IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF CALIFORNIA, *et al.*, Plaintiffs, v. ELAINE L. CHAO, in her capacity as Secretary, United States Department of Transportation, *et al.*, Defendants.	Case No. 1:19-cv-02826-KBJ

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF STATE PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

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INTRODUCTION

California, twenty-two other States, the District of Columbia, and three cities (State Plaintiffs) challenge a National Highway Traffic Safety Administration (NHTSA) regulation that purports to declare certain state vehicle emission regulations preempted under the Energy Policy and Conservation Act (EPCA). Defendants move to dismiss, arguing that the United States Court of Appeals for the D.C. Circuit has original jurisdiction over these challenges under 49 U.S.C. § 32909(a)(1). Defendants are wrong.

"Because district courts have general federal question jurisdiction under 28 U.S.C. § 1331, the normal default rule is that persons seeking review of agency action go first to district court rather than to a court of appeals." *Loan Syndications & Trading Ass'n v. SEC*, 818 F.3d 716, 719 (D.C. Cir. 2016) (internal quotations omitted). "Parties may proceed directly to the courts of appeals only when authorized by a specific direct-review statute." *Id*. Original appellate jurisdiction "under a direct review statute is strictly limited to the agency action(s) included therein." *Id.* (internal quotations omitted). Section 32909(a)(1) is such a direct-review statute, but the action challenged here—NHTSA's Preemption Regulation—is not among the limited agency actions included therein.

Section 32909(a)(1) authorizes direct appellate review only for "a regulation prescribed in carrying out any of sections 32901-32904 and 32908." 49 U.S.C. § 32909(a)(1). EPCA's preemption provision, Section 32919, is not among those enumerated sections. Accordingly, Defendants cannot, and do not, argue that the Preemption Regulation "carr[ies] out" EPCA's preemption section because doing so would mean direct appellate review is unavailable here.

Defendants argue instead that the Preemption Regulation "carr[ies] out" Sections 32901 through 32903. Defendants base this argument on an expansive reading of "carrying out"—one that significantly enlarges the scope of Section 32909(a)(1) beyond regulations expressly

authorized by the enumerated sections. But that reading is the opposite of the one Congress intended. Indeed, Congress made clear that a "regulation prescribed in carrying out" is synonymous with a "rule prescribed under." *See, infra,* Sec. I.A.1. And the D.C. Circuit has adopted this as the "straightforward" reading of Section 32909(a)(1). *Delta Construction Co. v. EPA*, 783 F.3d 1291, 1299 (D.C. Cir. 2015). Direct appellate review is available only for regulations *prescribed under* Sections 32901-32904 or 32908. Defendants' more expansive reading of Section 32909(a)(1) cannot be sustained.

Direct appellate review is unavailable here because the Preemption Regulation was not prescribed under any of the enumerated sections. In fact, none of those sections contains so much as a reference to preemption, let alone any text that even arguably "direct[s] or authorize[s]" the Preemption Regulation. *See Nat'l Ass'n of Mfrs. v. Dept. of Defense* (*NAM*), 138 S. Ct. 617, 630 (2018) (interpreting the Clean Water Act's direct-review provision). Defendants' attempt to shoehorn the Preemption Regulation into the direct-review scope of Section 32909(a)(1) fails, and this court has jurisdiction under the default rule for district court review.

BACKGROUND

The only question before the Court on this motion is whether the Preemption Regulation is within the scope of actions that 49 U.S.C. § 32909(a)(1) directs to the courts of appeals in the first instance. *See, e.g.,* Mot. to Dismiss or Transfer (Mot.) at 1. Nonetheless, in the Background section of their opening brief, Defendants present almost eight pages of arguments that certain California standards are preempted by EPCA. Mot. at 3-11. State Plaintiffs firmly disagree with Defendants' positions and will rebut them at the appropriate time. *See* First Amended and Supplemented Complaint (FAC) ¶¶ 48-73, 136-50. However, because those arguments are

irrelevant to the issue before the Court now, State Plaintiffs focus here, instead, on the background relevant to Defendants' motion and this court's jurisdiction.

A. The Energy Policy and Conservation Act

Congress enacted the Energy Policy and Conservation Act of 1975 in response to the energy crisis of the 1970s, with the intent to, among other things, "conserve energy supplies through energy conservation programs" and "provide for improved energy efficiency of motor vehicles." Pub. L. 94-163, § 2, 89 Stat. 871, 874 (1975). To further those objectives, EPCA requires NHTSA "to prescribe by regulation average fuel economy standards" with which automobile manufacturers must comply. 49 U.S.C. § 32902(a).[1] NHTSA must set these standards at "the maximum feasible … level" that it determines "manufacturers can achieve" in a given model year. *Id.*

EPCA also establishes a framework for implementing the fuel economy standards and authorizes NHTSA to make certain changes to that framework through regulations. For example, Section 32903 governs how manufacturers may earn credits for over-complying with the fuel economy standards and how those credits may be used to meet a manufacturer's own compliance obligations. *Id.* § 32903(a), (b), (c). Congress then authorized NHTSA to "establish, by regulation, a fuel economy credit trading program" that would allow manufacturers to sell their credits to other manufacturers "whose automobiles fail to achieve the prescribed standards." *Id.* § 32903(f)(1).

In addition, Congress included an express preemption provision in EPCA. Section 32919(a) provides that "[w]hen an average fuel economy standard prescribed under this chapter is in effect, a State or political subdivision of a State may not adopt or enforce a law or regulation

[1] Here, and elsewhere, the statute refers to the Secretary of Transportation. The Secretary has delegated her authority to NHTSA. 49 C.F.R. § 1.95(a).

related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter." 49 U.S.C. § 32919(a). It is this provision that NHTSA purports to interpret in its Preemption Regulation. *E.g.*, 84 Fed. Reg. 51,310, 51,313 (Sept. 27, 2019).

Finally, EPCA contains a judicial review provision that authorizes direct appellate review for some, but not all, of the regulations for which the statute establishes agency authority. Defendants rest their motion on one part of this provision, Section 32909(a)(1), under which direct appellate review is authorized for "regulation[s] prescribed in carrying out any of sections 32901-32904 or 32908" of EPCA. 49 U.S.C. § 32909(a)(1). Section 32919, EPCA's preemption provision, is not in this enumerated list. *See id.*

When EPCA was originally adopted in 1975, its direct-review provision was worded slightly differently: it provided direct appellate review for "any rule prescribed under" its enumerated sections. Pub. L. 94–163, 89 Stat 871 (1975). The current text of Section 32909(a)(1) dates from 1994 when EPCA was recodified, along with several other transportation-related statutes, into title 49. As part of this recodification, Congress made technical changes to numerous provisions, including what is now Section 32909(a)(1). Relevant here, Congress substituted the phrase "a regulation prescribed in carrying out" in place of "any rule prescribed under." *See* Pub. L. 103-272, 108 Stat. 745, 1070 (1994). In the recodification statute, Congress instructed that these changes to the text "may not be construed as making a substantive change in the laws replaced." 49 U.S.C. § 101 (note); Pub. L. No. 103-272, § 6(a), 108 Stat. 745, 1378 (1994).

B. NHTSA's Preemption Regulation

On August 24, 2018, NHTSA and EPA published a joint Notice of Proposed Rulemaking (NPRM) in the Federal Register. 83 Fed. Reg. 42,986 (Aug. 24, 2018). In it, NHTSA proposed,

among other things, to promulgate regulations purporting to define the scope of EPCA preemption and, specifically, purporting to declare that state greenhouse gas (GHG) and zero emission vehicle (ZEV) standards applicable to new cars and light trucks are preempted. *E.g.*, *id.* at 42,999. California has had such standards for decades, pursuant to waivers of preemption granted by EPA under the Clean Air Act. *See* FAC ¶¶ 66-69. Other States have adopted California's standards in their jurisdictions pursuant to 42 U.S.C. § 7507. *See id.* ¶ 82.[2]

On September 19, 2019, the Acting Administrator of NHTSA and the EPA Administrator signed a joint regulatory notice, finalizing, among other things, NHTSA's adoption of the Preemption Regulation. 84 Fed. Reg. 51,310. The "Judicial Review" section of this notice referred to the Clean Air Act's judicial review provision, 42 U.S.C. § 7607(b), and its 60-day deadline. 84 Fed. Reg. at 51,361. NHTSA did not mention EPCA's judicial review provision, 49 U.S.C. § 32909, or the 59-day statute of limitations established in that provision, *id.* at § 32909(b). *See* 84 Fed. Reg. at 51,361.

C. Procedural History

State Plaintiffs filed their complaint on September 20, 2019. The complaint challenges only NHTSA's Preemption Regulation.[3] A group of nongovernmental organizations filed their complaint, also challenging only NHTSA's Preemption Regulation, on September 27, 2019, and this Court related the cases.

[2] In the joint NPRM, EPA proposed to withdraw parts of the waiver it had granted to California in 2013—specifically the parts that covered California's GHG and ZEV standards for model years 2021 through 2025. 83 Fed. Reg. at 43,240. One of the three reasons EPA provided for this proposed action was NHTSA's proposal "to find that California's GHG and ZEV standards are preempted under EPCA." *Id.*

[3] While EPA also finalized its withdrawal of parts of California's waiver, the only agency action at issue in this case is NHTSA's Preemption Regulation. The Clean Air Act's judicial review provision, unlike the one in EPCA, provides for direct review of *all* final actions in the courts of appeals. 42 U.S.C. § 7607(b); *see also NAM*, 138 S. Ct. at 633. Accordingly, State Plaintiffs agree with Defendants that challenges to EPA's waiver withdrawal action must be filed in the courts of appeals.

On October 15, 2019, this Court granted State Plaintiffs' motion for leave to amend and supplement their complaint. Also on October 15, Defendants filed a Notice of Intent to File a Motion to Dismiss and served State Plaintiffs with that motion. On October 31, 2019, the Coalition for Sustainable Automotive Regulation and the Association of Global Automakers moved to intervene in support of Defendants. On November 13, 2019, the Court docketed State Plaintiffs' First Amended and Supplemented Complaint.

STANDARD OF REVIEW

As discussed above, "[i]nitial review" of agency action "occurs at the appellate level only when a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to directly review [that] agency action." *Watts v. SEC*, 482 F.3d 501, 505 (D.C. Cir. 2007). The meaning of such a statute—the only question presented here—"is a discrete issue of statutory interpretation." *NAM*, 138 S. Ct. at 624 (interpreting Clean Water Act's direct-review provision). Courts "accord no deference to the executive branch" when construing direct-review statutes. *NetCoalition v. SEC*, 715 F.3d 342, 348 (D.C. Cir. 2013); *see also, e.g.*, *NAM*, 138 S. Ct. at 626-31; *Loan Syndications*, 818 F.3d at 721.

ARGUMENT

I. THE PREEMPTION REGULATION IS NOT AMONG THE LIMITED SET OF REGULATIONS FOR WHICH CONGRESS PROVIDED DIRECT APPELLATE REVIEW IN SECTION 32909(a)(1)

It is well-established that "[a]n appellate court's jurisdiction under a direct review statute is strictly limited to the agency action(s) included therein." *NetCoalition*, 715 F.3d at 348; *see also Loan Syndications*, 818 F.3d at 719. The Preemption Regulation is not one of the agency actions included in Section 32909(a)(1)—the direct review provision upon which Defendants rely. Defendants' arguments to the contrary rely heavily on an overbroad reading of Section 32909(a)(1) that, as discussed below, contravenes both congressional intent and binding

precedent. Under the only permissible of reading Section 32909(a)(1), direct appellate review is limited to regulations promulgated pursuant to authority provided by one of the statutory sections enumerated therein. But none of those sections "'colorably authorize[s]'" the Preemption Regulation. *Paralyzed Veterans of Amer. v. DOT*, 286 F.Supp.3d 111, 117 (D.D.C. 2017) (quoting *Loan Syndications*, 818 F.3d at 724). Accordingly, direct appellate review is not available under Section 32909(a)(1), this court has jurisdiction, and Defendants' motion should be denied.[4]

A. Section 32909(a)(1) Encompasses Only those Regulations Prescribed Under One of Its Enumerated Sections, and the Phrase "Carrying Out" Does Not Indicate Otherwise

Section 32909(a)(1) provides direct appellate review exclusively for "regulation[s] prescribed in carrying out any of sections 32901-32904 or 32908." 49 U.S.C. § 32909(a)(1). Under Defendants' reading, direct review is not limited to "the specific regulations directly promulgated under the provisions cited in Section 32909(a)(1)" but, rather, extends to "any regulations NHTSA issues that more broadly 'carry[] out' those sections of the statute." Mot. at 13; *see also id.* at 2, 14, 17. The categories of regulations that would be included in, or excluded from, Defendants' reading of "carrying out" is noticeably vague.[5] In any event their reading is wrong.

[4] Because this Court has jurisdiction over State Plaintiffs' challenge, it "is without power to transfer this action." *See Hoffmann v. United States*, 266 F. Supp. 2d 27, 36 (D.D.C. 2003). But even if the Court were to conclude it lacks jurisdiction, transfer would be unnecessary in light of protective petitions filed in the D.C. Circuit. *See Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1337 (D.C. Cir. 2013).

[5] Defendants appear to suggest that regulations that "carry[] out" the enumerated sections might be those that "are directly and integrally tied to," or "protect the integrity of," other regulations that are expressly authorized by Section 32909(a)(1)'s enumerated sections. Mot. at 14, 15. These vague and undefined characterizations of the phrase "carrying out" suggest that Defendants' reading could have the undesirable effect of *increasing* uncertainty about which cases should be filed where. *See Hertz Corp. v. Friend*, 559 U.S. 77, 93-94 (2010) (adopting interpretation of jurisdictional statute that avoids "invit[ing] greater litigation" and "eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims").

The only permissible reading of Section 32909(a)(1) is the limited one Defendants attempt to evade—namely, that direct appellate review is authorized only for regulations promulgated pursuant to one of the enumerated sections. The D.C. Circuit has already so indicated, describing its "straightforward reading of" Section 32909(a)(1) as encompassing only regulations "prescribe[ed] under the provisions enumerated in the direct review statute." *Delta Construction*, 783 F.3d at 1299. Moreover, as discussed below, this straightforward reading is the one Congress intended, as is unambiguously evident from the text, structure, and history of the statute.

1. Congress Intended "Prescribed in Carrying Out" to Be Synonymous with "Prescribed Under"

As noted above, the phrase "a regulation prescribed *in carrying out*" was not in EPCA's judicial provision when Congress first enacted the statute in 1975. EPCA's original judicial review provision authorized direct appellate review for "any rule prescribed *under*" the enumerated statutory sections. Pub. L. 94–163, 89 Stat 871 (December 22, 1975) (emphasis added).[6] When Congress made this substitution, it expressly indicated that this was a technical, non-substantive change. 49 U.S.C. § 101 (note). Thus, Congress' decision to replace "under" with "in carrying out" did not change the scope of direct review, and Section 32909(a)(1) remains limited to regulations *prescribed under* one of the five enumerated sections.[7]

[6] The section numbers enumerated in the judicial review provision also changed with recodification, because all section numbers changed (and some sections were split into two). *Compare* Pub. L. 94-163, § 504(a), 89 Stat. 871, 908 (1975), *with* 49 U.S.C. § 32909(a). But the judicial review provision referred to the same substantive set of statutory provisions before and after these technical recodification changes.

[7] The plain text of the relevant statutes likewise establishes that Section 32909(a)(1)'s "regulation prescribed in carrying out" and Section 32909(a)(2)'s "regulation prescribed under" have the same meaning. Before recodification, these sections referred, respectively, to "any rule prescribed under" and "any final rule under." Pub. L. No. 94-163, § 301, 89 Stat. 871, 908; Pub. L. No. 95-619, § 402, 92 Stat. 3206, 3256. These indistinguishable meanings were expressly left unchanged in the recodification, as discussed above, and that more than suffices to overcome any presumption that the difference in language could suggest "different meanings were intended." *See DePierre v. United States*, 564 U.S. 70, 83 (2011) ("Congress sometimes uses slightly different language to convey the same message … [and courts] must be careful not to place too much emphasis on … marginal semantic divergence[s].") (internal quotation marks omitted).

Indeed, Congress' instructions for interpreting recodification changes could not be more clear. The "Legislative Purpose and Construction" section of the recodification statute directs that the new sections, including Section 32909(a)(1), "may not be construed as making a substantive change in the laws replaced." 49 U.S.C. § 101 (note); Pub. L. No. 103-272, § 6(a), 108 Stat. 745, 1378 (1994); *see also* Pub. L. No. 103-272, 108 Stat. 745 (1994) (describing recodification as an act to "revise, codify, and enact *without substantive change* certain general and permanent laws, related to transportation") (emphasis added). The House and Senate Reports underscore the point, noting, for example, that "[i]n making changes in the language, precautions [were] taken against making substantive changes in the law." H.R. Rep. No. 103-180, at 3 (1993); *see also id.* at 1-2, 5; S. Rep. No. 103-265, at 1 (1994). And NHTSA itself has publicly acknowledged that the 1994 recodification, and specifically its recodification of judicial review provisions, did not change their meanings. 60 Fed. Reg. 63,648 63,649 (Dec. 12, 1995) (stating that recodification of the "judicial review" provisions into title 49 of the U.S. Code was "without substantive change").

Put simply, then, the only direct appellate review Congress intended to provide in Section 32909(a)(1) is for regulations "prescribed under" one of the enumerated statutory sections: Sections 32901-32904 and 32908. Contrary to Defendants' claim, this reading does not render the phrase "carrying out" superfluous or read words out of the statute. *See* Mot. at 15. Rather, it gives "a regulation prescribed in carrying out" the meaning Congress intended it to have, following Congress' express instructions in the recodification statute. Defendants' contrary reading violates that enactment.[8]

[8] Defendants have to stretch far to make this argument, positing that any reading more narrow than theirs involves reading Section 32909(a)(1) as encompassing "regulations prescribed *in*" the enumerated statutory sections. Mot. at 15 (emphasis added). That reading is not the one Congress intended or the one State Plaintiffs or the D.C.

Read properly, EPCA's judicial review provision is not, as Defendants' claim, "far broader" than the one in the Clean Water Act—the one at issue in *NAM*. *See* Mot. at 17. Rather, the judicial review provisions of both EPCA and the Clean Water Act are "limited to particular, discrete agency actions or regulations." *Contra* Mot. at 17. In fact, the primary provision at issue in *NAM* provided direct appellate review for "any EPA action 'in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345.'" *NAM*, 138 S. Ct. at 628 (quoting 33 U.S.C. § 1369(b)(1)(E).) That section, just like Section 32909(a)(1), identifies a subset of statutory sections and provides direct review for final agency actions taken pursuant to the authority provided in those enumerated sections. *See NAM*, 138 S. Ct. at 624. Defendants' attempt to distinguish these two statutes—and the Supreme Court's decision in *NAM*—fail.

The "statutory language" of both EPCA and the recodification statute, as well as the "probative legislative history," unambiguously "indicate that … original appellate jurisdiction [exists] only over challenges to regulations whose authorizing provisions appear in" Section 32909(a)(1). *See Am. Petroleum Inst.*, 714 F.3d at 1337. Defendants' contrary reading must be rejected.

2. Defendants' Reading of "Carrying Out" Would Render Much of the Text of EPCA's Judicial Review Provision Superfluous

Defendants' overbroad reading of "carrying out" also fails because it would render significant portions of Section 32909(a)—including the entirety of Section 32909(a)(2)—superfluous. *See NAM*, 138 S. Ct. at 630 (rejecting interpretation of direct-review provision because it rendered "other statutory language" unnecessary).

Circuit have adopted. That reading is, in fact, nonsensical because Congress does not prescribe regulations *in* statutory sections. It authorizes agencies to prescribe regulations *under* statutory sections, as it did in Sections 32901 through 32904 and Section 32908.

Section 32909(a)(2) provides for direct review of "a regulation prescribed under Section 32912(c)(1)." Section 32912(c)(1), in turn, requires NHTSA to increase the civil penalties for non-compliance with the federal fuel economy standards, if NHTSA determines that doing so "will result in, or substantially further, substantial energy conservation" and "will not have a substantial deleterious impact on the economy of the United States, a State, or a region of a State." It is hard to see how a decision that those conditions have been met, accompanied by an increase in the civil penalties for non-compliance, would not "carry out" the fuel economy standards, and thus qualify for direct review, under Defendants' broad reading of Section 32909(a)(1). Indeed, Defendants themselves advance this very argument here. Mot. at 17-18. But Section 32909(a)(1) cannot be read so broadly, because doing so renders Section 32909(a)(2) entirely superfluous. *See* Mot. at 15 (relying on *Agnew v. Gov't of the D.C.*, 920 F.3d 49, 57 (D.C. Cir. 2019) for this canon of statutory construction).

Defendants' expansive reading would also render unnecessary Section 32909(a)(1)'s enumeration of any section other than Section 32902. Section 32902 authorizes and requires NHTSA to adopt average fuel economy standards, and regulations promulgated pursuant to *any other* section of EPCA's fuel economy chapter would seemingly help "carry out" those standards. For example, the credit trading programs NHTSA may establish, by regulation, pursuant to Section 32903 would, presumably, facilitate compliance with the fuel economy standards. Such a trading program would seem to "broadly carry[] out" the fuel economy standards program at least as much as a preemption regulation. *See* Mot. at 13 (internal quotation omitted). Under Defendant's reading, then, Section 32909(a)(1)'s express reference to Section 32903 is rendered entirely superfluous, and the same is true for the enumeration of Sections 32901, 32904, and 32908.

In essence, Defendants' uncabined reading of Section 32909(a)(1) would transform it into a provision that provides direct review for all EPCA regulations. But Congress knows how to "authorize[] direct circuit-court review of *all*" final actions when it wishes to do so, "as it did under the Clean Air Act." *NAM*, 138 S. Ct. at 633 (citing 42 U.S.C. § 7607(b)(1)). "That Congress structured judicial review … differently," here, "confirms what the text makes clear"—that the scope of direct appellate review is limited to the regulations prescribed under the enumerated sections. *See id.*; *see also id.* at 634 ("It is true that Congress could have funneled all challenges to national rules to the courts of appeals, but it chose a different tack here: It carefully enumerated the seven categories of EPA action for which it wanted immediate circuit-court review and relegated the rest to the jurisdiction of the federal district courts.").

In fact, Defendants' overbroad reading of "carrying out" is essentially an application of the "practical effects test" the Supreme Court rejected in *NAM*. There, the government argued that the Waters of the United States rule was subject to direct review because it would have practical effects on the implementation of regulations, specifically effluent limitations, for which Congress had provided direct review. *NAM*, 138 S. Ct. at 630. Likewise, here, Defendants argue that NHTSA's Preemption Regulation is subject to direct review because, they claim, it will have practical effects on NHTSA's implementation of the federal fuel economy standards. Mot. at 14. In rejecting this argument in *NAM*, the Court observed that "the Government offers no textual basis to read its 'practical-effects' test into" the judicial review provision, that "the Government's construction also renders other statutory language superfluous," and that "the Government's 'practical-effects' test ignores Congress' decision to grant appellate courts exclusive jurisdiction only over seven enumerated types of EPA actions." *NAM*, 138 S. Ct. at 630-631. The same is true here.

3. Defendants' Reading of "Carrying Out" Would Override Congress' Decision to Exclude Some EPCA Regulations from Direct Review

Defendants' attempt to read "carrying out" as broadening the scope of direct review also improperly fails "to give effect to Congress' express inclusions and exclusions"—and, in particular, fails to recognize that Congress expressly declined to provide direct review for some regulations it expressly directed or authorized in EPCA. *See NAM*, 138 S. Ct. at 630.

As noted above, Section 32909(a)(1) enumerates five sections of EPCA's fuel economy chapter: Sections 32901-32904 and 32908. The other part of EPCA's judicial review provision—Section 32909(a)(2)—adds one more, Section 32912(c)(1). But EPCA's fuel economy chapter contains nineteen sections. 49 U.S.C. §§ 32901-32919. Thus, EPCA's judicial review provision plainly omits multiple sections, including several that authorize regulations.

For example, Section 32907(a) requires manufacturers to report certain information to NHTSA regarding compliance with the fuel economy standard for a given model year, including "the actions the manufacturer has taken or intends to take to comply with the standard." 49 U.S.C. § 32907(a). Section 32907(a)(1)(C), in turn, authorizes NHTSA to promulgate regulations requiring additional information in these reports. Yet, Section 32907 and its authorized regulations are absent from the direct-review provision. Other EPCA sections also authorize adoption of regulations for which direct review is not provided. *E.g.*, 49 U.S.C. §§ 32907(b)(1); 32917(b).

Regulations promulgated under these sections would appear to be subject to direct appellate review under Defendants' overbroad reading of Section 32909(a)(1) because such regulations at least arguably support the fuel economy standards program. But that result would impermissibly override "Congress' decision to grant appellate courts exclusive jurisdiction *only* over [the] enumerated types of … actions set forth in" Section 32909(a). *See NAM*, 138 S. Ct. at

631 (emphasis added); *see also id.* (rejecting interpretation that "would encompass … actions taken under [other sections], even though such actions are nowhere listed in" the interpreted provision).

4. Prior Practice in NHTSA Cases Undermines, Rather than Supports, Defendant's Reading of "Carrying Out"

Finally, Defendants claim that their overbroad reading of "carrying out" "is consistent with prior practice," implying that it is somehow inconsistent for State Plaintiffs to have filed *this* case in district court when some of the Plaintiffs here have also filed petitions for review in the Second Circuit challenging *other* NHTSA actions. Mot. at 17. There is no inconsistency, and nothing about those Second Circuit cases undermines district court jurisdiction in this case.[9]

As Defendants acknowledge, both Second Circuit cases involve NHTSA actions that affect the civil penalties applicable to manufacturers that "fail[] to meet the applicable fuel economy standards." Mot. at 18. Defendants claim that original jurisdiction in the courts of appeals "was proper" because NHTSA's civil penalty actions "carry[] out" the fuel economy standards. *Id.* Notably, Defendants point to no arguments State Plaintiffs made to that effect and to no decision on that issue by the Second Circuit. Instead, Defendants erroneously claim that "Plaintiffs and the Second Circuit *implicitly recognized*" Defendants' overbroad reading of "carrying out" in Section 32909(a)(1). Mot. at 18 (emphasis added). In other words, the inconsistency Defendants attempt to manufacture here relies solely on what Defendants imagine the Second Circuit, and

[9] There is, likewise, nothing about the protective petitions filed in the D.C. Circuit that undermines this Court's jurisdiction. In the preamble to the Preemption Regulation, NHTSA stated that challenges should be filed in the D.C. Circuit. 84 Fed. Reg. at 51,361. It is hardly surprising, then, that parties filed protective petitions in that Court to "preserve their challenges," and doing so does not suggest agreement with NHTSA's position. *See NAM*, 138 S. Ct. at 627.

the petitioners there, "recognized." Defendants' speculation about the legal theories of other parties and other courts is hardly a basis for a jurisdictional ruling. It is also simply wrong.

Defendants fail to recognize that the jurisdictional basis in the Second Circuit cases has been the other subsection of EPCA's direct-review provision—Section 32909(a)(2)—not Section 32909(a)(1).[10] As noted above, Section 32909(a)(2) provides for direct appellate review of "a regulation prescribed under section 32912(c)(1)." 49 U.S.C. § 32909(a)(2). Section 32912(c)(1), in turn, is the only section in EPCA that authorizes NHTSA to adjust the civil penalties for violating the fuel economy standards. And NHTSA's adjustments to those same penalties have been, and are, at issue in the Second Circuit cases. Notably, in its most recent penalties adjustment rule, NHTSA explicitly relied on Section 32912(c)(1). *See* 84 Fed. Reg. 36,017, 36,019, 36,020 (July 26, 2019) (applying criteria and standards of Section 32912(c)(1) in determining whether and how to adjust penalty amount). Recognizing that NHTSA's authority to suspend or reverse increased civil penalties derives from Section 32912(c)(1), if it exists at all, Petitioners in those cases have challenged NHTSA's penalty adjustment actions in the court of appeals under Section 32909(a)(2). These challenges have no bearing on the interpretation of Section 32909(a)(1)—the subsection upon which Defendants rely here.

Defendants' claim that "prior practice" in NHTSA cases supports their expansive reading is further belied by *Delta Construction*, in which the D.C. Circuit construed the same provision at issue here, Section 32909(a)(1), and held that the appellate court lacked jurisdiction over NHTSA's denial of a petition for rulemaking concerning the fuel economy standards. 783 F.3d at 1298-1299. Defendants fail to acknowledge this case, let alone attempt to explain how the denial of a petition seeking a change to the fuel economy standards is less about "carrying out"

[10] *See* Pre-Argument Statement, *NRDC v. NHTSA*, No. 17-2806 (2d Cir. filed Sept. 22, 2017), ECF No. 21 (identifying Section 32909(a)(2) as basis for appellate jurisdiction).

those standards than a regulation purporting to interpret an express preemption provision found in an entirely separate section of the statute. Defendants likewise fail to address, let alone distinguish, *Public Citizen, Inc. v. NHTSA*, 489 F.3d 1279 (D.C. Cir. 2007), which rejected an overbroad reading of a similar judicial review provision—the one applicable to NHTSA's safety standards. *See also Delta Construction*, 738 F.3d at 1298-99 (describing *Public Citizen* as "controlling" interpretation of Section 32909(a)(1)). Indeed, Defendants never mention a whole host of cases in which district court review of NHTSA actions was plainly proper. *See, e.g.*, *Ctr. for Auto Safety v. Dole*, 828 F.2d 799, 802 (D.C. Cir. 1987), *on reh'g,* 846 F.2d 1532 (D.C. Cir. 1988); *Rex Chainbelt Inc. v. Volpe*, 342 F. Supp. 281, 282 (E.D. Wis. 1972), *rev'd on non-jurisdictional grounds,* 486 F.2d 757 (7th Cir. 1973). Past practices in challenges to NHTSA actions do not support Defendants here.[11]

The only permissible construction of Section 32909(a)(1) is the one Congress intended and the one the D.C. Circuit adopted in *Delta Construction*. This Court has jurisdiction unless the Preemption Regulation was prescribed under Sections 32901, 32902, or 32903—the enumerated sections upon which Defendants rely. As discussed below, it was not, and Defendants' motion should be denied.

B. The Preemption Regulation Was Not Prescribed Under Sections 32901 through 32903

As explained above, Section 32909(a)(1) provides direct appellate review only for regulations prescribed under its five enumerated sections: Sections 32901, 32902, 32903, 32904, and 32908. *See* 49 U.S.C. § 32909(a)(1). As Defendants apparently concede, a regulation

[11] "Past practices" in preemption challenges also do not suggest that this case must be heard exclusively in the courts of appeals. Preemption claims are, of course, routinely decided by district courts. Indeed, some of the movant-intervenors in this case have previously and unsuccessfully claimed, in district court, that California's GHG standards are preempted by EPCA. *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007).

prescribed "under" a particular statutory section is a regulation prescribed "'pursuant to' or 'by reason of the authority of'" that section. *NAM*, 138 S. Ct. at 630 (quoting *St. Louis Fuel & Supply Co., Inc. v. FERC*, 890 F.2d 446, 450 (D.C. Cir. 1989)); *see also* Mot. at 17. Put another way, where a statutory section's text does not "direct or authorize" the relevant agency action, it is not an action taken "pursuant to" or "by reason of the authority of" that section. *NAM*, 138 S. Ct. at 630. Thus, EPA's "Waters of the United States" rule—which interpreted and defined the statutory phrase for which it was named—was not a "limitation promulgated or approved under section 1311" of the Clean Water Act because section 1311 contains no text "authoriz[ing] EPA to *define* a statutory phrase appearing elsewhere in the Act." *Id.*

Similarly, here, the Preemption Regulation was not promulgated pursuant to any of the provisions enumerated in Section 32909(a)(1). As noted above, EPCA's preemption provision, Section 32919, is not among the five enumerated provisions. This, alone, suggests direct review is unavailable here. *See Loan Syndications*, 818 F.3d at 718 (direct review inapplicable where "Congress knew how to add sections to [the direct review] list, but chose not to do so"). Of course, Defendants do not argue that the Preemption Regulation was prescribed pursuant to EPCA's preemption section because doing so would foreclose their jurisdictional arguments. Instead, Defendants attempt to shoehorn the Preemption Regulation into the direct-review provision by arguing it was "promulgated pursuant to and by reason of the authority of Sections 32901-903." Mot. at 17. This attempt fails because the three sections Defendants invoke—Sections 32901 through 32903— "nowhere … direct or authorize" NHTSA to promulgate preemption regulations or to interpret provisions, like Section 32919, that "appear[] elsewhere in the Act." *See NAM*, 138 S. Ct. at 630.

Rather, the plain text of Sections 32901 through 32903 provides authority for NHTSA to promulgate particular categories of regulations that do not include the regulation at issue here. Specifically, Section 32901 authorizes NHTSA to promulgate regulations that expand upon, or otherwise alter, the definitions Congress established for certain terms or phrases. *E.g.*, 49 U.S.C. § 32901(a)(1)(K) (authorizing addition of other fuels to Congress' definition of "alternative fuels"); *id.* § 32901(a)(14), (15), (18) (authorizing refinement of definitions for "manufacturer," "model," and "passenger automobile," respectively). Section 32902, in turn, authorizes NHTSA to "prescribe by regulation average fuel economy standards for automobiles manufactured by a manufacturer in [a] model year." *Id.* § 32902(a); *see also id.* § 32902(b)(2)(A). And Section 32903 authorizes NHTSA to "establish, by regulation, … fuel economy credit trading program[s]" to facilitate compliance with the average fuel economy standards promulgated under Section 32902. *Id.* §§ 32903(f)(1), (g)(1). These sections do not mention preemption, do not authorize the interpretation of EPCA's preemption provision, and do not empower NHTSA to promulgate preemption regulations. Defendants themselves point to nothing in the statutory text of sections 32901, 32902, 32903 that could even arguably be read as "direct[ing] or authoriz[ing]" the Preemption Regulation. In other words, "[r]ather than confront [the] statutory text, the Government asks [this Court] to ignore it altogether." *See NAM*, 138 S. Ct. at 631. As in *NAM*, the absence of any textual basis for Defendants' arguments disposes of them. *See id.*

In fact, the absence of any reference to preemption in Sections 32901 through 32903 is not the only way that the text of those sections undermines Defendants' position. Significantly, where these sections authorize NHTSA to interpret statutory text, they do so explicitly and narrowly. For example, in Section 32901, Congress authorized NHTSA to refine some, *but not all*, of the definitions Congress established in that same section. *Compare* 49 U.S.C. §

32901(a)(18) (authorizing definition of "passenger automobile," within limits), *with id.* § 32901(a)(8) (establishing fixed definition of "dedicated automobile"). These limited grants of interpretative authority underscore that these sections do not authorize NHTSA to interpret text found elsewhere in EPCA, such as the preemption provision in Section 32919. There is simply "no textual basis" for Defendants' position that the Preemption Regulation was prescribed under Sections 32901 through 32903. *See NAM*, 138 S. Ct. at 630.

Finally, NHTSA's "passing invocation of" sections 32901 through 32903 "does not control [this Court's] interpretive inquiry." *See NAM*, 138 S. Ct. at 630 n.8.[12] It also does not confer jurisdiction on the courts of appeals. *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("[N]o action of the parties can confer subject-matter jurisdiction upon a federal court."). As the Supreme Court recently reaffirmed, agencies are not empowered to transform one type of regulation into a totally different type by "mere designation." *NAM*, 138 S. Ct. at 630 n.8 (quoting *Adamo Wrecking Co. v. United States,* 434 U.S. 275, 283 (1978)). NHTSA cannot transform the Preemption Regulation into one of the definitions authorized under Section 32901, the fuel economy standards authorized under Section 32902, or the credit trading regulations authorized under Section 32903, with no textual support and simply by purporting to declare it so.

The Preemption Regulation "falls outside the ambit of" EPCA's judicial review provision, "and any challenges to [it] must be filed in federal district courts." *See id.* at 623. Defendants' motion to dismiss should be denied.

[12] It is particularly apt to describe NHTSA's invocation of these sections as "passing" in the context of considering whether Section 32909(a)(1) applies, given that NHTSA failed to reference Section 32909 or its 59-day statute of limitations in the "Judicial Review" section of the Final Actions. *See* 84 Fed. Reg. at 51,361.

II. DEFENDANTS' OTHER ARGUMENTS ALSO FAIL

"In the absence of any statute that colorably provides jurisdiction for direct review," *see Loan Syndications*, 818 F.3d at 723, Defendants resort to "a litany of extratextual considerations that [they] believe[] support direct circuit-court review," *see NAM*, 138 S. Ct. at 632. *See also* Mot. at 19-23. "Those considerations—alone and in combination—provide no basis to depart from the statute's plain language." *NAM*, 138 S. Ct. at 632. "Ultimately, whether initial subject-matter jurisdiction lies in the courts of appeals must of course be governed by the intent of Congress and not by any views [the courts] may have about sound policy." *Loan Syndications*, 818 F.3d at 720. Here, Congress expressly conveyed its clear intent that only *certain* regulations should go first to the courts of appeals, and the Preemption Regulation is not among them.

Defendants begin their extratextual campaign by arguing that claims that an agency lacks authority are "not a sufficient basis to evade an otherwise applicable jurisdictional provision." Mot. at 19. Whatever the merits of that contention, it presumes that the Preemption Regulation fits within Section 32909(a)(1)'s enumerated actions, rather than providing any support—textual or otherwise—for that position. The question before the Court on this motion is not whether NHTSA's Preemption Regulation is *ultra vires* but whether it fits within the limited categories of actions enumerated for direct review in 49 U.S.C. § 32909(a)(1). As discussed above, it does not. And this Court has jurisdiction to decide whether it has jurisdiction and to interpret Section 32909(a)(1) in doing so. *See United States v. Ruiz*, 536 U.S. 622, 628 (2002) ("[I]t is familiar law that a federal court always has jurisdiction to determine its own jurisdiction."); *see also* Fed. R. Civ. Pro. 12(b)(1) (providing district court motions as a means of resolving subject matter jurisdiction). Indeed, district courts regularly and properly engage in this very exercise—the interpretation of judicial review provisions to determine their own jurisdiction. *E.g.*, *Levy v. SEC*, 462 F. Supp. 2d 64, 68–69 (D.D.C. 2006); *see also NAM*, 138 S. Ct. at 617 (noting, without

concern, that multiple district courts had determined whether or not they had jurisdiction to review the Waters of the United States rule).

Defendants also argue that this case involves "relief that would affect [the Circuit Court's] future statutory jurisdiction." Mot. at 20. Here, Defendants attempt to analogize to *Telecommunications Research & Action Center v. FCC* (*TRAC*), 750 F.2d 70 (D.C. Cir. 1984). But the judicial review provision at issue in *TRAC* unambiguously directed "'*all* final orders of the Federal Communications Commission'" to the courts of appeals. *Id.* at 75 n.5 (quoting 28 U.S.C. § 2342(1) (1982)) (emphasis added). To preserve that jurisdiction, the Court decided it also had jurisdiction over a *delay* in issuing such a final order. *Id.* at 77. In contrast, EPCA's judicial review does not provide for direct review of *all* regulations, and this is not a challenge to a precursor action (like a delay). *TRAC* has no bearing on this case. *See Moms Against Mercury v. FDA*, 483 F.3d 824, 827 (D.C. Cir. 2007) (recognizing *TRAC* as a "limited exception" applicable only to its facts); *Cutler v. Hayes*, 818 F.2d 879, 888 (D.C. Cir. 1987) (describing "statutory provisions enabling us to review *any* final FCC order" as "[e]ssential to our holding [in *TRAC*]") (emphasis added). And the default rule that district courts normally review agency actions, in the first instance, "obviously does not thwart appellate jurisdiction." *See Pub. Citizen*, 489 F.3d at 1288.

Finally, echoing a suggestion in the preamble to the final rule, *see* 84 Fed Reg at 51,361, Defendants argue that this case belongs in the courts of appeals because the challenge to EPA's waiver withdrawal will be heard there and, in Defendants' view, the interests of judicial economy would be served by joint adjudication. Mot. at 21-23. But "the Government's policy arguments do not obscure what the statutory language makes clear"—that the Preemption Regulation is not among the categories of regulations Congress directed to the courts of appeals

in the first instance. *See NAM*, 138 S. Ct. at 634.[13] "Discretionary considerations of 'fairness or efficiency' do not authorize [courts] … to disregard plain statutory terms assigning a different court initial subject-matter jurisdiction over a suit." *Pub. Citizen*, 489 F.3d at 1288. Indeed, "[h]ad Congress wanted to prioritize [judicial economy], it could have authorized direct circuit-court review of all nationally applicable regulations, as it did under the Clean Air Act." *NAM*, 138 S Ct. at 633 (citing 42 U.S.C. § 7607(b)(1)); *see also Am. Petroleum Inst.*, 714 F.3d at 1335.

In addition, Defendants likely exaggerate the inefficiency of adjudicating this case in the district court in the first instance. *See* Mot. at 21 (referring to this as "glaringly inefficient"). "[U]nder the Administrative Procedure Act, many challenges to agency regulations are heard first in the district court and then reviewed de novo by [the court of appeals]." *Am. Petroleum Inst.*, 714 F.3d at 1337. And, of course, original jurisdiction in the court of appeals is not the only way to address concerns about judicial efficiency. For example, under the circumstances here, the D.C. Circuit might hold the challenge to EPA's waiver withdrawal in abeyance, until this Court reaches a decision in this case (presumably on summary judgment motions). The D.C. Circuit could then consolidate the appeal in this case with the waiver withdrawal challenge and, thus, consider all the issues together as Defendants suggest.

Defendants' extratextual arguments cannot overcome Congress' clear intent that regulations—like the Preemption Regulation—that are not prescribed under one of the sections enumerated in Section 32909(a)(1) are subject to district court review in the first instance.

[13] As in *NAM*, the fact that Congress has spoken clearly—including certain actions and excluding others—renders Defendants' "reliance on *Florida Power* … misplaced." *See NAM*, 138 S. Ct. at 634; *see also* Mot. at 22-23 (relying on *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 745 (1985)). "In other words, unlike in *Lorion,* where the indicators of congressional intent favored initial appellate review, all indicators here" point unambiguously to district court review. *See Am. Petroleum Inst.*, 714 F.3d at 1336.

CONCLUSION

For the foregoing reasons, State Plaintiffs respectfully request that this Court deny Defendants' motion to dismiss.

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2019, I electronically filed a notice of service pursuant to the Court's General Order and Guidelines Applicable to APA Cases, with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system. The participants in the case are registered CM/ECF users and service of that notice will be accomplished by the CM/ECF system.

I further certify that on November 14, 2019, I served a copy of the foregoing memorandum of points and authorities in opposition to Plaintiffs' motion to dismiss, and a proposed order, on lead counsel for Defendants via e-mail.

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