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 REPLY 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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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 ADD	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
Industry Intervenors	The Coalition for Sustainable Automotive Regulation, the Automotive Regulatory Council, Inc., and American Fuel & Petrochemical Manufacturers
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
Industry Petitioners Brief	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
NHTSA	National Highway Traffic Safety Administration
Primary Brief	Brief of State and Local Government Petitioners and Public Interest Petitioners
Primary Reply Brief	Reply Brief of State and Local Government Petitioners and Public Interest Petitioners

Response Briefs	Briefs filed by Respondents and Industry Intervenors in response to Petitioners' briefs
Transportation Coalition	National Coalition for Advanced Transportation

INTRODUCTION AND SUMMARY OF ARGUMENT

Industry Petitioners support the arguments in the Primary Reply Brief and focus in this brief on two issues. First, even if EPA had authority to revoke California's waiver once granted (which it did not), EPA's action was arbitrary and capricious because it failed to consider Industry Petitioners' investment-backed reliance on the well-founded expectation that California and the Section 177 States would retain authority to enforce their standards. Second, state zero-emission-vehicle mandates are not "related to fuel economy standards" and thus not preempted by EPCA because zero-emission vehicles are expressly excluded from EPCA's definitions of "fuel" and "fuel economy," such vehicles cannot be considered in setting "fuel economy standards," and zero-emission-vehicle mandates cannot be satisfied by economy of "fuel" use and are intended instead to address criteria pollutant and greenhouse gas emissions. Respondents' arguments to the contrary are unpersuasive, and their Actions should be vacated.

ARGUMENT

I. EPA Failed to Consider Industry Reliance Interests

EPA has no legal authority to revoke a waiver once granted. Industry Petitioners Br. 4-9. But even if it did, withdrawal of California's waiver without consideration of Industry Petitioners' reliance interests was arbitrary and capricious.

See Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915-16 (2020).

Respondents misconstrue Industry Petitioners' standing declarations—based on two cherry-picked sentences—to support their assertion that Industry Petitioners' investments were not made in reliance on California's waiver. Respondents Br. 76. But Industry Petitioners have repeatedly made clear that the opposite is true.

For example, Tesla explained that its billions of dollars in direct investments in auto manufacturing and charging infrastructure have been supported by "the regulatory certainty embodied in California and the Section 177 States' Model Year 2017-2025 greenhouse gas performance standards and Zero Emission Vehicle programs." Mendelson Decl. ¶8 (Industry ADD9-10). Southern California Edison explained that its electrification program "must rely on consistent implementation of regulatory programs, including the California Air Resources Board's standards and regulations." Peterman Decl. ¶9 (Industry ADD18). Sacramento Municipal Utility District declared that it "has relied on California's existing greenhouse gas and Zero Emission Vehicle standards in planning" investments and that removal of those standards, along with relaxation of federal standards, "could . . . result in substantially lower returns on the Sacramento Municipal Utility District's investments out to 2030." Lau Decl. ¶¶5, 9 (Industry ADD3-5). Los Angeles Department of Water and Power explained that its investments were premised on the

ability of California and the Section 177 States to "continue enforcing their more stringent greenhouse gas and zero-emission vehicle standards for cars and trucks . . . regardless what EPA and NHTSA might do to weaken federal standards . . . ." Sutley Decl. ¶¶4, 9 (Industry ADD22-24). Importantly, Industry Petitioners clearly presented these reliance interests in their comments on the proposed actions (*see*, *e.g.*, JA400).

Respondents mistakenly suggest that any reliance was unreasonable because the federal standards "were subject to further review" as part of EPA's Mid-Term Evaluation (Respondents Br. 74); but that in no way implicates California's *separate* authority to continue implementing *its own* standards under the waiver, which was not subject to the Mid-Term Evaluation. *See* 40 C.F.R. § 86.1818–12(h). Nor has California's waiver authority "long been in dispute" as Respondents assert (Respondents Br. at 74); California's zero-emission-vehicle standards and later its greenhouse gas standards have been covered by a waiver since 1993. *See* 58 Fed. Reg. 4,166 (Jan. 13, 1993). Industry Petitioners based substantial investments on the reasonable expectation that, regardless of what happened with the federal standards, California's and the Section 177 States' authority would remain intact.

EPA made no effort to grapple with Industry Petitioners' reliance interests prior to withdrawal of the waiver. Respondents assert that EPA "weighed . . . possible reliance interests" (Respondents Br. 77), but the Federal Register pages they

cite plainly do not pertain to Industry Petitioners' interests. Elsewhere, the agencies dismissed the *States'* reliance interests (JA15, 18, 25-26, 29) and offered a generic and conclusory dismissal of the reliance interests of "other parties (such as automakers)." JA26. EPA did not specifically acknowledge, let alone give any weight to, Industry Petitioners' investments made in reliance on California's waiver. Because EPA "entirely failed to consider an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), its action is arbitrary and capricious and must be vacated. *Dep't of Homeland Sec.*, 140 S. Ct. at 1915-16; *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016) (where serious reliance interests are at stake, conclusory statements do not suffice).

II. NHTSA's Preemption Regulation Is Unlawful

Respondents' and Industry Intervenors' EPCA preemption arguments fail for the reasons set forth in the Primary Reply Brief. Industry Petitioners highlight here that zero-emission-vehicle mandates are not "related to fuel economy standards" (and thus not preempted) because they do not regulate "fuel" or "fuel economy" as those terms are defined under EPCA, they cannot be met through more efficient use of "fuel," and they are enacted for reasons unrelated to fuel economy. Industry Petitioners Br. 10–14. Respondents fail to meaningfully engage, let alone refute, these arguments.

EPCA expressly defines "fuel" and "fuel economy" to exclude zero-emission-vehicle technologies. 49 U.S.C. § 32901(a)(10) ("fuel" means "gasoline", "diesel oil", "or other liquid or gaseous fuel" defined by regulation); *id.* § 32901(a)(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"). Further, EPCA precludes NHTSA from considering such technologies in setting "fuel economy standards." *Id*. § 32902(h). Zero-emission vehicles accordingly do not consume "fuel" for EPCA purposes, and zero-emission-vehicle mandates cannot be met through greater "fuel economy." Instead, such mandates require an entirely different drivetrain technology and energy source than internal combustion engines.

Respondents (at 43) and Industry Intervenors (at 19-20) attempt to point to EPCA provisions addressing manufacturing *incentives* and crediting alternative fuel vehicles (including zero-emission vehicles) in calculating corporate average fuel economy performance. 49 U.S.C. §§ 32905, 32904(a)(2). But by expressly precluding consideration of such vehicles in setting "fuel economy standards" under EPCA, *see id*. § 32902(h), Congress made clear that zero-emission-vehicle mandates are not "related to fuel economy standards" and are not subject to preemption. The fact that Congress provided incentives for alternative fuel vehicles *outside* of the standard-setting process actually highlights that zero-emission-vehicle standards are not "related to fuel economy" for EPCA purposes.

Industry Intervenors (at 20) err in asserting that zero-emission-vehicle mandates are "impliedly preempted because they conflict with Congress's determination that the 'maximum feasible' fuel-economy standard should be set without regard to ZEVs." The opposite is true: Congress's exclusion of zero-emission vehicles from consideration in setting fuel economy standards makes clear that the two types of standards address separate issues and do not conflict. Further, EPCA specifically requires that NHTSA must consider "the effect of other motor vehicle standards of the Government on fuel economy" when setting fuel economy standards. *See* 49 U.S.C. § 32902(f). NHTSA must therefore consider state vehicle emission mandates for which preemption has been waived under Clean Air Act Section 209(b). *See* Primary Brief 87-90; JA412-13. Finally, neither Response Brief demonstrates that state zero-emission-vehicle mandates render compliance with EPCA impossible or are an obstacle to accomplishing EPCA's objectives. *See Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472, 480 (2013). For decades, regulated entities have successfully complied with both state zero-emission-vehicle mandates and NHTSA's corporate average fuel economy standards, while benefiting from EPCA's incentives for alternative fuel vehicles.

Finally, Respondents are incorrect that the purpose of zero-emission-vehicle mandates is to affect fuel economy. Respondents Br. 42. The purpose of these mandates is to incentivize advanced technology to eliminate emissions of criteria

and greenhouse gas air pollutants, in accordance with Clean Air Act Section 209(b) and *Massachusetts v. EPA*, 549 U.S. 497, 531-32 (2007). Many states rely on zero-emission-vehicle mandates in their EPA-approved State Implementation Plans to comply with federal National Ambient Air Quality Standards for ground-level ozone and other pollutants. Primary Brief 12, 30-32. Thus, in addition to being inconsistent with EPCA's plain text and purpose, NHTSA's overbroad interpretation of EPCA preemption would deprive states of a crucial tool to implement their statutory obligations under the Clean Air Act to protect public health against air pollution. This Court should reject this overreach by vacating NHTSA's rule.

CONCLUSION

The Court should grant the Petitions for Review.

Dated: October 27, 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 1,400 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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