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)

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.

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

FINAL 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: October 27, 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[1]:

- Atlantic City Electric
- Baltimore Gas & Electric
- ChargePoint

[1] 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: October 27, 2020

Respectfully submitted,

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Counsel for Petitioner National Coalition for Advanced Transportation

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: October 27, 2020

Respectfully submitted,

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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.[2]

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

[2] 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: October 27, 2020

Respectfully submitted,

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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)[3]; Lau Decl. ¶¶ 4-5 (ADD2-3); Mendelson Decl. ¶¶ 8-9 (ADD9-11); Sutley Decl. ¶¶ 4-5 (ADD22-23); JA400. 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* JA5.

Finally, Transportation Coalition member Tesla, Inc. manufactures all-electric vehicles that are sold in California and the Section 177 States, and is thus directly subject to the State Standards. *See* Mendelson Decl. ¶ 7 (ADD9); *cf.* Cal.

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

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," JA22, 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).[4] 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.* at 302; *see also Ford Motor Co. v. EPA*, 606 F.2d 1293, 1297 (D.C. Cir. 1979)

[4] 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.

("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*." JA24 (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. JA23-24.[5] Here, by contrast, EPA exceeded its statutory role by unilaterally initiating revocation.[6]

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.*, JA398. In the years since EPA granted 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

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[5] 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.

[6] 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." JA25.

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." JA22. 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.[7] It is also contrary to the statute because it purports to preempt standards that mandate that a certain

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

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," JA11. This interpretation is patently inconsistent with the text and structure of the statute.

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 duel 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* JA414. 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, JA5, "appear[] to conflict directly with Congress's intent that [fuel economy] standards be performance-based rather than design mandates," JA86, and "apply irrespective of" the statutory factors for setting fuel economy standards, "including technological feasibility and economic practicability," JA5. 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,[8] 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 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. JA12-13. 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

[8] JA73 ("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.").

fuel economy." JA6 (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. JA401-11, JA392-97. 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.

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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 2,982 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.

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