

**ORAL ARGUMENT NOT YET SCHEDULED**

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No. 19-1230 (and consolidated cases)

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**IN THE 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, *et al.*,  
*Respondents.*

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On Petition for Review of Final Agency Action of the  
Environmental Protection Agency and the  
National Highway Traffic Safety Administration  
84 Fed. Reg. 51,310 (Sept. 27, 2019)

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**BRIEF OF *AMICI CURIAE* THE NATIONAL LEAGUE OF CITIES;  
THE U.S. CONFERENCE OF MAYORS; AND THE  
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN  
SUPPORT OF PETITIONERS**

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

Except for those listed in the Identities and Interests section below, all parties, intervenors, and *amici* appearing in this case are listed in the brief for State and Local Government and Public Interest Petitioners.

References to the rulings under review and related cases appear in the brief for State and Local Government and Public Interest Petitioners.

**STATEMENT REGARDING SEPARATE BRIEFING,  
AUTHORSHIP, AND MONETARY CONTRIBUTIONS**

*Amici* National League of Cities, U.S. Conference of Mayors and International Municipal Lawyers Association file this separate *amicus* brief in compliance with the word limits set forth in the Court's Order of May 20, 2020 (Doc. No. 1843712). *See* Fed. R. App. P. 29(a)(5), 32(a)(7)(B)(i). A single joint brief is not practicable in this case because the other *amicus* briefs do not address the unique perspective of associations representing the entities responsible for local responses to climate change. *See* D.C. Circuit Rule 29(d).

Under Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that no party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person—other than the *amici curiae* or their counsel—contributed money intended to fund the preparation or submission of this brief.

## CORPORATE DISCLOSURES

The undersigned counsel for *amici* certifies that no corporation among *amici* has ever issued stock, and that none has a parent company whose ownership interest is 10 percent or greater.

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## **GLOSSARY**

EPA	United States Environmental Protection Agency
EPCA	Energy Policy and Conservation Act
NHTSA	National Highway Traffic Safety Administration
RIA	Regulatory Impact Assessment
SAFE Rule	Safer Affordable Fuel-Efficient Vehicles Rule
ZEV	Zero-Emission Vehicle

## **IDENTITIES AND INTERESTS OF *AMICI CURIAE***

The National League of Cities (NLC), founded in 1924, is the oldest and largest organization representing U.S. municipal governments. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. In partnership with 49 state municipal leagues, NLC advocates for over 19,000 cities, towns, and villages, where more than 218 million Americans live. Its Sustainable Cities Institute provides NLC members with resources on climate mitigation and adaptation.

The U.S. Conference of Mayors, founded in 1932, is the official nonpartisan organization of the more than 1,400 U.S. cities that are home to 30,000 people or more. The Conference of Mayors established its Climate Protection Center to assist with implementation of the 2005 Mayors Climate Protection Agreement, which over 1,000 mayors have joined, each pledging to reduce their city's greenhouse gas emissions levels to below 1990 levels.

The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan professional organization consisting of more than 2,500 members. The membership is composed of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters.

Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

As discussed below, the National Highway Traffic Safety Administration's (NHTSA) new reading of the Energy Policy and Conservation Act (EPCA) could imperil cities' ability to respond to climate change and other public health threats through programs that have long been considered within the authority of local governments. Additionally, cities will suffer from pollution caused by the action taken by the Environmental Protection Agency (EPA), which will lead to an increase in both greenhouse gas emissions and criteria pollutants.

### **1. NHTSA's Overly Broad Interpretation of EPCA Preemption Threatens Local Initiatives.**

NHTSA's Preemption Rule relies on its novel reading of EPCA as preempting local requirements that "directly or substantially affect[] corporate average fuel economy levels" or have "the direct and substantial effect of regulating fuel consumption." 84 Fed. Reg. 51,310, 51,313 (Sept. 27, 2019). This expansive interpretation of EPCA could be construed to argue that local programs to address transportation pollution are preempted. Cities have a stake in ensuring that such an erroneous and dangerous reading of EPCA does not stand.

### **2. Cities Are Already Grappling with the Effects of Climate Change**

Over 80 percent of Americans live in urban areas—and even more work in cities—meaning that *amici*'s members are responsible for understanding the risks to, and planning for the wellbeing of, the great majority of Americans.<sup>1</sup> Virtually all cities report feeling the effects of a changing climate.<sup>2</sup> Climate change can also exacerbate cities' existing challenges, including social inequality, aging and deteriorating infrastructure, and stressed ecosystems.<sup>3</sup>

Cities' costs to recover from damage caused by climate change will be enormous. By 2100, unmitigated climate change could every year cause 57,000 pollution-related deaths, at a cost of \$930 billion; lead to 1.2 billion lost labor hours, valued at \$110 billion; and result in hundreds of billions of dollars in infrastructure, water supply and other costs.<sup>4</sup> Without emissions reductions the

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<sup>1</sup> Center for Sustainable Systems, University of Michigan. 2019. "U.S. Cities Factsheet." Pub. No. CSS09-06.

<sup>2</sup> Alliance for a Sustainable Future, MAYORS LEADING THE WAY ON CLIMATE 2 (Jan. 2020), <https://bit.ly/2T4tMpY>.

<sup>3</sup> See Maxwell, K., et al., *Ch. 11: Built Environment, Urban Systems, and Cities in Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* (Reidmiller, D.R. et al., eds. 2018). U.S. Global Change Research Program, Washington, DC, USA, pp. 439 [hereinafter "4<sup>th</sup> National Climate Assessment"].

<sup>4</sup> EPA. 2015. Climate Change in the United States: Benefits of Global Action. United States Environmental Protection Agency, Office of Atmospheric Programs, EPA 430-R-15-001 at 78, <https://bit.ly/2xc5uCO>.

annual cost of coastal storm damage is expected to climb from \$3 billion to as high as \$35 billion by the 2030s and \$5 trillion through 2100.<sup>5</sup>

Additionally, heat waves are the deadliest type of extreme weather,<sup>6</sup> and because urban “heat islands” heat up faster and stay hotter than suburban and rural areas, city dwellers are disproportionately affected by heat waves.<sup>7</sup> The EPA estimates that failure to mitigate climate change will result in an additional 12,000 deaths per year from extreme temperature by 2100 in 49 major U.S. cities.<sup>8</sup>

Cities are not only on the front lines of climate impacts—they are also at the forefront of climate change adaptation and mitigation efforts nationwide. In fact, in 2019, 60% of U.S. cities launched or significantly expanded an initiative to address climate change, such as a green vehicle procurement program or new energy policy.<sup>9</sup> Yet, local governments have limited ability to regulate the circumstances imposed on them by the wider world. A 2017 study found that by collaborating with national governments and other partners, cities can achieve over

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<sup>5</sup> KATE GORDON ET AL., *RISKY BUSINESS: THE ECONOMIC RISKS OF CLIMATE CHANGE IN THE UNITED STATES* 3–4 (2014) [bit.ly/1QBbFfv](http://bit.ly/1QBbFfv); EPA, *supra* note 4 at 7.

<sup>6</sup> Office of Climate, Water, and Weather Services. *Weather fatalities, 2012*. Silver Spring, MD: US Dep’t of Commerce, National Weather Service, 2013, *available at* <http://www.nws.noaa.gov/om/hazstats.shtml>.

<sup>7</sup> John Balbus & George Luber, et al., *Ch. 14, Human Health*, in 4<sup>th</sup> National Climate Assessment at 544.

<sup>8</sup> EPA *supra* note 4 at 8.

<sup>9</sup> Alliance for a Sustainable Future, *supra* note 2 at 2.

half of the emissions reductions that are necessary to limit warming to 1.5° Celsius; but acting unilaterally, cities can deliver only 5% of the total emissions reductions needed to reach that goal.<sup>10</sup> The need for broader efforts led 290 local governments to declare their support for climate action to meet the goals of the 2015 Paris Agreement after President Trump announced that the United States would withdraw.<sup>11</sup>

As the U.S. National Global Change Research Program has noted, “[d]ecisions made today determine risk exposure for current and future generations and will either broaden or limit options to reduce the negative consequences of climate change.”<sup>12</sup> By failing to take climate change seriously now, EPA and

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<sup>10</sup> C40 & ARUP, DEADLINE 2020 79-80 (June 1, 2017), <https://bit.ly/2YL5J2f>. Although holding global temperature increase to 2 degrees Celsius was a commonly stated goal before 2015, the Paris Agreement seeks to limit warming to 1.5 degrees. “Climate-related risks to health, livelihoods, food security, water supply, human security, and economic growth are projected to increase with global warming of 1.5°C and increase further with 2°C.” IPCC, 2018: Summary for Policymakers. In: Global Warming of 1.5°C. (Masson-Delmotte, et al.) at 9.

<sup>11</sup> We Are Still In, “*We Are Still In*” Declaration (visited June 17, 2020), <https://bit.ly/2VnQx9Y>; We Are Still In, *Who’s In* (June 17, 2020), <https://bit.ly/39APYxh>.

<sup>12</sup> David Reidmiller, et al., *Ch. 1: Overview*, in 4<sup>th</sup> National Climate Assessment at 34.



NHTSA will cause cities to shoulder greater adaptation costs over the coming decades and centuries.<sup>13</sup>

### **3. Cities Are Overburdened By Criteria Pollutants Emitted by Vehicles.**

Cities also have a significant interest in addressing the public health threats posed by non-greenhouse gas pollution that vehicles emit. Motor vehicle emissions within cities are a significant source of criteria pollutants such as ozone and particulate matter.<sup>14</sup> Nearly half of the American population lives in counties with unhealthy levels of both pollutants, an increase over the last several years.<sup>15</sup> Ozone damages healthy lungs, can exacerbate existing lung conditions, and can cause chronic obstructive pulmonary disease.<sup>16</sup> Particulate matter can prompt asthma attacks, heart attacks, and strokes, and can cause lung cancer.<sup>17</sup>

Cities increasingly face the need to manage the threat of ozone pollution. Nationally, ozone pollution spiked in 2016-2018.<sup>18</sup> Over the same period, many

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<sup>13</sup> EPA, *supra* note 4 at 78-79 (describing range of avoided adaptation costs that would result from reducing greenhouse gases consistent with a 2-degree target).

<sup>14</sup> See U.S. EPA, *Criteria Air Pollutants*, <https://www.epa.gov/criteria-air-pollutants> (visited June 11, 2020); American Lung Association, *State of the Air 2020* (2020) at 39, [www.stateoftheair.org/assets/SOTA-2020.pdf](http://www.stateoftheair.org/assets/SOTA-2020.pdf).

<sup>15</sup> American Lung Association, *supra* note 14 at 5.

<sup>16</sup> NASA, *Sensing our Planet* (2017) at 13, <https://go.nasa.gov/37l6SjR>.

<sup>17</sup> American Lung Association, *Nearly Half of U.S. Breathing Unhealthy Air; Record-breaking Air Pollution in Nine Western Cities* (April 21, 2020), <https://bit.ly/2AqUEdg>.

<sup>18</sup> American Lung Association, *supra* note 14 at 5-6.

cities experienced an increase in the number of unhealthy ozone days.<sup>19</sup> Several cities, especially those at high altitudes, experience high levels of background ozone, making local ozone production even more deleterious.<sup>20</sup>

Managing particulate matter is likewise a major need and a challenge for U.S. cities. Half of the 26 most polluted cities faced worse levels of year-round particulate matter during the 2016-2018 period than in previous years. Of cities with major decreases in year-round particulate matter during 2016-2018, many still have not reached healthy air quality. Short-term particulate matter—periods of unhealthy spikes in particulate matter—is also a growing problem for cities. Of the 25 most polluted cities, 22 had more unhealthy air days during the 2016-2018 period than in the several years prior, and several cities had the highest average of unhealthy air days ever recorded.<sup>21</sup>

Climate change exacerbates local air quality pollution and amplifies its impacts.<sup>22</sup> Moreover, urban populations experiencing socioeconomic inequality are more vulnerable to the impacts of heat.<sup>23</sup> The risks of air pollution are further

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<sup>19</sup> *Id.* at 7.

<sup>20</sup> NASA, *supra* note 17 at 14.

<sup>21</sup> American Lung Association, *supra* note 14 at 7-8.

<sup>22</sup> C.G., P.D. Dolwick, N. Fann, L.W. Horowitz, V. Naik, R.W. Pinder, T.L. Spero, D.A. Winner, and L.H. Ziska, 2018, *Ch. 13: Air Quality*, in 4th National Climate Assessment; American Lung Association, *supra* note 14 at 6, 39.

<sup>23</sup> Maxwell, K., et al., *supra* note 3 at 447.

heightened by the current pandemic: air pollution has been linked to higher COVID-19 death rates,<sup>24</sup> and survivors of COVID-19 may suffer long-term lung damage such as lung disease.<sup>25</sup> For these reasons, local governments have a significant interest in controlling vehicle emissions in order to minimize air pollution and its negative health effects.

## ARGUMENT

### 1. NHTSA's Preemption Rule is Unlawful.

NHTSA's Preemption Rule contravenes EPCA and established case law. NHTSA also acted arbitrarily and capriciously by relying on illogical reasoning and disregarding the clear need to address criteria pollutants. *See Michigan v. EPA*, 135 S. Ct. 2699, 2706, 2707 (2015) (the process by which an agency reaches a result must be "logical and rational" and "an agency may not 'entirely fail to consider an important aspect of the problem.'" (quoting *Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 374 (1998); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))).

#### A. NHTSA's Rule Is Contrary to Established Precedent.

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<sup>24</sup> Harvard T.H. Chan School of Public Health, *Air Pollution Linked with Higher COVID-19 Death Rates* (May 5, 2020), <https://bit.ly/2YpSq5Q>.

<sup>25</sup> David Cox, *Some Patients Who Survive COVID-19 May Suffer Lasting Lung Damage*, SCIENCE NEWS, April 27, 2020.

NHTSA's Preemption Rule directly contradicts the Supreme Court's holding in *Massachusetts v. EPA*, 549 U.S. 497 (2007). Under the new rule, any state or local law regulating or prohibiting tailpipe carbon dioxide emissions is "related to" fuel economy standards, and therefore preempted by EPCA. 84 Fed. Reg. at 51,362 (quoting 49 U.S.C. § 32919). The Supreme Court has roundly rejected this view, dismissing the argument that EPCA intrudes on the authority to "regulate carbon dioxide emissions from motor vehicles because doing so would require tighten[ing] mileage standards." *Massachusetts*, 549 U.S. at 531. Rather, regulating carbon dioxide emissions to protect public health and welfare is "wholly independent of [NHTSA's] mandate to promote energy efficiency." *Id.* at 532; *see also Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1173 (E.D. Cal. 2007) ("California's effort to regulate greenhouse gas emissions through the waiver of preemption provisions of the Clean Air Act overlaps, but does not conflict with [NHTSA]'s activities under EPCA"); *Green Mountain Chrysler v. Crombie*, 508 F. Supp. 2d 295, 343-99 (D. Vt. 2007) (holding that EPCA does not preempt California's greenhouse gas standards).

The unlawful breadth of NHTSA's rule is demonstrated further by the rationale behind it, provided in the preamble. There, NHTSA posits that "local requirements that . . . directly or substantially affect[] corporate average fuel economy levels" necessarily "relate to fuel economy standards" and therefore "are

preempted,” and that state or local actions that have “the direct and substantial effect of regulating fuel consumption” are also “‘related to’ fuel economy standards” and preempted. 84 Fed. Reg. at 51,313. Nothing in the statute, or the case law, supports this newfound standard.

Courts have held that EPCA preempts state or local requirements that expressly distinguish between vehicles based on fuel economy. *See, e.g., Metropolitan Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 158 (2d Cir. 2010); *Ophir v. City of Boston*, 647 F. Supp. 2d 86, 88 (D. Mass. 2009); *Metropolitan Taxicab Bd. of Trade v. City of New York*, 08-CV-7837, 2008 WL 4866021, at \*11-12 (S.D.N.Y. Oct. 31, 2008); *but see Green Alliance Taxi Cab Ass’n v. King County*, No. C08-1048RAJ, 2010 WL 2643369, at \*5 (W.D. Wash. June 29, 2010) (city’s voluntary incentive program to encourage hybrid adoption was not preempted by EPCA). No court has held that greenhouse gas emissions standards are preempted by EPCA.

As Petitioners explain, because NHTSA disavows any interpretive discretion, the Preemption Rule can stand solely if it represents the only reasonable interpretation of EPCA. *See* Pub. Int. Pet. Br. at 84. By reading EPCA to preempt local requirements that merely have a “direct” or “substantial” *effect* on corporate average fuel economy levels, or have the “direct and substantial effect of regulating fuel *consumption*,” however, NHTSA seeks to extend EPCA preemption

beyond any previous understanding of the statute's reach. Far from articulating the only reasonable interpretation of EPCA, NHTSA's reading conflicts with the language, structure, and prevailing construction of the statute.

**B. NHTSA Acted Arbitrarily and Capriciously By Failing to Consider That Its Interpretation of EPCA Threatens Longstanding Local Initiatives.**

NHTSA's rule is also arbitrary and capricious. "Federal administrative agencies are required to engage in 'reasoned decisionmaking,'" *Michigan*, 135 S. Ct. at 2706 (quoting *Allentown Mack*, 522 U.S. at 374). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Id.* (quoting *Allentown Mack*, 522 U.S. at 374); *see also Am. Wild Horse Preserv. Campaign v. Perdue*, 873 F.3d 914, 920 (D.C. Cir. 2017) ("[T]he Administrative Procedure Act . . . prohibits arbitrary and capricious actions by federal agencies and mandates that they give reasoned explanation for the actions that they do take.").

Here, the process by which NHTSA determined that EPCA preempts greenhouse gas and zero-emission-vehicle (ZEV) standards was neither logical nor rational. Rather, NHTSA's newfangled interpretation of EPCA is so broad that it threatens longstanding local initiatives to address transportation pollution.

As discussed, NHTSA now reads EPCA to preempt local requirements that merely have a "direct" or "substantial" *effect* on corporate average fuel economy

levels, or have the “direct and substantial effect of regulating fuel *consumption*.”

84 Fed. Reg. at 51,313. In addition to contradicting precedent, this interpretation of EPCA may threaten local programs that no reasonable person could think are preempted.

For example, municipal initiatives can increase the adoption of electric vehicles in order to reduce transportation pollution. Such initiatives include requirements that garages install electric vehicle charging stations or that residential buildings make a certain number of parking spaces amenable to charging equipment. A bump in electric vehicles purchases could have an “effect” on corporate average fuel economy. This is because an automaker’s average fuel economy is calculated using the fuel economy of each vehicle it manufactures, and electric vehicles factor into that calculation. *See* 49 U.S.C. § 32904(a)(1), (2).<sup>26</sup> By NHTSA’s reasoning, one could argue that because local requirements that boost electric vehicle use “substantially affect[] corporate average fuel economy levels [they] are preempted.” 84 Fed. Reg. at 51,313. NHTSA asserts that “local governments are able to continue to encourage ZEVs in many different ways, such as in investments in infrastructure and appropriately tailored incentives.” 84 Fed.

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<sup>26</sup> Even though electric vehicles can improve an automaker’s average fuel economy, they do not change the fuel economy *standards* that automakers must meet, and their fuel economy is divorced from emissions. *See* Pub. Int. Pet. Br. at 17, 100.

Reg. at 51,321. But this conclusion flies in the face of NHTSA's own analysis. Where an agency's decision is "illogical on its own terms" it is arbitrary and capricious. *Gamefly, Inc. v. Postal Regulatory Comm'n*, 704 F.3d 145, 149 (D.C. Cir. 2013) (internal citations omitted).

NHTSA's novel reading of EPCA could also be construed to argue for preemption of municipal efforts to reduce vehicular traffic. Local governments regularly encourage residents to decrease personal vehicle use by expanding bike lanes, providing free public transportation, or creating high-occupancy vehicle lanes to incentivize carpools. *See, e.g., Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1094 (D.C. Cir. 1996) (noting that EPA must provide state and local authorities with information related to carpool lanes, restrictions on car use, and other strategies they can use to reduce transportation emissions) (citing 42 U.S.C. § 7408(f)). Now, an argument could be made that such a requirement "has the direct and substantial effect of regulating fuel consumption," 84 Fed. Reg. at 51,313, and is therefore preempted under NHTSA's interpretation of EPCA.<sup>27</sup>

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<sup>27</sup> While *amici* focus on local initiatives to curb transportation pollution, NHTSA's newfound interpretation of EPCA could also threaten local rules that promote public safety, such as speed limits or requirements to use snow tires (which can add weight to a vehicle). *See* U.S. Dep't of Energy, *Driving More Efficiently*, <https://www.fueleconomy.gov/feg/driveHabits.jsp> (visited June 29, 2020) (explaining that speed affects fuel economy); 83 Fed. Reg. 42,986, 43,235 (Aug. 24, 2018) (explaining that vehicle weight affects fuel economy). Although

(continued...)



“Congress could not possibly have intended to eliminate” such “laws in areas traditionally subject to local regulation.” *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995). EPCA should not be read to produce such an “unsettling result.” *Id.* at 665. NHTSA’s rule cannot stand because it “relies on an untenable interpretation of congressional intent and an overbroad view of an agency’s power to pre-empt state [and local] law.” *Wyeth v. Levine*, 555 U.S. 555, 573 (2009).

**C. NHTSA Acted Arbitrarily and Capriciously by Ignoring the Criteria Benefits of Greenhouse Gas and ZEV Standards.**

It is beyond cavil that an agency may not “entirely fail[] to consider [an] important aspect of the problem.” *DHS v. Regents of the Univ. of Cal.*, -- S. Ct. --, 2020 WL 3271746, at \*23 (June 18, 2020) (quoting *State Farm*, 463 U.S. at 43). NHTSA acted arbitrarily and capriciously by failing to consider that greenhouse gas and ZEV standards are critical to addressing criteria pollution.

NHTSA concludes that greenhouse gas standards are “related to fuel economy standards” because “the more fuel a vehicle burns or consumes, the more carbon dioxide it emits.” 84 Fed. Reg. at 51,316. NHTSA further determines that

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(...continued)

NHTSA claims that safety requirements with an “incidental” effect on fuel economy would not be preempted under its new rule, NHTSA does not define “incidental” or articulate any limiting principle that would save such measures from its broad reading of EPCA preemption. *See* 84 Fed Reg. at 51,314.

ZEV standards are equally “related to fuel economy standards” because a ZEV mandate is simply a carbon dioxide regulation. *Id.* at 51,320. In addition to the legal failures identified by Petitioners, *see* Pub. Int. Pet. Br. at 82-108; Ind. Pet. Br. at 10-15, this analysis fails to account for the need to address criteria pollutants.

NHTSA’s reasoning suffers from at least two fatal flaws. First, NHTSA disregarded the significant criteria benefits of both greenhouse gas and ZEV standards, which EPA has repeatedly recognized and which commenters raised. *See* Pub. Int. Pet. Br. at 60; *see also* EPA-HQ-OAR-2018-0283-0718\_83; NHTSA-2018-0067-11873\_371-372. Second, NHTSA ignored the connection between the greenhouse gases that cause climate change and criteria pollutants such as ozone, which increases with temperature rise. *See* NHTSA-2018-0067-12295\_24.

Criteria pollutants are “an important aspect” of NHTSA’s action because reducing pollution is “a principal objective of [the Clean Air Act] and because commenters raised concerns about” the crucial role that greenhouse gas and ZEV standards play in reducing ozone and particulate matter. *Gresham v. Azar*, 950 F.3d 93, 102 (D.C. Cir. 2020); *see also Public Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993) (“The requirement that an agency action not be arbitrary or capricious includes a requirement that the agency . . . respond to relevant and significant public comments.”) (citations omitted); *Nat’l. Asphalt Pavement Ass’n v. Train*, 539 F.2d 775, 783 (D.C. Cir. 1976) (Clean Air Act aims “to reduce

existing levels of air pollution.”). In failing to consider the need to address criteria pollution, NHTSA acted arbitrarily and capriciously.

## **2. EPA’s Withdrawal of California’s Clean Air Act Waiver is Arbitrary and Capricious.**

EPA’s revocation of California’s Clean Air Act waiver is arbitrary and capricious because it is not “reasonable and reasonably explained,”

*Pharmaceutical Manufacturing Research Serv., Inc. v. Food & Drug Admin.*, 957 F.3d 254, 262 (D.C. Cir. 2020) (citations omitted), and EPA failed to consider “important aspect[s] of the problem,” *Michigan*, 135 S. Ct. at 2707, including: the role of California’s Advanced Clean Cars program in addressing climate change and criteria pollutants; local governments’ reliance interests in the program; and the inequitable impacts of its action. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

### **A. California’s Advanced Clean Cars Program Buys Efforts to Reduce Greenhouse Gases and Criteria Pollutants Across the Country.**

EPA failed to adequately assess the impacts that will flow from the withdrawal of California’s authority to implement its greenhouse gas and ZEV standards. California’s Advanced Clean Cars program includes revisions to the state’s greenhouse gas standards, low-emission vehicle program and ZEV mandate. 78 Fed. Reg. 2111, 2112 (Jan. 9, 2013). The revised ZEV mandate requires automakers to maintain a certain percentage of ZEV “credits.” EPA-HQ-OAR-

2012-0562-0004\_22. Automakers can earn ZEV “credits” by selling ZEVs or plug-in hybrid vehicles (which are not entirely electric). 78 Fed. Reg. at 2119. The ZEV mandate aims to achieve “the commercialization of ZEVs” and low-emitting hybrids by “pushing higher production volumes which in turn would achieve cost reductions.” *Id.* at 2114. The Advanced Clean Cars program combines a suite of regulations to reduce greenhouse gases and criteria pollutants such as ozone and particulate matter “into a single coordinated package of requirements” for light-duty vehicles. *Id.* at 2111.

EPA did not adequately assess the consequences of nullifying two of the three components of that coordinated package. Neither the preliminary nor the final regulatory impact assessment for the Safer Affordable Fuel Efficient Vehicles (SAFE) Rule discuss the impacts of revoking California’s waiver,<sup>28</sup> and no regulatory impact assessment was released when this action was finalized.

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<sup>28</sup> See EPA Science Advisory Board Consideration of the Scientific and Technical Basis of the EPA’s Proposed Rule titled *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks* (Feb. 27, 2020) at 29, <https://bit.ly/37iT3Cg> (“[W]e note that the PRIA does not examine the societal consequences (benefits or costs) of this legal interpretation [the EPCA Preemption Rule and waiver revocation], even though it represents a substantial change in policy.”); Final Regulatory Impact Assessment of the SAFE Rule (March 31, 2020) at 63 n.27, available at <https://bit.ly/3cUKHIS> (“Agency actions relating to California’s CAA waiver and EPCA preemption have since been finalized, see 84 FR 51310 (Sept. 27, 2019), and will not be discussed in great detail as part of this final rule.”).

However, the effects of both standards are significant.

California's motor vehicle standards have the capacity to shape the national market and reduce pollution levels across the country. Twelve other states have adopted the rules, as permitted by Section 177 of the Clean Air Act. *See* 42 U.S.C. § 7507; Pub. Int. Pet. Br. at 68. EPA's action bars them from continuing to enforce more environmentally protective requirements than the federal rules.

California's standards can also achieve nationwide emissions reductions more indirectly; Congress intended for California to serve as "a kind of laboratory for innovation" in motor vehicle pollution controls. *Engine Mfrs. Ass'n*, 88 F.3d at 1080 (quoting *Motor and Equipment Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1111 (D.C. Cir. 1979)). California's ZEV mandate serves a crucial technology-forcing purpose by requiring manufacturers to produce increasing numbers of ZEVs and hybrids. *See* NHTSA-2018-0067-11873\_373; Pub. Int. Pet. Br. at 58, 61. By spurring commercialization of zero- and low-emission vehicles, California's standards have ripple effects beyond its borders and the Section 177 states. Halting the ZEV program risks stifling the market's growth and frustrating efforts to address both greenhouse gases and criteria pollutants. *See* NHTSA-2018-0067-12123\_33. EPA's failure to even acknowledge, let alone consider, that its action will likely increase pollution is arbitrary and capricious. *See Gresham*, 950 F.3d at 102.

**B. EPA Acted Arbitrarily and Capricious by Failing to Consider the Need to Reduce Transportation Emissions to Address Climate Change.**

EPA also disregarded the urgent need to cut vehicular greenhouse gases in order to avoid the most catastrophic consequences of climate change. *See Michigan*, 135 S. Ct. at 2706. Additionally, “[t]he ‘requirement that agency action not be arbitrary and capricious includes a requirement that the agency adequately explain its result.’” *Snohomish Cty, Wash. v. Surface Transp. Bd.*, 954 F.3d 290, 301 (D.C. Cir. 2020) (quoting *Jost v. Surface Transp. Bd.*, 194, F.3d 79, 85 (D.C. Cir. 1999)). “The agency must explain the evidence which is available, and must offer a ‘rational connection between the facts found and the choice made.’” *State Farm*, 463 U.S. at 52 (quoting *Burlington Truck Lines, Inc. v. United States*, 371U.S. 156, 168 (1962)); *see also Sierra Club v. EPA*, 884 F.3d 1185, 1189 (D.C. Cir. 2018)) (EPA must provide a “reasonable connection to the facts in the record”) (quoting *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 629 (D.C. Cir. 2016)). As discussed, EPA’s action will undercut efforts to reduce greenhouse gases across the country. EPA offers no rational connection between the record, which overwhelmingly establishes the imperative to decrease greenhouse gas pollution from the transportation sector, and its choice to instead increase emissions by revoking California’s waiver.

For example, state and city commenters warned that many U.S. cities are

increasingly threatened by vector-borne disease, heat waves, and sea-level rise as a result of climate change. NHTSA-2018-0067-12361\_3, 6, 12-13 (quoting 4th National Climate Assessment at 26, 744, 752-53, 1104, 1107)).<sup>29</sup> Commenters further noted that transportation is “the top contributor to U.S. greenhouse gas emissions.” *Id.* at 3, (quoting 4th National Climate Assessment at 483). The record also reflects that the International Panel on Climate Change’s conclusion that “[c]limate related risks to health, livelihoods, food security, water supply, human security, and economic growth are projected to increase with global warming of 1.5° C and increase further with 2° C.” NHTSA-2017-0069-0680\_SPM-11. These and other “extraordinary and compelling” conditions underscore the threat that unmitigated climate change poses to cities in California and across the country. *See* Pub. Int. Pet. Br. at 56-57.

While EPA does not assess the climate impacts of its action, EPA does conclude that California may not seek to address climate change through its motor vehicle pollution controls because the state cannot make a meaningful dent in

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<sup>29</sup> *See also* NHTSA-2017-069-0682\_16 (“Research suggests that mortality risk for those 65 or older from heat waves could increase ten-fold by the 2090s because of climate change.” (quoting California’s Fourth Climate Change Assessment, Statewide Summary (2018)); *id.* at 20 (“[T]he incidence of daily tidal flooding is accelerating in more than 25 Atlantic and Gulf Coast Cities. Global average sea levels are expected to continue to rise . . . A rise of as much as 8 feet by 2100 cannot be ruled out.” (citing 4th National Climate Assessment, Vol. I at 10)).

global greenhouse gas emissions. 84 Fed. Reg. 51,340. In doing so, EPA runs afoul of the Supreme Court’s admonition that “[a]gencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.” *Massachusetts*, 549 U.S. at 524; *see also id.* (rejecting the “erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum”). EPA also ignores its own conclusion that even where “individual greenhouse gas source categories could appear small in comparison to the total,” contributors must all do their part to reduce greenhouse gas emissions. 74 Fed. Reg. 66,495, 66,543 (Dec. 15, 2009). EPA has not and cannot offer any “reasoned explanation” for abandoning this principle. *See Fox Television*, 556 U.S. at 516. Moreover, EPA’s attempt to hamstring California on the ground that California alone cannot stop climate change has dangerous implications for the many local governments that, knowing they cannot fully resolve the problem, are making strides to reduce greenhouse gases through climate action plans, green procurement programs, and other local initiatives. *See supra*, Section 1(B).

Additionally, EPA’s action in revoking California’s waiver cannot be considered in a vacuum. Shortly after EPA completed “Part 1” of the SAFE Rule, stripping California of its authority to implement its greenhouse gas and ZEV standards, the federal government finalized the remainder of the SAFE Rule: significantly weakening federal standards for motor vehicle greenhouse gas



emissions and fuel economy. *See* 84 Fed. Reg. at 51,310; 85 Fed. Reg. 24,174 (Apr. 30, 2020). In the environmental impact statement for the final SAFE Rule, EPA calculates that this federal rollback will significantly increase greenhouse gases. As compared to no action, the SAFE Rule will result in a 9% increase in carbon dioxide emissions by 2100, contributing to temperature rise of over 2° Celsius by 2060 and well above 3° Celsius by 2100.<sup>30</sup> EPA is aware of the scientific consensus that warming of more than 2° Celsius will cause “truly catastrophic climate change impacts.” NHTSA-2017-069-0682\_10.<sup>31</sup> Not only has EPA abdicated its statutory duty to reduce the motor vehicle emissions that contribute to climate change. *Massachusetts*, 549 U.S. at 533. EPA has now lowered the national bar *and* forced California—and states that have embraced California’s standards—to sink to its level.

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<sup>30</sup> Environmental Impact Statement for Final SAFE Rule (March 2020) at 5-35, 5-40, *available at* <https://bit.ly/31R0uQz>.

<sup>31</sup> *See also* NHTSA-2017-069-0682\_20 n.85 (during the Pliocene, when the earth’s temperature was 2° – 3.5° C above preindustrial levels, sea level was up to 66 feet higher than today) (citing 4th National Climate Assessment Vol. I at 141); EPA-HQ-OAR-2018-0283-4135\_44 (“Risks increase at a steepening rate under an additional warming of 1 to 2° C and become high above 3° C, due to potential for large and irreversible sea level rise from ice sheet loss.”) (quoting IPCC, 2014: Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva, Switzerland, 151 p. 72.); EPA-HQ-OAR-2018-0283-5054\_370 (citing likelihood that warming of 2° Celsius will trigger feedback loops that will drive further warming even if greenhouse gas emissions cease).

EPA seeks to downplay the additional increment of temperature rise caused by its regulatory rollback as small relative to overall projected warming.<sup>32</sup> This rhetoric is inconsonant with Supreme Court precedent and EPA's own prior findings. *See Massachusetts*, 549 U.S. at 524; 74 Fed. Reg. at 66,543. Faced with projected warming of more than 3° Celsius, EPA cannot throw its hands in the air and assume that it will fall short of its statutory duty to address climate change. *See Massachusetts*, 549 U.S. at 533. Rather, the record calls for meaningful emissions reductions—including ones that cannot fully solve climate change “in one fell regulatory swoop.” *Id.* at 524. EPA utterly failed to consider the need to address motor vehicle greenhouse gas emissions, or to provide a “reasonable connection [between] the facts in the record” and its decision to increase greenhouse gases by revoking California's waiver. *Sierra Club*, 884 F.3d at 1189.

**C. EPA's Action is Arbitrary and Capricious Because It Failed to Consider the Need to Address Criteria Pollutants.**

Like NHTSA, EPA unlawfully ignores the pressing need to address criteria pollutants. *See Gresham*, 950 F.3d at 102. California's greenhouse gas and ZEV standards play a critical role in reducing ozone and particulate matter. *See Pub. Int.*

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<sup>32</sup> Final Environmental Impact Statement, *supra* note 30 at 5-40.

Pet. Br. at 60-61.<sup>33</sup> Local governments are also gravely concerned about the public health threats posed by criteria pollutants. *See, e.g.*, EPA-HQ-OAR-2018-0283-3903 (Boulder); EPA-HQ-OAR-2018-0283-4018 (Los Angeles County); EPA-HQ-OAR-2018-0283-5687 (Sacramento); EPA-HQ-OAR-2018-0283-5935 (Dallas). The record makes painfully clear that ozone is causally linked to many health conditions, including cardiovascular effects, “respiratory effects, including lung function decrements, pulmonary inflammation, exacerbation of asthma, respiratory-related hospital admissions, and mortality,” EPA-HQ-OAR-2018-0283-0247\_1309, and that particulate matter poses severe health risks such as acute and chronic bronchitis, respiratory and cardiovascular hospitalizations, asthma attacks, heart attacks, and infant mortality, EPA-HQ-OAR-2018-0283-0654\_4-44, 4-45, 4-47, 4-50.

Additionally, as discussed *supra*, the ZEV mandate drives ZEV adoption in California, the Section 177 states, and beyond by expanding the ZEV market.

EPA’s decision to nullify the ZEV mandate therefore frustrates local governments’

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<sup>33</sup> EPA misrepresents a statement in California’s waiver request that the ZEV program does not provide criteria pollutant benefits in terms of tank-to-wheel emissions; this is simply because the tailpipe criteria emissions reductions of the Advanced Clean Cars program are attributed to the low-emission vehicle standards. NHTSA-2018-0067-11873\_371. In finalizing this action, EPA ignored the objection that this statement had been taken out of context. 84 Fed. Reg. at 51,330.

efforts to protect their citizens from ozone and particulate matter. EPA's failure to consider the need to address such pollution renders its action arbitrary and capricious.

**D. EPA Arbitrarily and Capriciously Failed to Consider Local Governments' Reliance Interests.**

An agency must provide a detailed justification for a new policy “when its prior policy has engendered serious reliance interests that must be taken into account.” *Fox Television*, 556 U.S. at 515. It is arbitrary and capricious to ignore such interests. *Id.*; see also *Nat'l Lifeline Ass'n v. F.C.C.*, 921 F.3d 1102, 1114 (D.C. Cir. 2019). “[B]ecause [EPA] was not writing on a blank slate, . . . it was required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.” *Regents of the Univ. of Cal.*, 2020 WL 3271746, at \*23 (internal citations omitted) (emphasis in original). EPA contravened this requirement by omitting any mention of local policy initiatives that rely on state efforts to reduce pollution and expand the zero- and low-emission vehicle market.

Many cities in California and Section 177 states warned EPA that their climate action plans rely on the existing motor vehicle standards. See, e.g., EPA-HQ-OAR-2018-0283-5687 (Sacramento); EPA-HQ-OAR-2018-0283-3899 (Eugene); EPA-HQ-OAR-2018-0283-3903 (Boulder); EPA-HQ-OAR-2018-0283-

4017 (Chula Vista); EPA-HQ-OAR-2018-0283-3907 (Ojai); EPA-HQ-OAR-2018-0283-5472 (Aspen); EPA-HQ-OAR-2018-0283-5685 (Portland).<sup>34</sup> Now that EPA has weakened the federal requirements and barred those states from following California's, these cities will find it difficult or impossible to meet their greenhouse gas targets.

Additionally, EPA's action will frustrate cities' efforts to meet their electric vehicle-procurement goals, on which many rely to meet their climate objectives. For example, New York's Clean Fleet Initiative requires the procurement of plug-in electric vehicles to meet the city's goal of reducing greenhouse gases by 80% by 2050. *See* EPA-HQ-OAR-2018-0283-1165. Similarly, the Climate Mayors Electric Vehicle Purchasing Collaborative aims to pool the buying power of cities across the country to facilitate municipal electric vehicle purchases. *See* NHTSA-2018-0067-12400; EPA-HQ-OAR-2018-0283-5685. However, the widespread commercialization of ZEVs relies on the existing regulatory regime. *See* Industry Pet. Br. at 9. By threatening the ZEV market's growth, EPA will make it more difficult and costlier for cities to electrify their municipal fleets. EPA's failure to

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<sup>34</sup> A number of cities in other states submitted comments stressing their reliance on the augural federal standards. *See, e.g.*, EPA-HQ-OAR-2018-0283-4160 (Salt Lake City); EPA-HQ-OAR-2018-0283-5763 (Anchorage); EPA-HQ-OAR-2018-0283-4152 (Edina); EPA-HQ-OAR-2018-0283-4413 (Nashville); EPA-HQ-OAR-2018-0283-4130 (Houston); EPA-HQ-OAR-2018-0283-3326 (Metropolitan Washington Air Quality Committee).

consider local governments' reliance interests renders its action arbitrary and capricious. *See Nat'l Lifeline Ass'n*, 921 F.3d at 1114; *Fox Television*, 556 U.S. at 515.<sup>35</sup>

**E. EPA Arbitrarily and Capriciously Failed to Consider the Environmental Justice Impacts of Its Action.**

EPA's conclusory assertion that "this action will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations" is indefensible. 84 Fed. Reg. at 51,360. Commenters raised concerns about the disproportionate impacts that both climate change and criteria pollutants have on low-income communities and communities of color, and EPA's earlier findings—which have not been rescinded—indicate that both climate change and conventional pollution disproportionately harm low-income communities and communities of color. *See, e.g.*, NHTSA 2018-0067-12368\_231; 80 Fed. Reg. 64,510, 64,670 (Oct. 23, 2015); 74 Fed. Reg. at 66,526. EPA cannot ignore issues before it, and it "cannot simply disregard contrary or inconvenient factual determinations that it made in the past." *Mozilla Corp. v. FCC*, 940 F.3d 1, 55 (D.C Cir. 2019) (quoting *Fox Television*, 556 U.S. at 537 (Kennedy, J., concurring)); *see also Am. Wild Horse Preserv. Campaign*, 873 F.3d at 932

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<sup>35</sup> EPA did mention the reliance interests of states and automakers. *See* 84 Fed. Reg. at 51,336. As Petitioners explain, EPA's dismissal of such interests is erroneous. *See* Pub. Int. Pet. Br. at 30-32, 38 n. 11; Ind. Pet. Br. at 7-9.

(holding action arbitrary and capricious where agency “brushed aside critical facts about its past treatment of and official statements about” the issue at hand).

EPA erroneously contends that the connection between its action and the impacts felt in low-income communities or communities of color as a result of increased vehicle emissions in California and Section 177 states is too attenuated and not foreseeable. 84 Fed. Reg. at 51,360. EPA offers no foundation for this assertion, which is illogical on its face given the undeniably direct link between tailpipe emissions of criteria pollutants and health impacts in local residents. *See id.* at 51,339 (recognizing that criteria pollutants emitted from tailpipes in California cause health and welfare effects in California). Moreover, as discussed, EPA cannot dismiss the effects of greenhouse gas emissions that will result from its action. *See Massachusetts*, 549 U.S. at 524 (rejecting the “erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum”). EPA’s failure to meaningfully consider environmental justice concerns constitutes yet another reason that its action is arbitrary and capricious. *State Farm*, 463 U.S. at 52.

## CONCLUSION

For the foregoing reasons, *amici* urge this Court to grant the petitions for review.

Dated: July 6, 2020

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Cir. R. 32(e)(2)(C), I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and D.C. Cir. R. 32(e)(3) because it contains 6423 words, excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(e)(1). Further, this brief complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared using 14-point Times New Roman font, a proportionately spaced typeface.

Dated: July 6, 2020

/s/ Michael Burger

**CERTIFICATE OF SERVICE**

I certify that the foregoing brief was served today on all registered counsel in these consolidated cases via the Court's CM/ECF system.

Dated: July 6, 2020

/s/ Michael Burger