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)

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

UNION OF CONCERNED SCIENTISTS, *et al.*,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,

Respondent,

AUTOMOTIVE REGULATORY COUNCIL, INC., *et al.*,

Intervenors.

On Petition for Review of Final Action of the National Highway Traffic Safety Administration

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BRIEF OF FIVE FORMER SECRETARIES OF THE DEPARTMENT OF TRANSPORTATION AND FOUR FORMER ADMINISTRATORS OF THE ENVIRONMENTAL PROTECTION AGENCY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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July 6, 2020

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1)(A), counsel certifies as follows:

A. Parties and *Amici*. Except for the following amici, all parties, intervenors, and amici appearing to date in this Court are contained or referenced in the Proof Brief of State and Local Government Petitioners and Public Interest Petitioners ("Petitioners' Brief"), No. 1849316, filed on June 29, 2020. The amici are: The American Thoracic Society, American Lung Association, American Medical Association, American Public Health Association, and California Medical Association; Climate Scientists; Edison Electric Institute; The Institute for Policy Integrity at New York University School of Law; Professor Leah M. Litman; Lyft, Inc.; Members of Congress; National Association of Clean Air Agencies; National Parks Conservation Association and Coalition to Protect America's National Parks; National League of Cities, U.S. Conference of Mayors, and International Municipal Lawyers Association; and Thomas C. Jorling, Michael P. Walsh, and Margo T. Oge.

B. Rulings Under Review. The ruling under review is described in the Petitioners' Brief, No. 1849316, filed on June 29, 2020.

C. Related Cases. All related cases are listed in the Petitioner's Brief, No. 1849316, filed on June 29, 2020.

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RULE 29 STATEMENTS

The parties in these consolidated cases provided blanket consent to the filing of *amicus* briefs on May 26, 2020, Docket No. 1844268. A separate brief filed on behalf of Amici is warranted because Amici are unaware of other entities or individuals intending to participate whose views and experience are substantially similar to Amici's.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no party or party's counsel contributed money intended to fund preparing or submitting this brief. No party's counsel authored the brief in whole or in part, subject to the following proviso. The utility petitioners' counsel, Kevin Poloncarz, Donald Ristow, and Jake Levine are employed by the same law firm as counsel for Amici, but (1) neither they, nor the utility petitioners, authored any part of this brief or contributed any money intended to fund preparing or submitting the brief, and (2) the respective representation of those parties and Amici has been maintained separately in all respects, including the preparation of this brief.

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GLOSSARY

CAA	Clean Air Act
DOT	Department of Transportation
EISA	Energy Independence and Security Act of 2007
EPA	Environmental Protection Agency
EPCA	Energy Policy and Conservation Act
NHTSA	National Highway Traffic Safety Administration
SAFE Rule	Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule, Part One

INTEREST OF AMICI CURIAE

Amici are five former Secretaries of the United States Department of Transportation ("DOT")—Federico Peña, Rodney Slater, Norman Mineta, Ray LaHood, and Anthony Foxx—and four former Administrators of the United States Environmental Protection Agency ("EPA")—William Reilly, Carol Browner, Christie Todd Whitman, and Lisa Jackson. Their service has spanned four Presidential Administrations—from George H. W. Bush to Barack Obama—and more than 40 years in the aggregate.[1] Amici had the responsibility, respectively, for administering the Energy Policy and Conservation Act ("EPCA") and the Clean Air Act ("CAA"), and have extensive experience with the issues presented here.

While Amici have grave concerns about consequences of global climate change and the Administration's policies in this regard, they come together here motivated by a shared interest in the sound, lawful, and predictable administration

[1] Secretary Peña served in the Clinton Administration (1993-1997), and also served as Secretary of Energy from 1997-1998. Secretary Slater served in the Clinton Administration (1997-2001). Secretary Mineta served the George W. Bush Administration (2001-2006). Secretary LaHood served in the Obama Administration (2009-2013). Secretary Foxx served in the Obama Administration (2013-2017). Administrator Reilly served in the George H. W. Bush Administration (1989-1993). Administrator Browner served in the Clinton Administration (1993-2001). Governor Whitman served as EPA Administrator in the George W. Bush Administration (2001-2003). Administrator Jackson served in the Obama Administration (2009-2013).

of our nation's iconic environmental and energy laws. Amici seek to ensure that decisions under these laws are based on the statutory requirements to protect public health, welfare, and the environment, are rooted in sound science, continue to emphasize technological innovation, and respect the states' appropriate role. Amici's work with states, led by California, during their service did not interfere with their ability to carry out statutory duties under their complementary authorities to reduce tailpipe pollution and enhance fuel efficiency. To the contrary, in Amici's experience, California and other state efforts to reduce emissions enhanced their effectiveness as regulators by highlighting the significant pollution and fuel-use consequences from the automotive sector, and sharpened an industry focus on technological innovation and fleet performance.

INTRODUCTION AND SUMMARY OF ARGUMENT

For fifty years, under Presidential Administrations of both major political parties, our nation has been exceptionally well served by its system of environmental protection. America has led the world in securing a safe and healthy environment for our citizens and future generations. Through increasingly stringent motor vehicle emissions regulations, administered by EPA, our skies are cleaner and our air healthier, while our economy has seen extensive growth. Under EPCA's Corporate Average Fuel Economy provisions, administered by DOT, vehicles have become far more efficient, benefitting the environment while lessening foreign oil dependence.

The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule, Part One ("SAFE Rule" or the "Rule"), promulgated by EPA and DOT's National Highway Traffic Safety Administration ("NHTSA"), threatens to upend this progress and should be vacated.

The CAA and EPCA have been administered in a complementary fashion since EPCA's enactment in 1975. They were built upon California's leadership and expertise in addressing motor vehicle emissions well before there was a corresponding federal program under either statute. These statutes have depended on several principles, including prioritizing the unique role of California as a laboratory for innovation, a public-health focus, and adapting implementation to address new problems. Most recently, the CAA and EPCA have been at the heart of the agencies' response to climate change, a profound challenge that threatens our planet's health and well-being. In addressing this crisis, both agencies can find effective solutions, comply with their statutory obligations, and allow California to serve its unique role.

Transportation-sector emissions are a significant source of climate-change-causing greenhouse gas pollution. For years, EPA and DOT have used their complementary authorities to address those emissions, while allowing California to exercise its CAA-recognized authority. A key feature of the previous Administration's effort was to develop "One National Program" that would expand, with slight moderation, California's greenhouse gas leadership across the nation and

thereby achieve enhanced reductions, while harmonizing federal and California standards. While retaining the label "One National Program," the Rule distorts this concept, achieving its goals not by harmonization, but instead by wiping out the authority of California and the section 177 states to regulate motor vehicle greenhouse gas emissions. The Rule adopts a previously-rejected and unworkable interpretation of EPCA's preemption provision that elevates the fuel-economy standards into a barrier to any state action, overriding states' well-established authority under the CAA. There is no valid legal, factual, or logical basis for this result.

The SAFE Rule undermines the sound and consistent administration of our nation's iconic environmental and energy laws, and impedes the crucial regulatory work that has been central to our prosperity and collective well-being. The Rule undermines manufacturer confidence in regulatory stability that is essential for encouraging investments in innovation. Only Congress holds the power to so profoundly alter the mandates of the CAA and EPCA.

ARGUMENT

I. The CAA and EPCA Are Complementary and Designed to Provide Flexibility to Address Evolving Challenges and Promote Technological Innovation to Protect Public Health.

For half a century and through multiple revisions, Congress, EPA, and the courts have recognized that the CAA was designed to promote and harmonize state

and federal efforts to address our nation's air pollution problems, to protect public health, and to foster innovative technological solutions to our nation's existing and emerging air quality challenges.

Shortly after the CAA's enactment, the Supreme Court observed that air pollution was "one of the most notorious types of public nuisance in modern experience." *Washington v. Gen. Motors Corp.*, 406 U.S. 109, 114 (1972). The Court also observed that while the Act "largely" preempted state vehicle emissions standards, Congress had nevertheless not adopted "a uniform, nationwide solution to all aspects of this problem and, indeed, ha[d] declared that the prevention and control of air pollution at its source is the primary responsibility of States and local government." *Id.* Thus, from its inception, and through its 1977 and 1990 amendments, the CAA has provided a cooperative federal-state framework to address air pollution.

In *Whitman v. American Trucking Ass'n*, 531 U.S. 457 (2001), the Court reaffirmed that a focus of the Act is to protect public health while spurring technological innovation. As Justice Breyer explained, "the technology-forcing goals of the 1970 amendments are still paramount in today's Act.… Technology-forcing hopes can prove realistic. Those persons, for example, who opposed the 1970 Act's insistence on a 90% reduction in auto emission pollutants, on the ground of excessive cost, saw the development of catalytic converter technology that helped

achieve substantial reductions without the economic catastrophe that some had feared." *Id.* at 492 (Breyer, J., concurring).

EPA has long applied these principles to develop solutions to pressing public-health problems. For example, the Agency has regulated neurotoxic lead additives in gasoline, limited carcinogenic emissions of benzene, ended use of ozone-depleting chlorofluorocarbons, and controlled lung function-altering fine particulate matter.[2] These actions were upheld against legal challenges. *See, e.g.*, *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir.), *cert. den.*, 426 U.S. 941 (1976).

These efforts produced widely-recognized benefits. In 1997, a peer-reviewed EPA study concluded that CAA implementation created direct benefits between $5.6 and $49.4 trillion, exceeding costs by more than 42 times.[3] As EPA acknowledges, new passenger vehicles are 98-99% cleaner for most tailpipe pollutants compared to the 1960s, and U.S. cities have much improved air quality, despite increasing population and vehicle miles traveled. In 2020, the CAA will prevent more than 230,000 early deaths while protecting ecosystems' health and providing other

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[2] *See* Amicus Brief of Former Administrators, *Massachusetts v. EPA*, No. 05-1120 (S. Ct. 2006).

[3] EPA, *Benefits and Costs of the Clean Air Act: 1970 to 1990*, 55- 58 (Oct. 15, 1997), http://www.epa.gov/oar/sect812.

benefits, such as improved agricultural yields and visibility. Current benefits of the 1990 CAA amendments are projected to reach approximately $2 trillion in 1990 dollars.[4]

Climate change is the latest and greatest challenge facing EPA. In *Massachusetts v. EPA*, the Court made clear that the CAA extends to greenhouse gas pollution: while Congress "might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of §202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence." 549 U.S. at 532. Thus, the Court held that EPA must assess whether motor vehicle greenhouse gas emissions endangered public health and the environment. EPA did so in 2009, determining that greenhouse gases "endanger both the public health and the public welfare of current and future generations" and that "emissions of these greenhouse gases from new motor vehicles … contribute to the greenhouse gas air pollution." 74 Fed. Reg. 66,496, 66,496 (Dec. 15, 2009).

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[4] *See* EPA, *Benefits and Costs of the Clean Air Act from 1990 to 2020* (2011), https://www.epa.gov/sites/production/files/2015-07/documents/fullreport_rev_a.pdf.

EPCA too was designed to provide flexibility to address challenging and evolving problems. Following the 1973 oil embargo, Congress worked towards energy independence, and in EPCA charged DOT with regulating fuel economy to promote motor vehicle fuel efficiency. Congress eventually mandated that DOT establish separate passenger car and light truck standards at "the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year," based on four factors: technological feasibility; economic practicability; the effect of other government standards on fuel economy; and the national need to conserve energy. 49 U.S.C. §32902. Notably, EPCA is designed to accommodate technological developments including by requiring DOT to consult with EPA, *id.* §32902(b)(1), and to consider "other motor vehicle standards of the Government," *id.* §32902(f).

This interplay between the CAA and EPCA from the start recognized the relationship that emissions controls might have on fuel economy. For several decades, EPA and DOT have successfully used their complementary authorities to address the distinct but interrelated challenges presented by emissions and energy conservation. As the Court instructed in *Massachusetts v. EPA*, "that DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public's 'health' and 'welfare,' 42 U.S.C. §7521(a)(1), a statutory obligation wholly independent of DOT's mandate to

promote energy efficiency. *See* Energy Policy and Conservation Act …. The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency." 549 U.S. at 532. As the Department of Justice recently acknowledged, the complementary administration of these statutes is essential. *See Truck Trailer Mfrs. Ass'n v. EPA*, No. 16-1430, Initial Brief for Resp., Dkt. No. 1839164 at 1-2 (D.C. Cir. filed Apr. 21, 2020).

II. The CAA's Fundamental Architecture Has Recognized California's Central Role in Motor Vehicle Emissions Regulation for Over 50 Years.

A. California's Program Predates the Federal Scheme, and Was Preserved by the 1967 Waiver Provision.

California has long played a leading role in addressing motor vehicle emissions. As this Court observed, "California's interest in pollution control from motor vehicles dates to 1946," and "[c]omprehensive statewide efforts began in 1957." *Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1109 n.26 (D.C. Cir. 1979). California was thus "already the leader in the establishment of standards for regulation of automotive pollutant emissions at a time when the federal government had yet to promulgate any regulations of its own." *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996) (internal quotations omitted); *see also Motor & Equip. Mfrs.*, 627 F.2d at 1111 (Congress intended California to "act as a kind of laboratory for innovation" for mobile-source emissions control). Indeed, "[s]ince the inception of the federal government's emissions control program it has drawn

heavily on the California experience to fashion and to improve the national efforts at emissions control…. Congress intended the State to continue and expand its pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program." 627 F.2d at 1110-11.

Congress first recognized California's special role in the Air Quality Act of 1967. *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1296 (D.C. Cir. 1979). Although the legislation generally preempted state vehicle emissions standards, it created an exception solely for California, by providing that the Secretary of Health, Education, and Welfare *must* waive federal preemption of automobile emission standards with respect to "any state which has adopted standards … for the control of emissions from new motor vehicle engines prior to March 30, 1966" unless certain narrow conditions were met. 42 U.S.C. §1857f-6a(b) (1970). Because "California was the only state which had adopted standards … prior to March 30, 1966, it was the only one eligible for the waiver of federal preemption authorized by this section."[5] *Ford*, 606 F.2d at 1296. With this provision, Congress recognized "the unique problems facing California," and allowed it to adopt regulations "more stringent than, or

[5] EPA and NHTSA were formed in 1970. California has thus regulated automobile emissions for longer than either has existed.

applicable to emissions or substances not covered by, the national standards." H.R. Rep. No. 90-728 (1967 U.S.C.C.A.N. 1938, 1958).

California and the Health, Education and Welfare Secretary quickly worked together to implement this provision. In 1968, the Secretary issued the first waiver, regarding 1969-1970 model year vehicles, 33 Fed. Reg. 10,160 (July 16, 1968), and dozens of additional waivers have been issued since,[6] *e.g.*, 34 Fed. Reg. 7,348 (May 6, 1969). The Secretary's functions were transferred to EPA in 1970, and EPA continued to grant waivers.[7] In 1975, EPA explained the broad role Congress envisioned for California: "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. 23,102, 23,103 (May 28, 1975). Indeed, "[t]he structure and history of the California waiver provision clearly indicate both a Congressional intent and an EPA practice of leaving the decision on ambiguous and controversial matters of public policy to California's judgment." *Id.* at 23,104.

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[6] EPA, *Vehicle Emissions California Waivers and Authorizations* (last visited July 5, 2020), https://www.epa.gov/state-and-local-transportation/vehicle-emissions-california-waivers-and-authorizations (listing waivers).

[7] Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (Oct. 6, 1970); EPA, *Order 1110.2, Initial Organization of the EPA* (Dec. 4, 1970), https://archive.epa.gov/epa/aboutepa/epa-order-11102-initial-organization-epa.html.

B. The 1977 Amendments Expanded California's Authority and Allowed States Across the Nation to Adopt California's Standards.

In 1977, Congress further enhanced California's leading role by broadening California's authority to issue standards, and by allowing other states to adopt California's standards. In these amendments—which post-date EPCA by two years—"Congress had an opportunity to restrict the waiver provision … and it instead elected to expand California's flexibility to adopt a complete program of motor vehicle emissions control." *Motor & Equip. Mfrs.*, 627 F.2d at 1110. Accordingly, those amendments were designed "to give California more leeway to tailor its emission control program to its particular problems," by "expand[ing] the deference which the Administrator is required to give to California's decisions and assessments." *Ford*, 606 F.2d at 1294.

Specifically, EPA may only decline a waiver request under narrow enumerated conditions. *See Motor & Equip. Mfrs.*, 627 F.2d at 1111; *Motor & Equip. Mfrs' Ass'n v. Nichols*, 142 F.3d 449, 463 (D.C. Cir. 1998). These narrow bases for declining waivers reflected Congress's "conscious[] cho[ic]e to permit California to blaze its own trail with a minimum of federal oversight." *Ford*, 606 F.2d at 1297. Congress characterized these changes as designed "to afford California *the broadest possible discretion* in selecting the best means to protect the health of its citizens and the public welfare." *Ford*, 606 F.2d at 1297 (quoting H.R. Rep. No. 95-294, 95th Cong., 301-02 (1977)) (emphasis added).

California's leading role has continued since the 1977 amendments, with the state setting key tailpipe emissions standards, before federal requirements in many instances.[8] For example, in 1988, California mandated onboard diagnostic systems, which are critical "to properly diagnose emission component malfunctions," two years before the federal government. *Nichols*, 142 F.3d at 453.

The 1977 amendments also added section 177, "which permitted other states to 'piggyback' onto California's standards, if the state's standards 'are identical to the California standards for which a waiver has been granted for such model year.'" *Motor Vehicle Mfrs. Ass'n v. New York State Dep't of Envtl. Conserv.*, 17 F.3d 521, 525 (2d Cir. 1994). Section 177 was designed to provide "states greater flexibility in dealing with the control of emissions." *Am. Auto. Mfrs. Ass'n v. Mass. Dep't of Envtl. Prot.*, 163 F.3d 74, 78 (1st Cir. 1998). Indeed, states are not required to secure EPA approval to adopt California's standards. *Ford*, 606 F.2d at 1298; *see also Motor Vehicle Mfrs.*, 17 F.3d at 535. While the section only applies to states with "plan provisions approved under this part," 42 U.S.C. §7507, where that condition is met the statute is broad and contains no indication that it is limited to the context of states fulfilling their state-implementation-plan obligations. With the

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[8] National Research Council, *State and Federal Standards for Mobile-Source Emissions*, 90-92 (2006), https://doi.org/10.17226/11586.

unprecedented threat posed by climate change, it is even more important that California be allowed to serve as a laboratory for efforts to reduce greenhouse gas emissions—within the carefully-defined strictures of the Act's wavier process—and that other states retain the option of voluntarily following California's standards.

III. The SAFE Rule's Interpretation of EPCA and the CAA Is Contrary to Statutory Text, Structure, and History.

A. The Text, Structure, and History of EPCA and the CAA Do Not Indicate that California's Standards Are Preempted.

There is no evidence in the text, structure, or history of EPCA that Congress intended to undermine California and the section 177 states' CAA authority. Notably, EPCA's preemption provision says nothing about emission regulation, nor does it suggest that it displaces a CAA waiver. 49 U.S.C. §32919(a). The Rule's interpretation of EPCA is wrong in and of itself, and in how it has been incorporated by EPA as an impediment to the CAA's waiver provisions.[9]

First, EPCA's text recognizes California's authority under the CAA, providing that the DOT Secretary must consider "the effect of other Federal motor vehicle standards on fuel economy." Pub. L. No. 94-163, §502(e)(3); *see also* 42 U.S.C. §32902(f). EPCA provides that such federal standards include those

[9] Amici recognize and incorporate Petitioners' jurisdictional arguments on the scope of this Court's review. Amici's arguments on the unlawful interpretation of EPCA would apply, regardless, to the extent that interpretation serves as a rationale for EPA's waiver determination.

promulgated under CAA Section 209(b), which authorizes the California waiver. Pub. L. No. 94-163, §502(d)(3)(D) (incorporating "[e]missions standards under section 202 of the Clean Air Act, *and emissions standards applicable by reason of section 209(b) of such Act*") (emphasis added). Accordingly, "in 1975 when EPCA was passed, Congress unequivocally stated that federal standards included EPA-approved California emissions standards." *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 346 (D. Vt. 2007); *see also Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1173 (E.D. Cal. 2008) ("[T]here is nothing in statute or in case law to support the proposition that a regulation promulgated by California and granted waiver of preemption under section 209 is anything other than a 'law of the Government' whose effect on fuel economy must be considered by NHTSA in setting fuel economy standards."). DOT has acknowledged the same, for example evaluating California emissions standards as part of the "[e]ffect of other Federal motor vehicle standards on achievable fuel economy." 47 Fed. Reg. 20,639, 20,649 (May 13, 1982).

To be sure, DOT has at times fleetingly taken the position that California's greenhouse gas standards were preempted. *See* 71 Fed. Reg. 17,566, 17,654 (Apr. 6, 2006). But this position was never made definitive. Indeed, as DOT recognizes, it *lost* the litigation on that precise issue before two courts, 84 Fed. Reg. 51,310, 51,312 (Sept. 27, 2019), and thereafter abandoned that position and issued

regulations jointly with EPA recognizing California's authorities. Far from being "consistent with NHTSA's longstanding position on EPCA preemption over the course of nearly two decades," *id.*, the Rule represents little more than a return to an aberrant and rejected interpretation that was *itself* inconsistent with decades of practice. The only thing the Rule is "consistent" with is a failed past interpretation. The agencies cannot bootstrap that rejected interpretation into a reason to sustain the Rule.

Second, the dynamic relationship between emissions standards and fuel economy was well established before EPCA, and there is no indication that EPCA was intended to upend California's longstanding emissions standards. From early on, EPA was aware that fuel economy can be affected by emissions-reduction systems,[10] and fuel-economy issues were raised in pre-EPCA waiver determinations. For example, in 1975, EPA rejected the "arguments of … fuel economy penalties" in granting a CAA waiver. 40 Fed. Reg. at 23,104. Instead, the Agency acknowledged the variable relationship between these issues and found that a "balancing of these risks and costs against the potential benefits from reduced emissions" was a "policy decision" for California. *Id*. There is no suggestion in the

[10] *E.g.*, EPA, *Fuel Economy and Emission Control* (Nov. 1972), https://tinyurl.com/y9j7zj4k.

legislative history or elsewhere that Congress intended to alter California's waiver authority by enacting EPCA. Rather, Congress acknowledged that "[t]he effects of emission controls on fuel economy are particularly difficult to assess," and that there were changes "in fuel economy" relating to California's emission-control efforts. H.R. Rep. No. 94-340, at 86 (1975). This relationship was also acknowledged in the 1977 CAA amendments, which required EPA to provide a report to Congress regarding "relative fuel economy" relating to revised standards for certain automobile years. Pub. L. No. 95-95, 91 Stat. 685 §224 (1977).

Third, the 1977 CAA amendments do not suggest that California's standards could be preempted by EPCA. To the contrary, the amendments altered the waiver provision to "broaden and strengthen California's authority to prescribe and enforce separate new motor vehicle emission standards," notwithstanding concerns about whether it was "possible to achieve continued reductions in automobile emission standards while meeting the automobile fuel economy standards established … by [EPCA]." H.R. Rep. No. 95-294, at *23, 233 (Conf. Rep.) (1977). It is difficult to imagine that Congress enacted EPCA to strip California of any authority to impose emissions-control regulations for which a CAA waiver had been granted, in light of EPCA's silence on this issue, the well-established link between certain air-pollution-control efforts and fuel economy, and the subsequent 1977 CAA amendments.

B. The Rule's New Interpretation of EPCA Is Contrary to its Implementation History.

Both DOT and EPA have acknowledged that California could, consistent with EPCA, implement emissions standards even when automakers claimed they would negatively impact fuel economy. DOT's rulemakings have regularly incorporated analysis regarding California's emissions standards. *See, e.g.*, 64 Fed. Reg. 73,476, 73,477 (Dec. 30, 1999) (discussing "new, stringent California emission standards"), finalized, 65 Fed. Reg. 58,483 (Sept. 29, 2000); 61 Fed. Reg. 67,518, 67,520 (Dec. 23, 1996) (addressing same), finalized, 62 Fed. Reg. 37,153 (July 11, 1997); 59 Fed. Reg. 16,312, 16,317 (Apr. 6, 1994); 56 Fed. Reg. 13,773, 13,379 (Apr. 4, 1991) ("NHTSA has considered the potential for reductions in light truck fuel economy capability due to new emissions requirements" from California); 55 Fed. Reg. 3,608, 3,614-15 (Feb. 2, 1990), finalized 55 Fed. Reg. 12,487 (Apr. 4, 1990); 53 Fed. Reg. 11,074, 11,078 (Apr. 5, 1988); 47 Fed. Reg. 20,639, 20,649-50 (May 13, 1982) (temporarily adjusting fuel economy requirements in light of California standards), finalized 47 Fed. Reg. 55,684 (Dec. 13, 1982); 42 Fed. Reg. 13,807, 13,814 (Mar. 14, 1977) ("NHTSA recognizes that emissions requirements for vehicles sold in California … may have the effect of lowering the 50 state average fuel economy of a manufacturer ….").

Likewise, although certain emissions-control technologies actually *improve* fuel economy,[11] EPA has regularly granted waivers to California while acknowledging that some California emissions requirements may have negative fuel-economy implications. For example, in 1977, EPA granted a waiver despite arguments that it would result in fuel economy "compromises." 42 Fed. Reg. 2,337, 2,339 (Jan. 11, 1977). EPA reached a similar conclusion in 1978, explaining that "Congress fully addressed the problems associated with the technological conflicts between fuel economy and emissions control" in EPCA, by providing that "such conflicts would be resolved through reconsideration by the Secretary of Transportation of the average fuel economy standard in light of the California emission standards," not by preempting California's standards. 43 Fed. Reg. 1,829, 1,831 (Jan. 12, 1978); *see also* EPA, *A Study of the Relationship between Exhaust and Fuel Economy* III-1 (May 1983).[12] One automaker, for instance, asserted "that their California cars will suffer an additional 8% loss in fuel economy in 1983." *Id.* at V-36 (internal quotations omitted). Regardless, EPA did not find this as running counter to EPCA. It is particularly puzzling that DOT and EPA for decades

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[11] *See, e.g.*, 38 Fed. Reg. 10,317, 10,325-26 (Apr. 26, 1973) (discussing potential fuel-economy benefits of adopting catalytic converter technology).

[12] https://nepis.epa.gov/Exe/ZyPDF.cgi/9100UOUB.PDF?Dockey=9100UOUB.PDF. *See also* National Research Council, *Automotive Fuel Economy: How Far Should We Go?*, 4-77 (1992).

expressed no preemption concern with California standards that would *reduce* fuel economy and thereby hinder compliance with EPCA, yet now seek to undermine standards that would, if anything, *facilitate* compliance.

C. The Rule's Interpretation Is Contrary to Clear Congressional Intent in Amending EPCA.

Congress further sought to preserve California's authority when strengthening EPCA's requirements in the Energy Independence and Security Act of 2007 ("EISA"): "Except to the extent expressly provided in this Act, or in an amendment made by this Act, nothing in this Act or an amendment made by this Act supersedes, limits the authority or responsibility conferred by, or authorizes any violation of any provision of law (including a regulation), including any energy or environmental law or regulation." 42 U.S.C. §17002. The principal House proponent of the fuel economy title in EISA, Representative Edward Markey, explained during the final House debate that:

> The laws and regulations referred to in [this section] include, but are not limited to, the Clean Air Act and any regulations promulgated under Clean Air Act authority. It is the intent of Congress to fully preserve existing federal and State authority under the Clean Air Act. In addition, Congress does not intend … to in any way supersede or limit the authority and/or responsibility conferred by sections 177, 202, and 209 of the Clean Air Act. For section 202 of the Clean Air Act, this includes but is not limited to the authority and responsibility affirmed by … *Massachusetts v. EPA* ….

Statement of Rep. Edward J. Markey, H16750 (Dec. 18, 2007).[13]

D. The Rule's Interpretation of "Related to" in EPCA's Preemption Provision Is Untenable.

DOT's sweeping interpretation of EPCA's preemption provision, and EPA's acquiescence in it, is flawed. DOT contends that "related to" has a "broad" meaning, such that the statute's preemption provision would extend to a wide swath of state laws. 84 Fed. Reg. at 51,311. This reading would mean that each of the above-cited emissions-control requirements with fuel-economy impacts would be preempted. DOT's argument that state efforts which could "interfere with the compliance regime under EPCA" are preempted, *id.* at 51,314, is flatly inconsistent with its long history of finding otherwise in varied contexts. Moreover, other plainly-established state authorities—such as in-use vehicle controls designed to prevent traffic congestion and thereby reduce air pollution, or anti-idling laws—would seemingly be preempted, despite the CAA's acknowledgement of such authorities. 42 U.S.C. §7543(d).

Perhaps recognizing that the Rule would upend decades of regulatory practice, DOT suggests that only state requirements that relate "directly or substantially" to fuel economy are preempted. 84 Fed. Reg. at 51,313. This purported limitation

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[13] Available at https://www.congress.gov/crec/2007/12/18/CREC-2007-12-18-pt1-PgH16659.pdf.

falters at the outset, as DOT offers no cogent explanation of what amounts to a "direct" or "substantial" impact on fuel economy. As noted, many historic emission-control efforts were argued to have direct or substantial effects on fuel economy, such that they would impede compliance with fuel economy standards and result in penalties. Yet DOT fails to grapple with this history. Indeed, DOT identifies only two examples of actions that do not have a direct or substantial effect: extra weight of child safety seats, and regulation of vehicle refrigerant leakage. *Id.* at 51,314.

Elsewhere in the Rule, DOT concedes the breathtaking and unprecedented scope of its interpretation, arguing that zero-emission vehicle mandates designed to prohibit conventional pollutants such as ozone would be preempted, because "the only vehicles capable of emitting no ozone-forming emissions are vehicles that do not use fossil fuels." *Id.* at 51,321. But DOT fails to offer any explanation of how this is meaningfully distinct from mere limitations on such pollutants, which can also have significant fuel-economy impacts, and fails to acknowledge the public-health ramifications of its position. While DOT elsewhere asserts that regulation of non-greenhouse gas pollutants does not "pos[e] a conflict with NHTSA's regulation of fuel economy," *id.* at 51,327, this inconsistent reasoning makes clear what DOT is actually attempting to do: gerrymander its preemption provision interpretation to prohibit greenhouse gas emissions controls and zero-emission vehicle requirements, regardless of its sweep.

At bottom, this approach distorts the preemption provision's plain language and ignores congressional intent. Amici have never understood Congress to elevate fuel-efficiency concerns into a prohibition on emissions controls designed to protect public health, or to contradict the critical importance of innovation and experimentation by California. Amici never, in the collective discharge of their responsibilities, operated in this fashion.

E. EPA's New Evaluation of California's Waiver Under the CAA is Similarly Defective.

Petitioners' briefs have ably demonstrated the legal and practical flaws with EPA's purported revocation of California's waiver. Amici emphasize that EPA's revocation of California's waiver is unprecedented and contrary to the special and unusual burden placed on EPA regarding California's waivers. The CAA sets forth an extraordinary process, providing that "the Administrator shall … waive" preemption unless California's waiver requests fail certain deferential standards. 42 U.S.C. § 7543(b)(1). The agencies ignore this heightened burden.

DOT and EPA remarkably focus on voluntary manufacturer commitments as a purported justification for their actions. *See* 84 Fed. Reg. at 51,334. In the face of regulatory uncertainty created by the Rule, a number of manufacturers voluntarily agreed with California to meet more ambitious targets. That agreement, reached with Ford, VW, Honda, and BMW, was designed to "support[] continued annual reductions of vehicle greenhouse gas emissions through the 2026 model year [and

throughout the entire U.S.], encourage[] innovation to accelerate the transition to electric vehicles, and provide[] industry the certainty needed to make investments and create jobs."[14] California's action is entirely consistent with approaches the agencies deployed under Amici's leadership—achieving emissions reductions in a manner that promotes industry support—and it belies the Rule's economic and business objections to California's standards. California's agreement with manufacturers does not provide a legitimate basis for agency action and is not at issue before the Court. The Administration's focus on it in the Rule seems misplaced, punitive, and arbitrary.

Both the purported waiver revocation and the new preemption interpretation will cause drastic disruption for states, affected industry, and the public, with little justification. In this way, the Rule suffers from flaws similar to those in *Department of Homeland Security v. Regents of the University of California*, 591 U.S. ___ (June 18, 2020). There, the Court rejected the agency's decision to rescind the Deferred Action for Childhood Arrivals program, finding that the manner in which the program was dismantled was arbitrary and capricious under the Administrative

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[14] California Air Resources Board, *California and major automakers reach groundbreaking framework agreement on clean emissions standards* (July 25, 2019), https://ww2.arb.ca.gov/news/california-and-major-automakers-reach-groundbreaking-framework-agreement-clean-emission.

Procedure Act. *Id.* at *26. The opinion underscored the requirement for an agency to provide sufficient justification before undertaking a drastic reversal. As the Court explained, "[w]hen an agency changes course … it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters." *Id.* at *23-24 (internal citations and quotations omitted). If implemented, the Rule would compromise longstanding policies addressing air pollution. *See, e.g.*, Petitioners' Brief, Dkt. No. 1849316 at 29-30 (discussing "serious reliance interests" the Rule would disrupt).

IV. The Administration Undermines State Efforts to Address Climate Change, Threatening Grave Impacts.

A. Climate Change Poses Enormous Threats to Public Health and the Environment.

The U.S. National Climate Assessment, the official U.S. governmental synthesis of climate science, found that human health and safety are increasingly vulnerable to impacts of climate change, including exposure to extreme weather events, changes to air quality, the spread of diseases, and changes to the availability of food and water.[15] The Intergovernmental Panel on Climate Change's recent peer-

[15] U.S. Global Change Research Program, *Fourth National Climate Assessment* (2018), https://nca2018.globalchange.gov/.

reviewed findings have heightened the urgent imperative to reduce greenhouse gas emissions.[16]

As California's recent, peer-reviewed Fourth Climate Change Assessment finds, state-specific impacts have continued and intensified since the last CAA waiver evaluation in 2009.[17] For example, heat-related illnesses and deaths will worsen, and more severe wildfires, more frequent and longer droughts, rising sea levels, increased flooding, and more extreme weather events will all uniquely and increasingly impact the state.[18] Trends previously identified by EPA in granting

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[16] Intergovernmental Panel on Climate Change, *Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways* (Oct. 6, 2018) at Chapter 2, 2-24, 2-27, Chapter 4, 4-6, 4-30.

[17] California Fourth Climate Change Assessment, *Statewide Summary Report* (2019), https://www.energy.ca.gov/sites/default/files/2019-11/Statewide_Reports-SUM-CCCA4-2018-013_Statewide_Summary_Report_ADA.pdf.

[18] Cal. Dep't of Nat. Res., *California's Fourth Climate Change Assessment: Key Findings* (Aug. 27, 2018); Evan Halper, *Climate scientists see alarming new threat to California*, LA TIMES (Dec. 5, 2017).

California's waiver have only grown more extreme.[19] Climate change further exacerbates the severity of localized air quality challenges and health effects.[20]

B. State Focus on Low and Zero Emissions Solutions Is Vital to Addressing the Climate Crisis.

Transportation-sector emissions are the nation's largest contributor to greenhouse gas emissions—and light-duty passenger vehicles comprise a significant proportion of those emissions.[21] U.S. transportation emissions alone exceeded the aggregate annual economy-wide (i.e., from all sources) emissions for all but two other countries—China and India.[22]

Before the Rule's promulgation, states were making important contributions to mitigating greenhouse gas emissions from vehicles. As of August 2019, 13 states had adopted California's standards, accounting for 35.8% of new U.S. light-duty

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[19] *See* 78 Fed. Reg. 2,112, 2,129 (Jan. 9, 2013); 74 Fed. Reg. at 66,532.

[20] *See, e.g.*, American Lung Association, *Transportation* (last updated Feb. 12, 2020), https://www.lung.org/clean-air/outdoors/what-makes-air-unhealthy/transportation.

[21] EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks 2000-2018*, https://www.epa.gov/sites/production/files/2020-04/documents/us-ghg-inventory-2020-main-text.pdf.

[22] *Compare* U.S. Energy Information Administration, *Monthly Energy Review June 2020*, https://www.eia.gov/totalenergy/data/monthly/pdf/sec11_8.pdf *with* United Nations Framework Convention on Climate Change, *Country Submissions*, http://www.globalcarbonatlas.org/en/CO2-emissions.

vehicle sales with California.[23] Likewise, 11 states, accounting for 25.9% of the light-duty-vehicle market, have adopted California's Advanced Clean Cars Program, which requires auto manufacturers to offer an increasingly large share of electric or otherwise zero-emission vehicles."[24] These state efforts are critical to reducing transportation sector greenhouse gas emissions. EPA's assertion that California's standards and regulation would have only a *de minimis* effect on climate change vastly understates the impact that collective action by California and the section 177 states can have on greenhouse gas emissions.[25]

C. The Rule's Approach Would Undermine Core Public Health Protections, Affecting the Most Vulnerable Communities.

Despite EPA and DOT efforts to create artificial distinctions regarding tailpipe emissions—by singling out actions affecting greenhouse gas emissions—vehicle emissions for a range of pollutants and adverse health consequences are closely interrelated and central to state efforts to protect their most vulnerable populations. A prohibition on controlling such emissions would radically depart

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[23] California Air Resources Board, *States that Have Adopted California's Vehicle Standards Under Section 177 of the Federal Clean Air Act* (Aug. 19, 2019), https://ww2.arb.ca.gov/sites/default/files/2019-03/177-states.pdf.

[24] *Id.*

[25] NESCAUM Comments, Nos. NHTSA-2018-0067 at 9; EPA-HQ-OAR-2018-0283 (Oct. 25, 2018).

from Amici's collective experience in administering these statutes with a public-health focus. Congress could not have hidden such a large "elephant" in the "mousehole" of EPCA preemption. *Am. Trucking Ass'n*, 531 U.S. at 468.

California recently explained that the transportation sector is the largest source of state-based nitrogen oxides emissions—which are a precursor to dangerous ozone formation—posing many health risks, including pulmonary inflammation, aggravated asthma, and premature death.[26] Heavy-duty-vehicle emissions form a significant proportion of those emissions.[27] California has thus proposed a new heavy duty zero-emissions-vehicle program to address these concerns.[28]

In proposing these regulations, California recognizes that "[m]any California neighborhoods, especially Black and Brown, low-income and vulnerable communities, live, work, play and attend schools adjacent to the ports, railyards, distribution centers, and freight corridors and experience the heaviest truck

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[26] California Air Resources Board, *Transportation Emissions: Presentation To The Senate Environmental Quality Committee And Senate Transportation Committee*, at 3, 6 (Mar. 20, 2020), https://stran.senate.ca.gov/sites/stran.senate.ca.gov/files/CARB%20Slides.pdf.

[27] *Id.*

[28] California Air Resources Board, *California Takes Bold Step to Reduce Truck Pollution* (June 25, 2020), https://ww2.arb.ca.gov/news/california-takes-bold-step-reduce-truck-pollution.

traffic."[29] Many communities of color experience disproportionately high exposure to dangerous air pollution levels.[30] Climate and conventional pollutant health impacts are exacerbated, not only due to heightened exposures, but enhanced vulnerabilities:

> While all Californians are impacted by climate change, climate change does not affect all people in the same way. These frontline communities are particularly vulnerable to the impact of climate and environmental changes because of decades-long, pervasive socio-economic conditions that are perpetuated by systems of inequitable power and resource distribution.[31]

In addition, differential COVID-19 morbidity and potential particulate matter pollution synergies have highlighted and exacerbated these inequities of pollution, and make addressing these health impacts even more imperative.[32]

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[29] *Id.*

[30] *See, e.g.*, Am. Lung Ass'n., *State of the Air 2020*, 44, 45 (2020), http://www.stateoftheair.org/assets/SOTA-2020.pdf; Mikati *et al.*, *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 Am. J. Pub. Health, 480- 485 (2018), https://doi.org/10.2105/AJPH.2017.304297.

[31] California's Fourth Climate Change Assessment, *Climate Justice Summary Report*, at 6 (Sept. 28, 2018), https://www.energy.ca.gov/sites/default/files/2019-11/Statewide%20Reports-%20SUM-CCCA4-2018-012%20ClimateJusticeSummary_ADA.pdf.

[32] *See, e.g.*, Friedman and Schlanger, *Race, Pollution, and the Coronavirus*, N.Y. Times (Apr. 8, 2020), https://www.nytimes.com/2020/04/08/climate/coronavirus-pollution-race.html.

Yet the consequence of the Administration's actions would arguably prohibit even zero emissions fleet requirements designed to address nitrogen oxides pollution and these core public health air pollution concerns. *See* 84 Fed. Reg. at 54,321; 83 Fed. Reg. 42,986, 43,238-39 (Aug. 24, 2018). These impacts highlight the significant adverse consequences of EPA's and DOT's extreme efforts to reshape our well-established environmental and public health protections.

CONCLUSION

The SAFE Rule undermines the overarching purposes of the CAA and EPCA. It does not advance energy conservation efforts, nor does it reduce emissions to contribute to cleaner air and help address the climate crisis. It is an unwarranted and unlawful approach that departs from a half century of environmental progress and sound administration of the laws, and it poses a grave threat to our planet's future. For the foregoing reasons, the petitions for review should be granted and the DOT and EPA actions should be vacated.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This filing complies with Federal Rules of Appellate Procedure 29(a)(4)(G) and 32(g)(1) and the Court's May 20, 2020 Order, because it meets the prescribed format requirements and contains 6,475 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e). This motion also complies with typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 6th day of July, 2020, a true and correct copy of the foregoing brief was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

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