTSA’s Actions accordingly require the Sacramento Municipal Utility District to bear new and additional planning and analysis costs related to these market projections.

9. The Sacramento Municipal Utility District estimates that removal of California’s greenhouse gas and Zero Emission Vehicle standards, as well as reductions in the stringency of EPA’s and NHTSA’s federal greenhouse gas and

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<sup>2</sup> The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310 (Sept. 27, 2019).

corporate average fuel economy standards, could slow or reverse electric vehicle adoption trends and result in substantially lower returns on the Sacramento Municipal Utility District's investments out to 2030. This would, in turn, cause the Sacramento Municipal Utility District to reevaluate its rates and incentives for electric vehicle owners, and face choices of taking further financial losses to encourage enough electric vehicle adoption to make the Sacramento Municipal Utility District's investments scale, increasing rates for electric vehicle owners to recoup some losses, or abandoning the electric vehicle program after over 25 years of investment. In any case, the Sacramento Municipal Utility District will need to spend further time and expense modeling, rolling out, and negotiating updated rates.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct. Executed on June 24, 2020.



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Paul Lau

**ORAL ARGUMENT NOT YET SCHEDULED****IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

UNION OF CONCERNED SCIENTISTS,  
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COALITION FOR SUSTAINABLE  
AUTOMOTIVE REGULATION, *et al.*,

*Intervenors for Respondent.*

Case Nos. 19-1230,  
and consolidated cases

**DECLARATION OF JOSEPH MENDELSON, III**

I, Joseph Mendelson, III, do hereby declare that the following statements made by me under oath are true and accurate to the best of my knowledge, information, and belief:

1. I am Senior Counsel, Public Policy and Business Development at Tesla, Inc. (“Tesla”). I am responsible for Tesla’s relations with state agencies, including the California Air Resources Board that carries out California’s Low Emissions

Vehicle III greenhouse gas and Zero Emissions Vehicle standards and agencies in the states that have adopted greenhouse gas and zero emission vehicle regulations identical to California's under Section 177 of the Clean Air Act (the "Section 177 States"). I am also responsible for relations with federal agencies related to the United States Environmental Protection Agency's ("EPA") light-duty vehicle greenhouse gas vehicle emissions standards and National Highway Traffic Safety Administration ("NHTSA") corporate average fuel economy standards. I managed Tesla's participation in the regulatory process, including drafting and submitting written comments opposing NHTSA's proposed preemption rule, EPA's proposed revocation of the Clean Air Act Section 209(b) waiver it granted to California in 2013 for state vehicle greenhouse gas and Zero Emission Vehicle standards, and EPA's proposed determination that the Section 177 States may not adopt or enforce greenhouse gas regulations identical to those for which California has been granted a waiver.

2. Tesla is a member of the National Coalition for Advanced Transportation.

3. Tesla is a publicly traded corporation, incorporated in the State of Delaware on July 1, 2003, with headquarters located at 3500 Deer Creek Road, Palo Alto, CA 94304.



4. Tesla's mission is to accelerate the world's transition to sustainable energy. Moreover, Tesla believes the world will not be able to solve the climate change crisis without directly reducing air pollutant emissions—including carbon dioxide and other greenhouse gases—from the transportation and power sectors.

5. To accomplish its mission, Tesla designs, develops, manufactures, and sells high-performance fully electric vehicles and energy generation and storage systems, installs and maintains such systems, and sells solar electricity. Tesla currently produces and sells four fully electric vehicles: the Model S sedan, the Model X sport utility vehicle, the Model 3 sedan, and the Model Y mid-sized SUV. Less than three years after its first delivery to customers, the Tesla Model 3 is now one of the top ten best selling cars in America and, based on registration data, in the first quarter of 2020 became the best-selling car across all passenger segments in California.<sup>1</sup> Tesla vehicles have also received a number of distinctions, including over the past year the Model 3 being included in Consumer Reports' 2020 "Top Picks" List and the Model S being named Motor Trend's Ultimate Car of the Year.

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<sup>1</sup> See, e.g., Sean Szymkowski, *Tesla Model 3 was California's best selling car through first quarter: The electric sedan found more buyers than any rivaling car, and even mass-market sedans and crossovers*, CNET (June 1, 2020), <https://www.cnet.com/roadshow/news/tesla-model-3-california-best-selling-car/#:~:text=Tesla%20Model%203%20was%20California's%20best%20selling%20car%20through%20first,mass%2Dmarket%20sedans%20and%20crossovers> (citing data from the California New Car Dealers Association).

6. Tesla has made significant investments to establish, and continues to grow, a large network of retail stores, vehicle service centers, and electric vehicle charging stations to accelerate and support the widespread adoption of its vehicle products.

7. In the United States, Tesla conducts vehicle manufacturing and assembly operations at its facilities in Fremont, California and Sparks, Nevada. Tesla's American manufactured electric vehicles are sold nationwide including in California and the Section 177 States. As such, Tesla is subject to regulation under the California and the Section 177 States' greenhouse gas emissions and Zero Emission Vehicle standards.<sup>2</sup>

8. Tesla supports strong state vehicle greenhouse gas emissions performance standards for light-duty vehicles. For many years, the California standards have helped drive investment in electric vehicle manufacturing and technology because those performance standards incentivize manufacturing vehicles with lower carbon emissions and provide a mechanism by which vehicle manufacturers that deploy innovative technologies and out-perform the standards

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<sup>2</sup> See, e.g., Cal. Code Regs. tit. 13, § 1962.2 (Zero-Emission Vehicle Standards); Cal. Code Regs. tit. 13, § 1961.3(a) (Low Emissions Vehicle III greenhouse gas standards).

are rewarded as they can earn and sell tradeable compliance credits.<sup>3</sup> Tesla's required, public SEC filings regularly report quarterly revenue derived from automotive regulatory credit sales, including those occurring in California and other participating states' Zero Emission Vehicle Programs. Moreover, the regulatory certainty embodied in California and the Section 177 States' Model Year 2017-2025 greenhouse gas performance standards and Zero Emission Vehicle programs have contributed to market conditions that have supported billions of dollars in manufacturing investments by Tesla.

9. Tesla has expanded direct investment in its cutting-edge auto manufacturing, to develop innovative new sustainable energy technologies and products, and to invest in new electric vehicle charging and support infrastructure throughout the United States. Tesla has continued to innovate with respect to vehicle design to improve the efficiency of its all-electric vehicles, including through significant mass reduction, increased drive unit efficiency, maximizing regenerative

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<sup>3</sup> See, e.g., Virginia McConnell, Benjamin Leard & Fred Kardos, Resources for the Future, *California's Evolving Zero Emission Vehicle Program: Pulling New Technology into the Market* at 22-31 (Nov. 2019), [https://media.rff.org/documents/RFF\\_WP\\_Californias\\_Evolving\\_Zero\\_Emission\\_Vehicle\\_Program.pdf](https://media.rff.org/documents/RFF_WP_Californias_Evolving_Zero_Emission_Vehicle_Program.pdf) (California state Zero Emissions Vehicle credit banking and trading).

breaking, and more aerodynamic wheels and tires.<sup>4</sup> In 2013, Tesla had 8 Supercharger (DC fast charging) stations in North America. As of June 2020, Tesla's North American network has grown to include over 940 Supercharger Stations with over 9,000 individual charging stalls. It also includes a network of more than 10,000 Destination Charging locations that replicate the convenience of home charging by providing hotels, resorts, and restaurants with Tesla Wall Connectors.<sup>5</sup> Additionally, at its facility in Buffalo, New York, Tesla manufactures power electronics equipment for its global Supercharger vehicle charging network, including the North American charging network that supports its vehicles in California and the Section 177 States.

10. Tesla commented individually and through the National Coalition for Advanced Transportation on EPA's and NHTSA's proposed actions.<sup>6</sup>

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<sup>4</sup> Tesla, Model S Long Range Plus: Building the First 400-Mile Electric Vehicle (June 15, 2020), <https://www.tesla.com/blog/model-s-long-range-plus-building-first-400-mile-electric-vehicle>.

<sup>5</sup> See Tesla, On the Road, <https://www.tesla.com/supercharger> (last visited June 23, 2020).

<sup>6</sup> See Comments of Tesla, Inc. on the proposed Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, Docket Nos. EPA-HQ-OAR-2018-0283 (Oct. 26, 2018), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0283-4186>; Comments of the National Coalition for Advanced Transportation on the proposed Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, Docket Nos. NHTSA-2018-0067, EPA-HQ-OAR-2018-0283, NHTSA-2017-0069 (Oct. 26, 2018), <https://www.regulations.gov/document?D=NHTSA-2018-0067-11969>.

11. In September 2019, Respondents finalized the challenged agency actions (“Actions”), determining that California and the Section 177 States’ standards are preempted by federal law and revoking California’s waiver under the Clean Air Act that had granted authority to issue state vehicle greenhouse gas and Zero Emissions Vehicle emissions standards.<sup>7</sup> If California and the Section 177 States’ standards are preempted, then Tesla, like other manufacturers, is subject only to the federal standards. Respondents recently finalized a second decision substantially weakening those federal standards as compared to the California and Section 177 States’ standards and the prior federal standards.<sup>8</sup> Compared to the prior federal standards, by Respondents’ own analysis, the weakened federal standards are projected to reduce dedicated electric vehicles sales in the U.S. from 5.7 percent to 3.7 percent of all sales (for Model Year 2030).<sup>9</sup>

12. The challenged Actions harm Tesla’s ability to fulfill its corporate mission of transitioning the world’s car fleet to electric vehicles and threatens to negatively influence consumers’ confidence in the environmental and technical performance of Tesla’s vehicles.

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<sup>7</sup> See The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310 (Sept. 27, 2019).

<sup>8</sup> 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).

<sup>9</sup> *Id.* at 25,107-08.

13. Tesla's business interests in marketing electric vehicles are adversely affected by Respondents' decision in the challenged Actions purporting to prohibit California and the Section 177 States' standards. Respondents' positions in the challenged Actions represent an arbitrary, capricious, and unsupported reversal of course of decades of approvals for California and the Section 177 States to issue state vehicle emissions standards under the Clean Air Act (consistent with other federal law), including EPA's most recent 2013 grant of a Clean Air Act waiver to California to issue its standards.<sup>10</sup> This is especially true because Respondents' less stringent Model Year 2021-2026 standards will apply to Tesla in the absence of California and the Section 177 States' standards, undermining incentives to deploy Tesla's electric vehicles and associated technology.

14. Under the existing state performance standards, Tesla earns tradable compliance credits that can be sold to underperforming vehicle manufacturers. The challenged Actions will deprive Tesla of these tradeable compliance credits and associated revenues.

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<sup>10</sup> California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's Advanced Clean Car Program and a Within the Scope Confirmation for California's Zero Emission Vehicle Amendments for 2017 and Earlier Model Years, 78 Fed. Reg. 2112 (Jan. 9, 2013).

15. EPA's and NHTSA's reversal of longstanding policy in the challenged Actions upsets regulatory certainty. This harms Tesla's business by increasing transaction costs associated with evaluating, planning, and making potential investments in its charging infrastructure and manufacturing expansion in light of a vastly different regulatory framework.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct. Executed this 24th day of June, 2020.



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Joseph Mendelson, III

**ORAL ARGUMENT NOT YET SCHEDULED**

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

UNION OF CONCERNED SCIENTISTS,  
*et al.*,

*Petitioners,*

v.

NATIONAL HIGHWAY TRAFFIC  
SAFETY ADMINISTRATION,

*Respondent,*

COALITION FOR SUSTAINABLE  
AUTOMOTIVE REGULATION, *et al.*,

*Intervenors for Respondent.*

Case Nos. 19-1230,  
and consolidated cases

**DECLARATION OF CARLA PETERMAN**

I, Carla Peterman, do hereby declare that the following statements made by me under oath are true and accurate to the best of my knowledge, information, and belief:

1. I am Senior Vice President of Regulatory Affairs at SCE. I am responsible for the company's Regulatory Affairs, Energy and Environmental



Policy, Strategic Planning, and Resource and Environmental Planning and Strategy organizations at the national and state levels, overseeing regulatory strategy and operations and environmental affairs.

2. Southern California Edison is a subsidiary of Edison International, and is headquartered in Rosemead, California. Southern California Edison is one of the nation's largest electric utilities in the United States, serving more than 15 million people in a 50,000-square-mile area of southern California.

3. Edison International is a member of the National Coalition for Advanced Transportation.

4. Southern California Edison is committed to leading the transformation of the electric power industry toward a clean energy future. This electric-led strategy includes utility investment in programs to build and support the expansion of transportation electrification.

5. Southern California Edison supports strong vehicle greenhouse gas emissions standards and California's long-standing, Congressionally-recognized authority to regulate motor vehicle emissions to address its compelling and extraordinary conditions. Southern California Edison believes that California's greenhouse gas and Zero Emission Vehicle standards are critical to achieving air quality and climate goals. As described below, Southern California Edison is

actively investing in infrastructure and other programs that support customer adoption of zero emission vehicles and successful implementation of the standards.

6. Southern California Edison has developed a comprehensive and long-term business strategy in which Southern California Edison will play a leadership role in the electrification of the transportation sector, in order to achieve significant reductions in greenhouse gas and criteria pollutant emissions. This vision is described in Southern California Edison's Pathway 2045 whitepaper, which provides a blueprint for reaching California's ambitious greenhouse gas reduction and carbon neutrality goals.<sup>1</sup>

7. Southern California Edison's strategy involves substantial development of electrical infrastructure to support and enable the attainment of state and federal air quality and state climate change goals. These programs also stimulate technology innovation and market competition, enable consumer choice in charging equipment and services, attract private capital investments, and create high quality jobs for the public and our customers.

8. For example, in June of 2018 Southern California Edison filed an application with the California Public Utilities Commission seeking approval for a \$760 million program in electric vehicle fueling infrastructure—supporting up to

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<sup>1</sup> Southern California Edison, Pathway 2045 White Paper (Nov. 2019), <https://www.edison.com/home/our-perspective/pathway-2045.html>.

approximately 50,000 charge ports in Southern California Edison's service area—and market education and outreach.<sup>2</sup> This application follows our initial \$22 million Charge Ready pilot in 2016, supporting the installation of 1,300 light-duty electric vehicle charge ports. We have since doubled this investment to \$44 million to expand the reach of the program to 2,700 charge ports. Through Charge Ready Transport, Southern California Edison is investing \$356 million in installing infrastructure at 870 Southern California Edison customer sites by 2024, making it the largest truck and transit charging initiative in the nation.

9. In order to successfully plan, develop, obtain approval, and execute programs like these, Southern California Edison must rely on consistent implementation of regulatory programs, including the California Air Resources Board's standards and regulations.

10. Through the National Coalition for Advanced Transportation, Southern California Edison's parent company, Edison International, participated in the United States Environmental Protection Agency's ("EPA") and National Highway Traffic Safety Administration's ("NHTSA") regulatory process for the proposed The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026

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<sup>2</sup> Application of Southern California Edison Company (U 338-E) for Approval of its Charge Ready 2 Infrastructure and Market Education Programs, A.18-06-015 (Cal. PUC June 26, 2018), [http://www3.sce.com/sscc/law/dis/dbattach5e.nsf/0/2393DAED8E6B077F882582B800734ED4/\\$FILE/A1806XXX-%20SCE%20Charge%20Ready%202%20Application.pdf](http://www3.sce.com/sscc/law/dis/dbattach5e.nsf/0/2393DAED8E6B077F882582B800734ED4/$FILE/A1806XXX-%20SCE%20Charge%20Ready%202%20Application.pdf).



Passenger Cars and Light Trucks, submitting comments on, among other things, California's authority to establish vehicle greenhouse gas emissions standards.<sup>3</sup>

11. On September 27, 2019, EPA and NHTSA finalized The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program ("Actions"), which included EPA's withdrawal of the Clean Air Act waiver previously granted to California for state greenhouse gas and Zero Emission Vehicle standards as well as NHTSA's regulation declaring that such state standards are preempted by the Energy Policy and Conservation Act.<sup>4</sup> The Actions have created substantial uncertainty by seeking to undermine California's legal authority to set greenhouse gas and Zero Emission Vehicle standards for motor vehicles.

12. Regulatory uncertainty and disruption of existing and effective regulatory programs that inform and influence transportation electrification planning lead to unnecessary transaction and planning costs by causing confusion in the market.

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<sup>3</sup> Comments of the National Coalition for Advanced Transportation on the proposed Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, Docket Nos. NHTSA-2018-0067, EPA-HQ-OAR-2018-0283, NHTSA-2017-0069 (Oct. 26, 2018), <https://www.regulations.gov/document?D=NHTSA-2018-0067-11969>.

<sup>4</sup> The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310 (Sept. 27, 2019).

13. Southern California Edison believes that clear, consistent regulatory programs controlling emissions from mobile sources are critical to achieving vital air quality and climate goals, and ensuring that Southern California Edison can effectively plan and implement infrastructure programs to support these goals and our customers. The Actions impair these efforts.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct. Executed on June 24, 2020.

  
\_\_\_\_\_  
Carla Peterman

**ORAL ARGUMENT NOT YET SCHEDULED****IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

UNION OF CONCERNED SCIENTISTS,  
*et al.*,

*Petitioners,*

v.

NATIONAL HIGHWAY TRAFFIC  
SAFETY ADMINISTRATION, *et al.*,

*Respondents.*

Case Nos. 19-1230 and consolidated

**DECLARATION OF NANCY SUTLEY**

I, Nancy Sutley, do hereby declare that the following statements made by me under oath are true and accurate to the best of my knowledge, information and belief:

1. I am Chief Sustainability and Economic Development Officer at the Los Angeles Department of Water and Power (“LADWP”). Prior to my current position at LADWP, I served as Chair of the White House Council on Environmental Quality from 2009 to 2014. I also previously served as Los Angeles Deputy Mayor for Energy and Environment, a member of the Board of Metropolitan Water District of Southern California and the California State Water Resources Control Board, energy advisor to Governor Gray Davis, and Deputy

Secretary for Policy and Intergovernmental Relations for the California Environmental Protection Agency.

2. Founded in 1902 and delivering electricity starting in 1916, LADWP is the largest municipal electric utility in the nation, serving a population of over 4 million people. As a vertically integrated utility, LADWP owns and operates a diverse portfolio of generation, transmission, and distribution assets across several states, and a 465 square mile service territory that includes the City of Los Angeles and most of the Owens Valley.

3. The City of Los Angeles and the State of California have adopted ambitious policy mechanisms to address climate change and reduce emissions of greenhouse gases. LADWP considers itself a key partner to the City and the State in those efforts, and the work we do to enhance the sustainability of our business is at the center of our mission.

4. LADWP is committed to accelerating decarbonization in the transportation sector. LADWP has made major investments in electric vehicle-charging infrastructure and grid innovation designed to support zero-emission transportation. LADWP offers rebates for the purchase of certain used electric vehicles and installation of electric vehicle chargers through our Charge Up LA! Program. LADWP provides electric vehicle discount charging rates through its time-of-use meter service option. LADWP is also working to install thousands of electric vehicle chargers and associated charging infrastructure throughout the City of Los Angeles to support the growth of electric transportation.

5. LADWP is making these investments and taking these actions to realize the significant economic and environmental benefits that integration of vehicles to the electricity grid can provide to vehicle owners, customers, and LADWP's grid.

6. Along with other public and investor-owned utilities, LADWP commented upon the U.S. Environmental Protection Agency's ("EPA") and National Highway Traffic Safety Administration's ("NHTSA") proposed rule, "The Safer Affordable Fuel-Efficient Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks," 83 Fed. Reg. 42,986 (Aug. 24, 2018).<sup>1</sup> LADWP and the other utilities urged EPA and NHTSA not to withdraw California's waiver and to maintain the federal greenhouse gas and fuel economy standards established by EPA and NHTSA in 2012.

7. In "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program," 84 Fed. Reg. 51,310 (Sept. 27, 2019) ("SAFE Part One Rule"), EPA withdraws California's waiver to implement its own greenhouse gas and zero-emission-vehicle standards and annuls the authority of the other "Section 177 States" to enforce identical standards. NHTSA also declares such standards to be preempted.

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<sup>1</sup> See Letter from Michael Bradley, President, MJ Bradley & Associates, to EPA (Oct. 26, 2018) EPA-HQ-OAR-2018-0283 (joint comments on Proposed SAFE Rule by a group of electric power companies and electric utilities including LADWP, Austin Energy, Consolidated Edison Company of New York, Inc., Exelon, National Grid, New York Power Authority, Seattle City Light, and Sacramento Municipal Utility District).



8. In “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), EPA and NHTSA respectively adopted weaker federal greenhouse gas and fuel economy standards for cars and trucks than were established by the agencies in coordination with the California Air Resources Board in 2012.

9. For LADWP, the authority of California and the Section 177 States to continue enforcing their more stringent greenhouse gas and zero-emission vehicle standards for cars and trucks provided certainty that, regardless what EPA and NHTSA might do to weaken federal standards, strong incentives would remain in place for automakers to design and manufacture an appealing range of electric vehicles for sale in California and the Section 177 States. By withdrawing California’s waiver and declaring the more stringent state standards to be preempted, the SAFE Part One Rule eliminates that regulatory certainty, which makes it more challenging for LADWP to plan for and execute upon its strategy to support consumer adoption of electric vehicles in Los Angeles. It also removes an important set of regulatory drivers that had provided some assurance that automakers would continue to design, manufacture and sell electric vehicles in the numbers and on the schedule needed to realize the full range of benefits to customers, the electric grid and the environment from LADWP’s investments in electric vehicle infrastructure.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct. Executed on June 26, 2020.

A handwritten signature in blue ink, appearing to read 'Nancy Sutley', written over a horizontal line.

Nancy Sutley

**49 U.S.C. § 32901(a)(1)-(2), (5), (8)-(11)****§ 32901. Definitions**

(a) GENERAL.—In this chapter—

(1) “alternative fuel” means—

(A) methanol;

(B) denatured ethanol;

(C) other alcohols;

(D) except as provided in subsection (b) of this section, a mixture containing at least 85 percent of methanol, denatured ethanol, and other alcohols by volume with gasoline or other fuels;

(E) natural gas;

(F) liquefied petroleum gas;

(G) hydrogen;

(H) coal derived liquid fuels;

(I) fuels (except alcohol) derived from biological materials;

(J) electricity (including electricity from solar energy); and

(K) any other fuel the Secretary of Transportation prescribes by regulation that is not substantially petroleum and that would yield substantial energy security and environmental benefits.

(2) “alternative fueled automobile” means an automobile that is a—

(A) dedicated automobile; or

(B) dual fueled automobile.

\* \* \*

(5) “average fuel economy” means average fuel economy determined under section 32904 of this title.

\* \* \*

(8) “dedicated automobile” means an automobile that operates only on alternative fuel.

(9) “dual fueled automobile” means an automobile that—

(A) is capable of operating on alternative fuel or a mixture of biodiesel and diesel fuel meeting the standard established by the American Society for Testing and

Materials or under section 211(u) of the Clean Air Act (42 U.S.C. 7545(u)) for fuel containing 20 percent biodiesel (commonly known as “B20”) and on gasoline or diesel fuel;

(B) provides equal or superior energy efficiency, as calculated for the applicable model year during fuel economy testing for the United States Government, when operating on alternative fuel as when operating on gasoline or diesel fuel;

(C) for model years 1993-1995 for an automobile capable of operating on a mixture of an alternative fuel and gasoline or diesel fuel and if the Administrator of the Environmental Protection Agency decides to extend the application of this subclause, for an additional period ending not later than the end of the last model year to which section 32905(b) and (d) of this title applies, provides equal or superior energy efficiency, as calculated for the applicable model year during fuel economy testing for the Government, when operating on a mixture of alternative fuel and gasoline or diesel fuel containing exactly 50 percent gasoline or diesel fuel as when operating on gasoline or diesel fuel; and

(D) for a passenger automobile, meets or exceeds the minimum driving range prescribed under subsection (c) of this section.

(10) “fuel” means—

(A) gasoline;

(B) diesel oil; or

(C) other liquid or gaseous fuel that the Secretary decides by regulation to include in this definition as consistent with the need of the United States to conserve energy.

(11) “fuel economy” means the average number of miles traveled by an automobile for each gallon of gasoline (or equivalent amount of other fuel) used, as determined by the Administrator under section 32904(c) of this title.

\* \* \*

**49 U.S.C. § 32902(a)-(h)****§ 32902. Average fuel economy standards**

(a) PRESCRIPTION OF STANDARDS BY REGULATION.—At least 18 months before the beginning of each model year, the Secretary of Transportation shall prescribe by regulation average fuel economy standards for automobiles manufactured by a manufacturer in that model year. Each standard shall be the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year.

(b) STANDARDS FOR AUTOMOBILES AND CERTAIN OTHER VEHICLES.—

(1) IN GENERAL.—The Secretary of Transportation, after consultation with the Secretary of Energy and the Administrator of the Environmental Protection Agency, shall prescribe separate average fuel economy standards for—

(A) passenger automobiles manufactured by manufacturers in each model year beginning with model year 2011 in accordance with this subsection;

(B) non-passenger automobiles manufactured by manufacturers in each model year beginning with model year 2011 in accordance with this subsection; and

(C) work trucks and commercial medium-duty or heavy-duty on-highway vehicles in accordance with subsection (k).

(2) FUEL ECONOMY STANDARDS FOR AUTOMOBILES.—

(A) AUTOMOBILE FUEL ECONOMY AVERAGE FOR MODEL YEARS 2011 THROUGH 2020.—The Secretary shall prescribe a separate average fuel economy standard for passenger automobiles and a separate average fuel economy standard for non-passenger automobiles for each model year beginning with model year 2011 to achieve a combined fuel economy average for model year 2020 of at least 35 miles per gallon for the total fleet of passenger and non-passenger automobiles manufactured for sale in the United States for that model year.

(B) AUTOMOBILE FUEL ECONOMY AVERAGE FOR MODEL YEARS 2021 THROUGH 2030.—For model years 2021 through 2030, the average fuel economy required to be attained by each fleet of passenger and non-passenger automobiles manufactured for sale in the United States shall be the maximum feasible average fuel economy standard for each fleet for that model year.

(C) PROGRESS TOWARD STANDARD REQUIRED.—In prescribing average fuel economy standards under subparagraph (A), the Secretary shall prescribe

annual fuel economy standard increases that increase the applicable average fuel economy standard ratably beginning with model year 2011 and ending with model year 2020.

(3) **AUTHORITY OF THE SECRETARY.**—The Secretary shall—

(A) prescribe by regulation separate average fuel economy standards for passenger and non-passenger automobiles based on 1 or more vehicle attributes related to fuel economy and express each standard in the form of a mathematical function; and

(B) issue regulations under this title prescribing average fuel economy standards for at least 1, but not more than 5, model years.

(4) **MINIMUM STANDARD.**—In addition to any standard prescribed pursuant to paragraph (3), each manufacturer shall also meet the minimum standard for domestically manufactured passenger automobiles, which shall be the greater of—

(A) 27.5 miles per gallon; or

(B) 92 percent of the average fuel economy projected by the Secretary for the combined domestic and non-domestic passenger automobile fleets manufactured for sale in the United States by all manufacturers in the model year, which projection shall be published in the Federal Register when the standard for that model year is promulgated in accordance with this section.

(c) **AMENDING PASSENGER AUTOMOBILE STANDARDS.**—The Secretary of Transportation may prescribe regulations amending the standard under subsection (b) of this section for a model year to a level that the Secretary decides is the maximum feasible average fuel economy level for that model year. Section 553 of title 5 applies to a proceeding to amend the standard. However, any interested person may make an oral presentation and a transcript shall be taken of that presentation.

(d) **EXEMPTIONS.**—(1) Except as provided in paragraph (3) of this subsection, on application of a manufacturer that manufactured (whether in the United States or not) fewer than 10,000 passenger automobiles in the model year 2 years before the model year for which the application is made, the Secretary of Transportation may exempt by regulation the manufacturer from a standard under subsection (b) or (c) of this section. An exemption for a model year applies only if the manufacturer manufactures (whether in the United States or not) fewer than 10,000 passenger automobiles in the model year. The Secretary may exempt a manufacturer only if the Secretary—



(A) finds that the applicable standard under those subsections is more stringent than the maximum feasible average fuel economy level that the manufacturer can achieve; and

(B) prescribes by regulation an alternative average fuel economy standard for the passenger automobiles manufactured by the exempted manufacturer that the Secretary decides is the maximum feasible average fuel economy level for the manufacturers to which the alternative standard applies.

(2) An alternative average fuel economy standard the Secretary of Transportation prescribes under paragraph (1)(B) of this subsection may apply to an individually exempted manufacturer, to all automobiles to which this subsection applies, or to classes of passenger automobiles, as defined under regulations of the Secretary, manufactured by exempted manufacturers.

(3) Notwithstanding paragraph (1) of this subsection, an importer registered under section 30141(c) of this title may not be exempted as a manufacturer under paragraph (1) for a motor vehicle that the importer—

(A) imports; or

(B) brings into compliance with applicable motor vehicle safety standards prescribed under chapter 301 of this title for an individual under section 30142 of this title.

(4) The Secretary of Transportation may prescribe the contents of an application for an exemption.

(e) EMERGENCY VEHICLES.—(1) In this subsection, “emergency vehicle” means an automobile manufactured primarily for use—

(A) as an ambulance or combination ambulance-hearse;

(B) by the United States Government or a State or local government for law enforcement; or

(C) for other emergency uses prescribed by regulation by the Secretary of Transportation.

(2) A manufacturer may elect to have the fuel economy of an emergency vehicle excluded in applying a fuel economy standard under subsection (a), (b), (c), or (d) of this section. The election is made by providing written notice to the Secretary of Transportation and to the Administrator of the Environmental Protection Agency.

(f) CONSIDERATIONS ON DECISIONS ON MAXIMUM FEASIBLE AVERAGE FUEL ECONOMY.—When deciding maximum feasible average fuel economy under this section, the Secretary of Transportation shall consider technological feasibility,

economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy.

(g) REQUIREMENTS FOR OTHER AMENDMENTS.—(1) The Secretary of Transportation may prescribe regulations amending an average fuel economy standard prescribed under subsection (a) or (d) of this section if the amended standard meets the requirements of subsection (a) or (d), as appropriate.

(2) When the Secretary of Transportation prescribes an amendment under this section that makes an average fuel economy standard more stringent, the Secretary shall prescribe the amendment (and submit the amendment to Congress when required under subsection (c)(2) of this section) at least 18 months before the beginning of the model year to which the amendment applies.

(h) LIMITATIONS.—In carrying out subsections (c), (f), and (g) of this section, the Secretary of Transportation—

(1) may not consider the fuel economy of dedicated automobiles;

(2) shall consider dual fueled automobiles to be operated only on gasoline or diesel fuel; and

(3) may not consider, when prescribing a fuel economy standard, the trading, transferring, or availability of credits under section 32903.

\* \* \*



**49 U.S.C. § 32904(a)****§ 32904. Calculation of average fuel economy**

(a) METHOD OF CALCULATION.—(1) The Administrator of the Environmental Protection Agency shall calculate the average fuel economy of a manufacturer subject to—

(A) section 32902(a) of this title in a way prescribed by the Administrator; and

(B) section 32902(b)-(d) of this title by dividing—

(i) the number of passenger automobiles manufactured by the manufacturer in a model year; by

(ii) the sum of the fractions obtained by dividing the number of passenger automobiles of each model manufactured by the manufacturer in that model year by the fuel economy measured for that model.

(2)(A) In this paragraph, “electric vehicle” means a vehicle powered primarily by an electric motor drawing electrical current from a portable source.

(B) If a manufacturer manufactures an electric vehicle, the Administrator shall include in the calculation of average fuel economy under paragraph (1) of this subsection equivalent petroleum based fuel economy values determined by the Secretary of Energy for various classes of electric vehicles. The Secretary shall review those values each year and determine and propose necessary revisions based on the following factors:

(i) the approximate electrical energy efficiency of the vehicle, considering the kind of vehicle and the mission and weight of the vehicle.

(ii) the national average electrical generation and transmission efficiencies.

(iii) the need of the United States to conserve all forms of energy and the relative scarcity and value to the United States of all fuel used to generate electricity.

(iv) the specific patterns of use of electric vehicles compared to petroleum-fueled vehicles.

\* \* \*

**49 U.S.C. § 32905****§ 32905. Manufacturing incentives for alternative fuel automobiles**

(a) DEDICATED AUTOMOBILES.—Except as provided in subsection (c) of this section or section 32904(a)(2) of this title, for any model of dedicated automobile manufactured by a manufacturer after model year 1992, the fuel economy measured for that model shall be based on the fuel content of the alternative fuel used to operate the automobile. A gallon of a liquid alternative fuel used to operate a dedicated automobile is deemed to contain .15 gallon of fuel.

(b) DUAL FUELED AUTOMOBILES.—Except as provided in subsection (d) of this section or section 32904(a)(2) of this title, for any model of dual fueled automobile manufactured by a manufacturer in model years 1993 through 2019, the Administrator of the Environmental Protection Agency shall measure the fuel economy for that model by dividing 1.0 by the sum of—

(1) .5 divided by the fuel economy measured under section 32904(c) of this title when operating the model on gasoline or diesel fuel; and

(2) .5 divided by the fuel economy—

(A) measured under subsection (a) when operating the model on alternative fuel; or

(B) measured based on the fuel content of B20 when operating the model on B20, which is deemed to contain 0.15 gallon of fuel.

(c) GASEOUS FUEL DEDICATED AUTOMOBILES.—For any model of gaseous fuel dedicated automobile manufactured by a manufacturer after model year 1992, the Administrator shall measure the fuel economy for that model based on the fuel content of the gaseous fuel used to operate the automobile. One hundred cubic feet of natural gas is deemed to contain .823 gallon equivalent of natural gas. The Secretary of Transportation shall determine the appropriate gallon equivalent of other gaseous fuels. A gallon equivalent of gaseous fuel is deemed to have a fuel content of .15 gallon of fuel.

(d) GASEOUS FUEL DUAL FUELED AUTOMOBILES.—For any model of gaseous fuel dual fueled automobile manufactured by a manufacturer in model years 1993 through 2019, the Administrator shall measure the fuel economy for that model by dividing 1.0 by the sum of—

(1) .5 divided by the fuel economy measured under section 32904(c) of this title when operating the model on gasoline or diesel fuel; and

(2) .5 divided by the fuel economy measured under subsection (c) of this section when operating the model on gaseous fuel.

(e) ELECTRIC DUAL FUELED AUTOMOBILES.—(1) In general.—At the request of the manufacturer, the Administrator may measure the fuel economy for any model of dual fueled automobile manufactured after model year 2015 that is capable of operating on electricity in addition to gasoline or diesel fuel, obtains its electricity from a source external to the vehicle, and meets the minimum driving range requirements established by the Secretary for dual fueled electric automobiles, by dividing 1.0 by the sum of—

(A) the percentage utilization of the model on gasoline or diesel fuel, as determined by a formula based on the model's alternative fuel range, divided by the fuel economy measured under section 32904(c); and

(B) the percentage utilization of the model on electricity, as determined by a formula based on the model's alternative fuel range, divided by the fuel economy measured under section 32904(a)(2).

(2) Alternative calculation.—If the manufacturer does not request that the Administrator calculate the manufacturing incentive for its electric dual fueled automobiles in accordance with paragraph (1), the Administrator shall calculate such incentive for such automobiles manufactured by such manufacturer after model year 2015 in accordance with subsection (b).

(f) FUEL ECONOMY CALCULATIONS.—The Administrator shall calculate the manufacturer's average fuel economy under section 32904(a)(1) of this title for each model described under subsections (a)-(d) of this section by using as the denominator the fuel economy measured for each model under subsections (a)-(d).

(g) FUEL ECONOMY INCENTIVE REQUIREMENTS.—In order for any model of dual fueled automobile to be eligible to receive the fuel economy incentives included in section 32906(a) and (b), a label shall be attached to the fuel compartment of each dual fueled automobile of that model, notifying that the vehicle can be operated on an alternative fuel and on gasoline or diesel, with the form of alternative fuel stated on the notice. This requirement applies to dual fueled automobiles manufactured on or after September 1, 2006.

**49 U.S.C. § 32908****§ 32908. Fuel economy information**

(a) DEFINITIONS.—In this section—

(1) “automobile” includes an automobile rated at not more than 8,500 pounds gross vehicle weight regardless of whether the Secretary of Transportation has applied this chapter to the automobile under section 32901(a)(3)(B) of this title.

(2) “dealer” means a person residing or located in a State, the District of Columbia, or a territory or possession of the United States, and engaged in the sale or distribution of new automobiles to the first person (except a dealer buying as a dealer) that buys the automobile in good faith other than for resale.

(b) LABELING REQUIREMENTS AND CONTENTS.—(1) Under regulations of the Administrator of the Environmental Protection Agency, a manufacturer of automobiles shall attach a label to a prominent place on each automobile manufactured in a model year. The dealer shall maintain the label on the automobile. The label shall contain the following information:

(A) the fuel economy of the automobile.

(B) the estimated annual fuel cost of operating the automobile.

(C) the range of fuel economy of comparable automobiles of all manufacturers.

(D) a statement that a booklet is available from the dealer to assist in making a comparison of fuel economy of other automobiles manufactured by all manufacturers in that model year.

(E) the amount of the automobile fuel efficiency tax imposed on the sale of the automobile under section 4064 of the Internal Revenue Code of 1986 (26 U.S.C. 4064).

(F) other information required or authorized by the Administrator that is related to the information required by clauses (A)-(D) of this paragraph.

(2) The Administrator may allow a manufacturer to comply with this subsection by—

(A) disclosing the information on the label required under section 3 of the Automobile Information Disclosure Act (15 U.S.C. 1232); and

(B) including the statement required by paragraph (1)(E) of this subsection at a time and in a way that takes into account special circumstances or characteristics.

(3) For dedicated automobiles manufactured after model year 1992, the fuel economy of those automobiles under paragraph (1)(A) of this subsection is the fuel

economy for those automobiles when operated on alternative fuel, measured under section 32905(a) or (c) of this title, multiplied by .15. Each label required under paragraph (1) of this subsection for dual fueled automobiles shall—

- (A) indicate the fuel economy of the automobile when operated on gasoline or diesel fuel;
- (B) clearly identify the automobile as a dual fueled automobile;
- (C) clearly identify the fuels on which the automobile may be operated; and
- (D) contain a statement informing the consumer that the additional information required by subsection (c)(2) of this section is published and distributed by the Secretary of Energy.

(c) FUEL ECONOMY INFORMATION BOOKLET.—(1) The Administrator shall prepare the booklet referred to in subsection (b)(1)(D) of this section. The booklet—

- (A) shall be simple and readily understandable;
- (B) shall contain information on fuel economy and estimated annual fuel costs of operating automobiles manufactured in each model year; and
- (C) may contain information on geographical or other differences in estimated annual fuel costs.

(2)(A) For dual fueled automobiles manufactured after model year 1992, the booklet published under paragraph (1) shall contain additional information on—

- (i) the energy efficiency and cost of operation of those automobiles when operated on gasoline or diesel fuel as compared to those automobiles when operated on alternative fuel; and
- (ii) the driving range of those automobiles when operated on gasoline or diesel fuel as compared to those automobiles when operated on alternative fuel.

(B) For dual fueled automobiles, the booklet published under paragraph (1) also shall contain—

- (i) information on the miles a gallon achieved by the automobiles when operated on alternative fuel; and
- (ii) a statement explaining how the information made available under this paragraph can be expected to change when the automobile is operated on mixtures of alternative fuel and gasoline or diesel fuel.

(3) The Secretary of Energy shall publish and distribute the booklet. The Administrator shall prescribe regulations requiring dealers to make the booklet available to prospective buyers.

(d) DISCLOSURE.—A disclosure about fuel economy or estimated annual fuel costs under this section does not establish a warranty under a law of the United States or a State.

(e) VIOLATIONS.—A violation of subsection (b) of this section is—

(1) a violation of section 3 of the Automobile Information Disclosure Act (15 U.S.C. 1232); and

(2) an unfair or deceptive act or practice in or affecting commerce under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), except sections 5(m) and 18 (15 U.S.C. 45(m), 57a).

(f) CONSULTATION.—The Administrator shall consult with the Federal Trade Commission and the Secretaries of Transportation and Energy in carrying out this section.

(g) CONSUMER INFORMATION.—

(1) Program.—The Secretary of Transportation, in consultation with the Secretary of Energy and the Administrator of the Environmental Protection Agency, shall develop and implement by rule a program to require manufacturers—

(A) to label new automobiles sold in the United States with—

(i) information reflecting an automobile's performance on the basis of criteria that the Administrator shall develop, not later than 18 months after the date of the enactment of the Ten-in-Ten Fuel Economy Act, to reflect fuel economy and greenhouse gas and other emissions over the useful life of the automobile;

(ii) a rating system that would make it easy for consumers to compare the fuel economy and greenhouse gas and other emissions of automobiles at the point of purchase, including a designation of automobiles—

(I) with the lowest greenhouse gas emissions over the useful life of the vehicles; and

(II) the highest fuel economy; and

(iii) a permanent and prominent display that an automobile is capable of operating on an alternative fuel; and

(B) to include in the owner's manual for vehicles capable of operating on alternative fuels information that describes that capability and the benefits of using alternative fuels, including the renewable nature and environmental benefits of using alternative fuels.

(2) CONSUMER EDUCATION.—

(A) IN GENERAL.—The Secretary of Transportation, in consultation with the Secretary of Energy and the Administrator of the Environmental Protection Agency, shall develop and implement by rule a consumer education program to improve consumer understanding of automobile performance described in paragraph (1)(A)(i) and to inform consumers of the benefits of using alternative fuel in automobiles and the location of stations with alternative fuel capacity.

(B) FUEL SAVINGS EDUCATION CAMPAIGN.—The Secretary of Transportation shall establish a consumer education campaign on the fuel savings that would be recognized from the purchase of vehicles equipped with thermal management technologies, including energy efficient air conditioning systems and glass.

(3) FUEL TANK LABELS FOR ALTERNATIVE FUEL AUTOMOBILES.—The Secretary of Transportation shall by rule require a label to be attached to the fuel compartment of vehicles capable of operating on alternative fuels, with the form of alternative fuel stated on the label. A label attached in compliance with the requirements of section 32905(h) is deemed to meet the requirements of this paragraph.

(4) RULEMAKING DEADLINE.—The Secretary of Transportation shall issue a final rule under this subsection not later than 42 months after the date of the enactment of the Ten-in-Ten Fuel Economy Act.

**49 U.S.C. § 32919(a)****§ 32919. Preemption**

(a) GENERAL.—When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.

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**49 C.F.R. pt. 531 app. B****APPENDIX B TO PART 531—PREEMPTION****(a) Express Preemption:**

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

(A) Automobile fuel economy is directly and substantially related to automobile tailpipe emissions of carbon dioxide;

(B) Carbon dioxide is the natural by-product of automobile fuel consumption;

(C) The most significant and controlling factor in making the measurements necessary to determine the compliance of automobiles with the fuel economy standards in this part is their rate of tailpipe carbon dioxide emissions;

(D) Almost all technologically feasible reduction of tailpipe emissions of carbon dioxide is achievable through improving fuel economy, thereby reducing both the consumption of fuel and the creation and emission of carbon dioxide;

(E) Accordingly, as a practical matter, regulating fuel economy controls the amount of tailpipe emissions of carbon dioxide, and regulating the tailpipe emissions of carbon dioxide controls fuel economy.

(2) As a law or regulation related to fuel economy standards, any law or regulation of a State or a political subdivision of a State regulating or prohibiting tailpipe carbon dioxide emissions from automobiles is expressly preempted under 49 U.S.C. 32919.

(3) A law or regulation of a State or a political subdivision of a State having the direct or substantial effect of regulating or prohibiting tailpipe carbon dioxide emissions from automobiles or automobile fuel economy is a law or regulation related to fuel economy standards and expressly preempted under 49 U.S.C. 32919.

**(b) Implied Preemption:**

(1) A law or regulation of a State or a political subdivision of a State regulating tailpipe carbon dioxide emissions from automobiles, particularly a law or regulation that is not attribute-based and does not separately regulate passenger cars and light trucks, conflicts with:

(A) The fuel economy standards in this part;

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

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

(2) Any law or regulation of a State or a political subdivision of a State regulating or prohibiting tailpipe carbon dioxide emissions from automobiles is impliedly preempted under 49 U.S.C. Chapter 329.

(3) A law or regulation of a State or a political subdivision of a State having the direct or substantial effect of regulating or prohibiting tailpipe carbon dioxide emissions from automobiles or automobile fuel economy is impliedly preempted under 49 U.S.C. Chapter 329.