IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF CALIFORNIA, et al., *Plaintiffs,* and CALPINE CORPORATION, et al., *Proposed Intervenor Plaintiffs,* v. ELAINE L. CHAO, et al. *Defendants.*	Civil Action No. 1:19-cv-02826-KBJ
ENVIRONMENTAL DEFENSE FUND, et al., *Plaintiffs,* and CALPINE CORPORATION, et al., *Proposed Intervenor Plaintiffs,* v. ELAINE L. CHAO, et al., *Defendants.*	Civil Action No. 1:19-cv-02907-KBJ
SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, et al., *Plaintiffs,* and CALPINE CORPORATION, et al., *Proposed Intervenor Plaintiffs,* v. ELAINE L. CHAO, et al., *Defendants.*	Civil Action No. 1:19-cv-03436-KBJ

MOTION OF CALPINE CORPORATION, CONSOLIDATED EDISON, INC., NATIONAL GRID USA, NEW YORK POWER AUTHORITY, AND POWER COMPANIES CLIMATE COALITION TO INTERVENE AS PLAINTIFFS

Pursuant to Federal Rule of Civil Procedure 24, Calpine Corporation, Consolidated Edison, Inc., National Grid USA, New York Power Authority, and Power Companies Climate Coalition (collectively, the "Power Companies") respectfully move to intervene as Plaintiffs in the above-captioned related cases. This motion is supported by an accompanying memorandum of points and authorities, as well as a proposed complaint, as required under Local Rule 7(j).

Counsel for proposed Intervenor Power Companies has conferred with counsel for the other parties in these cases pursuant to Local Rule 7(m). Plaintiffs in *California, et al., v. Chao, et al*., Case No. 1:19-cv-02826-KBJ, take no position on this motion. Plaintiffs in *Environmental Defense Fund, et al., v. Chao, et al.*, Case No. 1:19-cv-02907-KBJ, consent to this motion. Plaintiffs in *South Coast Air Quality Management District, et al., v. Chao, et al.*, Case No. 1:19-cv-03436-KBJ, do not oppose this motion. Proposed Intervenor-Plaintiff National Coalition for Advanced Transportation consents to this motion. Counsel for Defendants in these three related cases reserve their right to take a position until they have had an opportunity to review this motion. Movant Intervenor-Defendants Coalition for Sustainable Automotive Regulation and the Association of Global Automakers, Inc. take no position on the motion at this time.

Dated: December 4, 2019

Respectfully submitted,

/s/ Kevin Poloncarz
KEVIN POLONCARZ
D.D.C. Bar No. CA00049
Donald L. Ristow
Jake Levine
COVINGTON & BURLING LLP
Salesforce Tower
415 Mission Street, 54th Floor
San Francisco, CA 94105-2533
(415) 591-7070
kpoloncarz@cov.com

Counsel for Calpine Corporation, Consolidated Edison, Inc., National Grid USA, New York Power Authority, and Power Companies Climate Coalition

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December, 2019, I electronically filed the foregoing Motion of Calpine Corporation, Consolidated Edison, Inc., National Grid USA, New York Power Authority, and Power Companies Climate Coalition to Intervene as Plaintiffs, along with the accompanying Memorandum of Points and Authorities in Support of Motion to Intervene, Proposed Complaint and Exhibit, Disclosure of Corporate Affiliations and Financial Interests, and Proposed Order with the Clerk of the Court using the CM/ECF System, which caused all participants to be served electronically.

/s/ Kevin Poloncarz
KEVIN POLONCARZ
D.D.C. Bar No. CA00049
COVINGTON & BURLING LLP
Salesforce Tower
415 Mission Street, 54th Floor
San Francisco, CA 94105-2533
(415) 591-7070
kpoloncarz@cov.com

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF CALIFORNIA, et al., *Plaintiffs*, and CALPINE CORPORATION, et al., *Proposed Intervenor Plaintiffs*, v. ELAINE L. CHAO, et al., *Defendants.*	Civil Action No. 1:19-cv-02826-KBJ
ENVIRONMENTAL DEFENSE FUND, et al., *Plaintiffs*, and CALPINE CORPORATION, et al., *Proposed Intervenor Plaintiffs*, v. ELAINE L. CHAO, et al., *Defendants.*	Civil Action No. 1:19-cv-02907-KBJ
SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, et al., *Plaintiffs*, and CALPINE CORPORATION, et al.., *Proposed Intervenor Plaintiffs*, v. ELAINE L. CHAO, et al., *Defendants.*	Civil Action No. 1:19-cv-03436-KBJ

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO INTERVENE AS PLAINTIFFS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, REGULATIONS AND OTHER AUTHORITIES

*Authorities chiefly relied upon are marked with an asterisk.

INTRODUCTION

Proposed Intervenor Plaintiffs Calpine Corporation ("Calpine"), Consolidated Edison, Inc. ("Con Edison"), National Grid USA ("National Grid"), New York Power Authority ("NYPA"), and Power Companies Climate Coalition[1] (collectively, the "Power Companies") are a coalition of major investor-owned utilities, the nation's largest state power authority, the nation's largest and tenth largest municipal utilities and a major independent power producer, all committed to generating clean electricity and supporting the widespread adoption of electric vehicles to combat climate change. They have made and are making significant investments to build infrastructure and position their generating resources to support increased consumer adoption of electric vehicles.

The Power Companies are making these investments on the basis of greenhouse gas ("GHG") and zero emission vehicle ("ZEV") standards promulgated by the State of California pursuant to its unique Clean Air Act ("CAA") authority to regulate motor vehicle emissions and by the many other states that have adopted identical standards pursuant to corresponding CAA authority (known as the "Section 177 States"). These federally-approved GHG and ZEV standards directly incentivize investments in widespread vehicle electrification. To date, California's and the Section 177 States' ability to continue enforcing their GHG and ZEV standards—regardless of changes in political leadership at the federal level—has provided the long-term certainty needed for the Power Companies to incorporate electrification of the transportation sector as a critical

[1] Power Companies Climate Coalition is an unincorporated association whose members include the Los Angeles Department of Water and Power ("LADWP"), Seattle City Light, NYPA, Con Edison, National Grid and each of Con Edison's and National Grid's regulated utility subsidiaries. Other members of Power Companies Climate Coalition, including Exelon Corporation and its subsidiaries, Pacific Gas and Electric Company, and Sacramento Municipal Utility District, intend to participate in these related cases through their membership in proposed intervenor plaintiff the National Coalition for Advanced Transportation (Mot. of Nat. Coalition for Advanced Transportation to Intervene as a Plaintiff, Case No. 1:19-cv-02826-KBJ, Doc. 39; Mot. of Nat. Coalition for Advanced Transportation to Intervene as a Plaintiff, Case No. 1:19-cv-02907-KBJ, Doc. 26). Other Power Companies Climate Coalition members, Public Service Enterprise Group Incorporated and its subsidiaries, are not participating in this litigation.

component of their business models and investment strategies. The Power Companies are moving to intervene in the above-captioned cases to ensure this regulatory framework remains intact and that their interests and investments are protected.

At issue in these three related cases is the preemptive scope of one long-extant clause in the 1975 Energy Policy and Conservation Act ("EPCA"), which heretofore has posed no obstacle to California's independent regulation of motor vehicle emissions in tandem with harmonized federal fuel economy standards. In September 2019, the U.S. Department of Transportation's National Highway Traffic Safety Administration ("NHTSA") issued a final rule that abruptly reinterpreted the scope of this clause to prevent California and the Section 177 States from enforcing their existing GHG and ZEV standards or enacting new standards. *See* "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program," 84 Fed. Reg. 51,310, 51,324 (Sept. 27, 2019) (the "Preemption Rule") (declaring existing standards "void *ab initio*"). This prohibition applies even if the U.S. Environmental Protection Agency ("EPA") has previously granted a waiver of preemption for the state to implement such standards pursuant to Section 209 of the CAA, or approved a State Implementation Plan that incorporates the standards as a means of achieving the National Ambient Air Quality Standards ("NAAQS").

The Power Companies believe that the Preemption Rule is without legal merit and should be set aside as unlawful, as it conflicts with the CAA and usurps the statutory power of the EPA to issue waivers that allow California to adopt more stringent vehicle emissions standards and other states to then adopt identical standards. If the Preemption Rule is upheld against judicial challenge as an accurate interpretation of the preemptive scope of EPCA, it will void the regulatory framework that supports the Power Companies' vehicle electrification efforts and preclude states from promulgating new standards requiring the deployment of electric vehicles.

For these reasons and as described below, the Power Companies have significant interests that will be impaired if the Preemption Rule is not set aside and declared unlawful, and those interests may not be adequately represented by the existing parties to the cases. The Court should grant this motion to intervene.

ARGUMENT

I. THE POWER COMPANIES ARE ENTITLED TO INTERVENE AS OF RIGHT

Under Federal Rule of Civil Procedure 24(a)(2), a movant is entitled to intervene as of right if: (1) the motion is timely; (2) the movant "claims an interest relating to the property or transaction that is the subject of the action"; (3) "disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest"; and (4) the movant's interest is not adequately represented by other parties. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). In this Circuit, "in addition to establishing its qualification for intervention under Rule 24(a)(2), a party seeking to intervene as of right must demonstrate that it has standing under Article III of the Constitution." *Id.* at 731–32. The Power Companies satisfy all of these requirements.

A. The Power Companies Have Standing to Intervene

The Power Companies have standing to intervene in these cases because their interests will be significantly and directly impaired by the Preemption Rule and would be redressed by a favorable decision of this Court. To establish standing under Article III, a party must demonstrate (1) a concrete and particularized injury in fact that is actual or imminent, (2) that the injury is fairly traceable to the challenged action, and (3) that the injury would likely be redressed if the Court granted the requested relief. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). An association has standing to intervene on behalf of its members if at least one member would have standing to sue in its own right, the interests the association seeks to protect "are germane to the

organization's purpose", and "neither the claim asserted nor the relief requested requires the participation of individual members." *Nat. Res. Def. Council v. EPA*, 755 F.3d 1010, 1016 (D.C. Cir. 2014) (quoting *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1323 (D.C. Cir. 2013)); *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002).

By preventing states from regulating carbon dioxide emissions from automobiles and voiding existing state regulations already in place, the Preemption Rule would cause substantial economic and environmental harm to the Power Companies and the millions of customers they serve. The Power Companies have made and are making significant investments to build the infrastructure needed to support increased consumer adoption of electric vehicles in accordance with the GHG and ZEV emissions standards adopted by California and the Section 177 States. The Power Companies have also made significant investments to position their generating resources to supply low- and zero-carbon power to the increasingly electrified vehicle fleet. They are also working to establish rate structures and programs to maximize the benefits and minimize the costs associated with integrating electric vehicle load to the grid.

For example, Con Edison is working to install charging ports across New York City, offers time-of-use rates to maximize savings and benefits for electric vehicle owners and, through its SmartCharge New York program, offers electric vehicle owners further incentives to charge at off-peak hours. National Grid has worked to install significant charging infrastructure throughout Massachusetts, Rhode Island, and New York, offers a voluntary time-of-use rate to incentivize off-peak charging and, through its electric vehicle pilot program in Massachusetts, is installing more charging ports and is working to boost adoption rates. NYPA, through its EVolve NY program, will invest up to $250,000,000 through 2025 to build on its existing investments in electric vehicle infrastructure, service, and consumer awareness. LADWP offers rebates for the purchase of

certain used electric vehicles and installation of electric vehicle chargers through its Charge Up LA! program, provides electric vehicle discount charging rates through its time-of-use meter service option, and is working to install charging infrastructure throughout the City of Los Angeles to support the growth of electric transportation. Likewise, Seattle City Light, through its Drive Clean Seattle program, is pursuing significant investments in charging infrastructure and innovative rate structures to effectuate its Transportation Electrification Strategy.

The Power Companies are making these investments and taking these actions to realize the significant economic and environmental benefits that integration of vehicles to the electricity grid can provide to vehicle owners, electric power companies, utilities and customers. For example, charging electric vehicles can help shift load to hours when the grid is underutilized and the cost of electricity is low, bringing down total system costs, and can also support the integration of renewable energy resources, which is a goal of the states and jurisdictions served by many of the Power Companies. Additionally, the widespread deployment of electric vehicles fueled by increasingly clean sources of electricity significantly reduces emissions of smog- and soot-forming pollutants, and can help attain and maintain the NAAQS in jurisdictions served by the Power Companies.

The GHG and ZEV standards adopted by California and the Section 177 States provide the regulatory certainty needed for the electricity sector to continue making investments to support vehicle electrification. By preempting and voiding these standards, the Preemption Rule prevents California, the Section 177 States, and other states that might seek to adopt identical standards from mandating that automakers deploy electric vehicles in the numbers and on the schedule needed to realize the full benefits of the Power Companies' investments and commitments, which, due to long planning horizons within the power sector, often must be made years in advance. In

addition, California and many Section 177 States are relying upon the reductions in both GHG and criteria pollutant emissions resulting from the rapid deployment of electric vehicles to achieve state climate goals and the NAAQS for ozone and fine particulate matter. If those reductions do not occur, then some of the Power Companies' existing generation resources will face additional pressure to reduce emissions more rapidly or at greater cost to customers than could be achieved through the widespread deployment of electric vehicles.

These injuries are directly traceable to the Preemption Rule and would be redressed by the relief requested in the Proposed Complaint below, namely, that the Court set aside the Preemption Rule and declare that its conclusions regarding preemption are not supported by EPCA or the CAA. As a result, the Power Companies have standing to challenge the Preemption Rule, including proposed Intervenor Plaintiffs Calpine, Con Edison, National Grid, and NYPA. Likewise, proposed Intervenor Plaintiff Power Companies Climate Coalition has standing in this case because it is an association with standing to sue on behalf of its members, which include LADWP and Seattle City Light (respectively, the largest and tenth largest municipal utilities in the U.S.), NYPA (the largest state power authority), and Con Edison and National Grid and each of their respective regulated utilities.[2] The Power Companies' substantial investments in electric vehicle infrastructure are premised upon the state laws that the Preemption Rule purports to void. In the case of proposed Intervenor Plaintiff Power Companies Climate Coalition, these interests are germane to its purpose of advocating for responsible solutions to address climate change and reduce GHG emissions. The Power Companies, therefore, separately and collectively have standing to challenge the Preemption Rule in this Court.

[2] For a description of the members of Power Companies Climate Coalition, see *supra* note 1.

B. The Power Companies Satisfy Rule 24(a) Requirements

1. The Motion to Intervene is Timely

A motion to intervene under Rule 24(a) must be timely. Whether such a motion is timely must be determined from all the relevant circumstances. *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 907 (D.C. Cir. 1977). This requires courts to examine and weigh a variety of factors, including the amount of time that has elapsed since the litigation began, the purpose for which intervention is sought, the need for intervention as a means for preserving the applicant's rights, and the probability of prejudice to the parties already in the case. *Hodgson v. United Mine Workers of America*, 473 F.2d 118, 129 (D.C. Cir. 1972); *see also Navistar, Inc. v. Jackson*, 840 F. Supp. 2d 357, 361 (D.D.C. 2012) (motion to intervene timely filed nearly two and a half months after complaint).

The Power Companies' motion is timely, as it comes just over ten weeks after the first filed complaint in these related cases and less than three weeks after the most recently filed complaint, *South Coast Air Quality Management District, et al. v. Chao, et al.*, Case No. 1:19-cv-03436-KBJ (filed Nov. 14, 2019). Moreover, the Power Companies' intervention comes before any responsive pleadings on the merits have been filed and would result in no prejudice to any of the existing parties. Further, while Defendants in the State and NGO cases have served motions to dismiss on jurisdictional grounds, this intervention comes after the November 27, 2019 deadline for service of replies, and the Power Companies do not intend to seek leave to file separate responses to Defendants' motions or otherwise take a position with respect to the underlying jurisdictional issues addressed in that briefing. As a result, the Power Companies' proposed intervention would not unduly disadvantage the existing parties. This motion is timely.

2. The Power Companies Have Legally Protected Interests in the Subject Matter of These Cases

For the same reasons that the Power Companies have Article III standing as demonstrated above, they have legally protected interests in the subject matter of these cases sufficient to meet Rule 24(a) requirements. *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1076 (D.C. Cir. 1998) (party "need not show anything more than that it has standing to sue in order to demonstrate the existence of a legally protected interest for purposes of Rule 24(a)."). By purporting to void the existing state GHG and ZEV standards and precluding the adoption of any similar standards, the Preemption Rule would bar states from mandating that electric vehicles be deployed in the numbers and on the schedule needed to realize the full benefits of the Power Companies' investments in electric vehicle infrastructure and generating resources to supply low- and zero-carbon power to such vehicles. The Power Companies therefore possess substantial interest in these cases that warrants intervention to protect.

3. The Power Companies' Interests May be Impaired by these Cases

As outlined above, the Preemption Rule threatens to significantly and directly impair the interests of the Power Companies if not set aside and declared unlawful by this Court. NHTSA has asserted that its Preemption Rule would bar states from regulating carbon dioxide emissions from new cars and trucks, including the promulgation and enforcement of ZEV sale requirements, and would render existing GHG and ZEV standards currently in place "void *ab initio*."[3] The authority of California and the Section 177 States to continue implementing strong state standards to reduce GHG emissions from new cars and trucks is a core regulatory driver supporting the Power Companies' substantial investments in clean vehicle infrastructure. By voiding those

[3] 84 Fed. Reg. at 51,324.

existing standards and barring the states from adopting any more stringent standards, a decision affirming the legality of the Preemption Rule in these cases would impair the Power Companies' legally protected interest in ensuring those standards remain in place. As a consequence, the Power Companies' interests may be impaired as a result of these cases within the meaning of Rule 24(a).

4. The Power Companies' Interests Are Not Adequately Represented by the Existing Parties

None of the existing parties to these cases can be expected to adequately represent the unique investment-backed interests of the Power Companies, which are predicated on the very state standards that NHTSA's Preemption Rule targets. The Power Companies' burden under this element is "not onerous" as they "need only show that representation of [their] interest 'may be' inadequate, not that representation will in fact be inadequate." *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). The Power Companies' interests in protecting their significant infrastructure investments and financial stake as suppliers of power to an increasingly electrified vehicle fleet are distinct from the interests of existing parties. This Circuit has long "recogniz[ed] the inadequacy of governmental representation of the interests of private parties in certain circumstances." *Id.* Existing Plaintiffs consist of state and local governments, local air districts, and non-governmental environmental organizations, all of which will bring to bear a different perspective and seek to protect different interests than those of the Power Companies. This is sufficient to establish that representation may not be adequate for the purposes of Rule 24(a).

II. ALTERNATIVELY, THE POWER COMPANIES REQUEST THIS COURT GRANT PERMISSIVE INTERVENTION

Though the Power Companies are entitled to intervention as of right under Rule 24(a), they also qualify for permissive intervention under Rule 24(b). This Court has discretion to allow the Power Companies to intervene under Rule 24(b) because they will raise claims with questions of law and fact that are common to the main action, and because intervention would not unduly delay

or prejudice the adjudication of the existing parties' rights. More specifically, as set forth in the attached Proposed Complaint, the Power Companies intend to raise many of the same claims as existing Plaintiffs in these cases, and their intervention comes on a timely basis before any merits pleading or briefing has commenced. The Power Companies further intend not to duplicate arguments made by the existing Plaintiffs, but to bring to the attention of the Court only those arguments, interests, and perspectives that are not adequately represented by the existing Plaintiffs. Additionally, the Power Companies will join with any other similarly situated parties to brief these cases to the extent practical and required by the Court. The Power Companies therefore request, in the alternative to intervention under Rule 24(a), that this Court exercise its discretion to allow them to permissively intervene under Rule 24(b).

CONCLUSION

For the foregoing reasons, the Power Companies meet all of the requirements to intervene as of right under Rule 24(a), and, alternatively, should be granted permissive intervention under Rule 24(b).

Dated: December 4, 2019

Respectfully submitted,

/s/ Kevin Poloncarz
KEVIN POLONCARZ
D.D.C. Bar No. CA00049
Donald L. Ristow
Jake Levine
COVINGTON & BURLING LLP
Salesforce Tower
415 Mission Street, 54th Floor
San Francisco, CA 94105-2533
(415) 591-7070
kpoloncarz@cov.com

Counsel for Calpine Corporation, Consolidated Edison, Inc., National Grid USA, New York Power Authority, and Power Companies Climate Coalition

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF CALIFORNIA
1300 I Street
Sacramento, CA 95814-2919

STATE OF COLORADO
1300 Broadway, 10th Floor
Denver, CO 80203

STATE OF CONNECTICUT
55 Elm Street
Hartford, CT 06141-0120

STATE OF DELAWARE
820 N. French Street, 6th Floor
Wilmington, DE 19801

STATE OF HAWAII
425 Queen Street
Honolulu, HI 96813

STATE OF ILLINOIS
69 West Washington St., 18th Floor
Chicago, IL 60602

STATE OF MAINE
6 State House Station
Augusta, ME 04333

STATE OF MARYLAND
1800 Washington Blvd.
Baltimore, MD 21230

STATE OF MINNESOTA
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127

STATE OF NEVADA
100 N. Carson Street
Carson City, NV 89701

STATE OF NEW JERSEY
25 Market Street
Trenton, NJ 08625

Civil Action No. 1:19-cv-02826-KBJ

STATE OF NEW MEXICO
408 Galisteo Street
Santa Fe, NM 87501

STATE OF NEW YORK
28 Liberty Street, 19th Floor
New York, NY 10005

STATE OF NORTH CAROLINA
P.O. Box 629
Raleigh, NC 27602

STATE OF OREGON
1162 Court Street NE
Salem, OR 97301-4096

STATE OF RHODE ISLAND
150 South Main Street
Providence, RI 02903

STATE OF VERMONT
109 State Street
Montpelier, VT 05609

STATE OF WASHINGTON
1125 Washington Street SE
Olympia, WA 98504

STATE OF WISCONSIN
State Capitol, Room 114 East
Madison, WI 53702

COMMONWEALTH OF MASSACHUSETTS
One Ashburton Place, 18th Floor
Boston, MA 02108

COMMONWEALTH OF PENNSYLVANIA
1600 Arch Street, Suite 300
Philadelphia, PA 19103

COMMONWEALTH OF VIRGINIA
202 North 9th Street
Richmond, VA 23219

PEOPLE OF THE STATE OF MICHIGAN
525 W. Ottawa St.
Lansing, MI 48909

DISTRICT OF COLUMBIA
441 Fourth Street NW
Suite 650 North
Washington, D.C. 20001

CITY OF LOS ANGELES
200 N. Spring Street, 14th Floor
Los Angeles, CA 90012

CITY OF NEW YORK,
100 Church Street
New York, NY 10007

CITY AND COUNTY OF SAN FRANCISCO,
1 Dr. Carlton B. Goodlett Pl., Room 234
San Francisco, CA 94102

Plaintiffs,

and

CALPINE CORPORATION
717 Texas, Suite 1000
Houston, TX 77002

CONSOLIDATED EDISON, INC.
4 Irving Place
New York, New York 10003

NATIONAL GRID USA
40 Sylvan Rd
Waltham, MA 02451

NEW YORK POWER AUTHORITY
123 Main Street
White Plains, NY 10601

POWER COMPANIES CLIMATE COALITION
415 Mission Street, 54th Floor
San Francisco, CA 94105-2533

Proposed Intervenor Plaintiffs,

v.

ELAINE L. CHAO, in her official capacity as Secretary, United States Department of Transportation
1200 New Jersey Avenue SE
Washington, DC 20590

JAMES C. OWENS, in his official capacity as Acting Administrator, National Highway Traffic Safety Administration
1200 New Jersey Avenue SE
Washington, DC 20590

UNITED STATES DEPARTMENT OF TRANSPORTATION
1200 New Jersey Avenue SE
Washington, DC 20590

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION
1200 New Jersey Avenue SE
Washington, DC 20590

UNITED STATES OF AMERICA
c/o United States Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Defendants.

[PROPOSED] COMPLAINT

Intervenor Plaintiffs Calpine Corporation, Consolidated Edison, Inc., National Grid USA, New York Power Authority, and Power Companies Climate Coalition (together, "Plaintiffs") allege as follows:

INTRODUCTION

1. Plaintiffs are a coalition of major investor-owned utilities, the nation's largest state power authority, the largest and tenth largest municipal utilities, and a major independent power producer, all committed to generating clean electricity and supporting the widespread adoption of electric vehicles to combat climate change. They bring this action for declaratory and injunctive relief against final regulations of the Department of Transportation's National Highway Traffic Safety Administration ("NHTSA"), which assert preemption of state and local vehicle greenhouse gas ("GHG") and zero emission vehicle ("ZEV") emission standards under the Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871 ("EPCA"). These regulations are now codified at 49 C.F.R. part 531 and 533 and appendices to those parts (collectively, the "Preemption Rule"). *See* "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program," 84 Fed. Reg. 51,310 (Sept. 27, 2019) (attached as "Exhibit A" to the First Amended and Supplemented Complaint for Declaratory and Injunctive Relief filed in *California v. Chao*, No. 1:19-cv-02826-KBJ (D.D.C. Oct. 15, 2019), which is attached as Exhibit 1 to this Complaint and adopted and incorporated by reference where stated below).

2. NHTSA's Preemption Rule represents an abrupt reinterpretation of language in EPCA, the meaning of which has long been settled by the decisions of two federal courts and decades of consistent application by NHTSA itself. The Preemption Rule interprets EPCA to void, rather than accommodate, California's GHG and ZEV standards and those of the other states that have adopted identical standards (the "Section 177 States"), even though the U.S. Environmental Protection Agency ("EPA") has expressly authorized such standards by waiving preemption of them under Section 209 of the Clean Air Act ("CAA") and by approving State Implementation Plans submitted by such states, which incorporate those standards as a means of achieving the

National Ambient Air Quality Standards ("NAAQS"). *See* 84 Fed. Reg. at 51,324 (declaring existing standards "void *ab initio*").

3. Plaintiffs believe that this interpretation is without legal merit and should be set aside as unlawful because it conflicts with the CAA and effectively nullifies the EPA's statutory power under Section 209 of the CAA to authorize California's adoption and enforcement of more stringent vehicle emissions standards. Plaintiffs also believe that NHTSA lacks legal authority to interpret the scope of preemption under EPCA or the power to enforce it. If the Preemption Rule is upheld against judicial challenge as a correct interpretation of the preemptive scope of EPCA, it will have the ultimate effect of voiding the regulatory framework that has driven Plaintiffs' investments and efforts to support vehicle electrification to-date and preclude states from promulgating any such standards in the future, regardless of changes in presidential administration.

4. For these reasons and those outlined below, Plaintiffs respectfully request that the Preemption Rule be declared unlawful and set aside because it exceeds NHTSA's statutory authority, is *ultra vires,* is arbitrary and capricious, and is not in accordance with law.

JURISDICTION AND VENUE

5. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, as the action arises under the laws of the United States. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201(a), and this Court may grant declaratory relief, injunctive relief, and other relief pursuant to 28 U.S.C. §§ 2201-2202, 5 U.S.C. § 706, and the Court's inherent and equitable authority.

6. Venue is proper in this district under 28 U.S.C. § 1391(b) and (e) because a substantial part of the events or omissions giving rise to the claim occurred in this district.

PARTIES

A. Plaintiffs

7. Calpine Corporation ("Calpine") is among America's largest generators of electricity from natural gas and geothermal resources, with 78 power plants in operation or under construction in 16 U.S. states and Canada, amounting to nearly 26,000 megawatts of generating capacity. Calpine also provides retail electric service to customers in competitive markets throughout the U.S., including an additional seven states (beyond those in which it operates generation resources), through its subsidiaries Calpine Energy Solutions and Champion Energy Services.

8. Consolidated Edison, Inc. ("Con Edison") is a holding company that owns several subsidiaries, including: Consolidated Edison Company of New York, Inc., which delivers electricity, natural gas and steam to customers in New York City and Westchester County; Orange & Rockland Utilities, Inc., which, together with its subsidiary, Rockland Electric Company, delivers electricity and natural gas to customers primarily located in southeastern New York State and Northern New Jersey; and Con Edison Clean Energy Business, Inc., which, through its subsidiaries, develops, owns, and operates renewable and energy infrastructure projects and provides energy-related products and services to wholesale and retail customers and has more than 2,600 megawatts of utility-scale solar and wind generation capacity in service, with a footprint spanning 17 states.

9. National Grid USA ("National Grid") is a holding company with regulated direct and indirect subsidiaries engaged in the transmission, distribution and sale of electricity and natural gas and the generation of electricity. It is the direct or indirect corporate parent of several subsidiary electric distribution companies, including Massachusetts Electric Company, Nantucket Electric Company, Niagara Mohawk Power Corporation and The Narragansett Electric Company.

National Grid USA is also the direct corporate parent of National Grid Generation LLC, which supplies capacity to, and produces energy for, the use of customers of the Long Island Power Authority.

10. New York Power Authority ("NYPA") is the largest state public power utility in the U.S., with 16 generating facilities and more than 1,400 circuit-miles of transmission lines. NYPA sells electricity to more than 1,000 customers, including local and state government entities, municipal and rural cooperative electric systems, industry, large and small businesses and non-profit organizations.

11. Power Companies Climate Coalition is an unincorporated association of companies and municipal utilities engaged in the generation and distribution of electricity and natural gas, organized to advocate for responsible solutions to address climate change and reduce GHG emissions, including through participation in litigation concerning federal regulation. Its members include the Los Angeles Department of Water and Power ("LADWP") and Seattle City Light, which, respectively, are the largest and tenth largest municipal electric utilities in the nation, NYPA, as well as Con Edison, National Grid and each of their respective subsidiaries, as enumerated and described above (*see supra* paras. 8, 9).[1]

[1] Other members of Power Companies Climate Coalition, including Exelon Corporation and its subsidiaries, Pacific Gas and Electric Company, and Sacramento Municipal Utility District, intend to participate in these related cases through their membership in the National Coalition for Advanced Transportation, which has separately moved to intervene in these cases (Mot. of Nat. Coalition for Advanced Transportation to Intervene as a Plaintiff, Case No. 1:19-cv-02826-KBJ, Doc. 39; Mot. of Nat. Coalition for Advanced Transportation to Intervene as a Plaintiff, Case No. 1:19-cv-02907-KBJ, Doc. 26). Public Service Enterprise Group Incorporated and its subsidiaries are also members of Power Companies Climate Coalition, but are not participating in this litigation.

B. Defendants

12. The U.S. Department of Transportation is an authority of the U.S. Government and is headquartered in Washington, D.C.

13. Elaine L. Chao is the Secretary of Transportation. She the highest ranking official of the U.S. Department of Transportation. Secretary Chao is sued in her official capacity.

14. NHTSA is "an administration in the [U.S.] Department of Transportation," 49 U.S.C. § 105(a), and is headquartered in Washington, D.C.

15. James C. Owens is the Acting Administrator of NHTSA and is its highest-ranking official. *See* 49 C.F.R. § 501.4(a). Acting Administrator Owens is sued in his official capacity.

16. The United States is named as a defendant pursuant to 5 U.S.C. § 702.

FACTS

17. Plaintiffs hereby adopt and incorporate by reference the statutory and regulatory background statements made in the First Amended and Supplemented Complaint for Declaratory and Injunctive Relief, in *California v. Chao*, No. 1:19-cv-02826-KBJ (D.D.C. Oct. 15, 2019), attached as Exhibit 1 to this Complaint, in paragraphs 48-112.

18. California has independently regulated emissions of air pollution from motor vehicles for 60 years (*see* 1959 Cal. Stats. ch. 200, § 1), predating the 1963 adoption of the CAA (Pub. L. No. 88-206, 77 Stat. 392) and 1965 CAA amendments authorizing the federal government to regulate motor vehicle emissions. Since 1967, the CAA has included a preemption "waiver" mechanism designed to allow California, and only California, to continue setting and enforcing its own motor vehicle emissions standards subject to meeting limited statutory conditions. *See* CAA § 209(b); 42 U.S.C. § 7543(b). Since 1977, Section 177 of the CAA has also provided all other states the ability to adopt and enforce California's standards rather than the standards adopted by the federal

government (the "Section 177 States"). *See* 42 U.S.C. § 7507. California obtained its first federal waiver to continue independently setting its own motor vehicle emissions standards in 1968, two years before the 1970 creation of the EPA and, for the last five decades, has routinely received federal waiver authorization from the EPA to continue directly regulating air pollution from motor vehicles and to establish increasingly stringent standards for adoption by other states. This cooperative federalist framework reflects Congress' judgment concerning the appropriate balance of federal and state authority with respect to the regulation of motor vehicle emissions, a judgment which took into account the value of providing a pathway for regulatory innovation, the resulting compliance costs for manufacturers and the environmental benefits to the public. For decades, this framework has worked as intended and in harmony with NHTSA's implementation of EPCA, as discussed below.

19. Congress enacted EPCA in 1975 to spur a reduction in the consumption of domestic petroleum following the oil embargo of 1973. To accomplish this, EPCA established numerical average fuel economy standards for model years 1978-1980 and directed NHTSA to set "maximum feasible" average fuel economy standards thereafter. *See* Pub. L. No. 94-163 § 502, 89 Stat. 871, 903 (1975). In determining this maximum level, NHTSA was directed long ago to consider four factors, including "the need of the Nation to conserve energy," "technological feasibility," "economic practicability," and, most importantly here, "the effect of other Federal motor vehicle standards" on fuel economy. *Id* § 502, 89 Stat. at 905. *See also* 49 U.S.C. § 32902(f). The fourth factor has long been interpreted and considered synonymous with EPCA's historical definition of "federal standards," a term which was expressly defined in EPCA to include "emissions standards applicable by reason of Section 209(b) of [the CAA] . . . ." Pub. L. No. 94-163 § 502, 89 Stat. at 905. As a result, EPCA has always accommodated California's vehicle

standards as a core element of its framework. Multiple amendments to both EPCA and the CAA left this framework substantively untouched. *See* States' Complaint, *California v. Chao*, Case No. 1:19-cv-02826-KBJ, at paras. 59-63.

20. Separate from these provisions, but at the center of this case, is EPCA's preemption clause, which heretofore has posed no obstacle to California's independent regulation of motor vehicle emissions in tandem with the federal government's regulation of fuel economy:

> When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.

49 U.S.C. § 32919(a). This language has never been interpreted to apply to emissions standards adopted under Section 209 of the CAA, and indeed two courts have already rejected arguments that EPCA preempts California's GHG standards specifically. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007); *Cent. Valley Chrysler-Jeep Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007). Furthermore, this clause delegates no authority to NHTSA to interpret its scope, and likewise provides no mechanism for NHTSA to make such an interpretation legally effective. It is perhaps for this reason that, until very recently, NHTSA has never found it prudent to issue any interpretation of this language.

21. The California Air Resources Board ("CARB") first adopted California's ZEV standards nearly 30 years ago and was granted a waiver by the EPA under Section 209 of the CAA to enforce those standards in 1993. 58 Fed. Reg. 4,166 (Jan. 13, 1993). CARB obtained subsequent waivers for amendments to its ZEV standards in 2006, 2011, and 2013. For over 25 model years, the ZEV

standards have required that a certain percentage of vehicles manufactured for sale in California be ZEVs. *See* States' Complaint, *California v. Chao*, No. 1:19-cv-02826-KBJ, at paras. 66-68.

22. CARB adopted California's GHG standards in 2005 and first received waiver authority from the EPA in 2009. 74 Fed. Reg. 32,744 (July 8, 2009). Among other things, these standards require automobile manufacturers to achieve fleet-wide reductions in GHG emissions starting in model year 2009 and to continue to achieve reductions thereafter. In 2010, CARB, the EPA and NHTSA—with support from major automobile manufacturers—embarked on developing a coordinated "National Program" through which CARB and the EPA would align their respective GHG emissions standards with one another to develop a single stringent, nationally-uniform standard, with which NHTSA would thereafter harmonize its fuel economy standards. Once the National Program standard was determined by the parties, CARB updated its GHG and ZEV regulations accordingly and was granted waiver authority from the EPA to enforce those updated standards in 2013. 78 Fed. Reg. 2,112 (Jan. 9, 2013). The EPA has since that time approved state implementation plans ("SIPs") under the CAA that include California's GHG and ZEV standards as enforceable elements for California and some Section 177 States. In some cases, California's GHG and ZEV standards are now codified in the Code of Federal Regulations and directly enforceable by the EPA as a matter federal law, as they are the legal mechanism by which states achieve compliance with the NAAQS under the CAA.

23. Despite the extensive history of cooperative federalism outlined above, and in the face of clear legal authority to the contrary, including the decisions of two federal courts, NHTSA abruptly changed course late last year, proposing the Preemption Rule as part of a joint rulemaking package with the EPA. *See* 83 Fed. Reg. 42,986 (Aug. 24, 2018). Simultaneously, NHTSA proposed to freeze existing fuel economy standards through 2026 and the EPA likewise proposed to freeze its

existing federal GHG standards through the same model year. Finally, the EPA proposed to partially revoke California's waiver for its GHG and ZEV standards, which would prevent California and the Section 177 States from implementing the standards.

24. NHTSA published its final Preemption Rule in the Federal Register on September 27, 2019. 84 Fed. Reg. 51,310 (Sept. 27, 2019). The Preemption Rule purports to terminate California's authority to adopt and enforce its existing GHG and ZEV standards, concluding that such standards now fall within the scope of the "related to" language in EPCA's preemption clause. More generally, NHTSA determined that this language expressly and implicitly preempts state and local laws that regulate or prohibit tailpipe carbon dioxide emissions, and that all state laws with the "direct or substantial effect of" regulating or prohibiting tailpipe carbon dioxide emissions are likewise preempted. 84 Fed. Reg. at 51,362. NHTSA concluded that ZEV mandates fall within the scope of this "direct or substantial effect" test and are preempted by EPCA. *Id.* at 51,320. The Preemption Rule was published with a final action by the EPA to revoke the Section 209 waiver for California's GHG and ZEV standards. The EPA's separate action expressly relies on the Preemption Rule as one basis for revoking California's waiver.

25. In reliance on the GHG and ZEV standards that the Preemption Rule purports to void, Plaintiffs have made substantial investments and established rate structures and programs to maximize the benefits and minimize the costs associated with integrating electric vehicle load to the grid. For example, Con Edison is working to install charging ports across New York City, offers time-of-use rates to maximize savings and benefits for electric vehicle owners and, through its SmartCharge New York program, offers electric vehicle owners further incentives to charge at off-peak hours. National Grid has worked to install significant charging infrastructure throughout Massachusetts, Rhode Island, and New York, offers a voluntary time-of-use rate to incentivize off-

peak charging and, through its electric vehicle pilot program in Massachusetts, is installing more charging ports and is working to boost adoption rates. NYPA, through its EVolve NY program, will invest up to $250,000,000 through 2025 to build on its existing investments in electric vehicle infrastructure, service, and consumer awareness. LADWP offers rebates for the purchase of certain used electric vehicles and installation of electric vehicle chargers through its Charge Up LA! program, provides electric vehicle discount charging rates through its time-of-use meter service option, and is working to install charging infrastructure throughout the City of Los Angeles to support the growth of electric transportation. Likewise, Seattle City Light, through its Drive Clean Seattle program, is pursuing significant investments in charging infrastructure and innovative rate structures to effectuate its Transportation Electrification Strategy. The Preemption Rule threatens to void the underlying regulatory framework supporting these investments and efforts.

26. The Preemption Rule was codified at Title 49 of the Federal Code of Regulations, Sections 531.7 and 533.7; Appendix B to part 531 and Appendix B to part 533. It is a "final agency action" within the meaning of 5 U.S.C. § 704, and therefore is subject to immediate challenge in this Court.

STANDING

27. Plaintiffs have standing in this case because they have legally protected interests that would be redressed by a decision of this Court that vacates the Preemption Rule and declares it unlawful.

28. The Preemption Rule prevents states from regulating carbon dioxide emissions from passenger vehicle tailpipes and voids existing state regulations already in place, including the GHG and ZEV standards adopted by California and the Section 177 States. Plaintiffs have made and are making significant investments to build the infrastructure needed to support increased consumer adoption of electric vehicles in accordance with these standards. They have also made

significant investments to position their generating resources to supply low- and zero-carbon power to fuel electric vehicles deployed by manufacturers pursuant to those standards.

29. Plaintiffs are making these investments and taking these actions to realize the significant economic and environmental benefits that integration of vehicles to the electricity grid can provide to them and their customers. For example, charging of electric vehicles can help shift load to hours when the grid is underutilized and the cost of electricity is low, bringing down total system costs, and can also support the integration of renewable energy resources. Additionally, the widespread deployment of electric vehicles, fueled by increasingly clean sources of electricity, significantly reduces emissions of smog- and soot-forming pollutants and can help attain and maintain the NAAQS in the jurisdictions served by Plaintiffs.

30. The GHG and ZEV standards implemented by California and the Section 177 States provide the regulatory certainty needed to support Plaintiffs' investments. By purporting to preempt and void these standards, the Preemption Rule prevents California, the Section 177 States, and other states that might seek to adopt identical standards from mandating that electric vehicles be deployed by automakers in the numbers and on the schedule needed to realize the full benefits of Plaintiffs' investments and commitments. Further, California and many Section 177 States are relying upon the reductions in both GHG and criteria pollutant emissions resulting from the rapid deployment of electric vehicles to achieve state climate goals and the NAAQS for ozone and fine particulate matter. If those reductions do not occur, then some of Plaintiffs' existing generation resources will face additional pressure to reduce emissions more rapidly or at greater cost to customers than could be achieved through the widespread deployment of electric vehicles.

31. These injuries are directly traceable to the Preemption Rule and would be redressed by the relief requested, namely, that the Court vacate the Preemption Rule and declare that its conclusions

regarding preemption are not supported by EPCA or the CAA. Plaintiffs Calpine, Con Edison, National Grid, and NYPA therefore have Article III standing on this basis.

32. Plaintiff Power Companies Climate Coalition has standing as a Plaintiff in this case because it is an association with standing to sue on behalf of its members. Its members include large utilities that have made substantial investment commitments to build electric vehicle infrastructure premised upon the state laws that the Preemption Rule purports to void. Its members have also made significant investments in low- and zero-carbon generation resources to supply the increasing load resulting from consumers' adoption of electric vehicles pursuant to such state laws. These interests are germane to Power Companies Climate Coalition's organizational purpose set forth above, and would be redressed by a favorable decision of this Court. Power Companies Climate Coalition therefore has standing on the same underlying basis as the other Plaintiffs.

CLAIMS

COUNT I

(Violation of Administrative Procedure Act - Exceedance of Statutory Authority)

33. Plaintiffs incorporate by reference the preceding allegations.

34. The Preemption Rule is a "final agency action" within the meaning of the Administrative Procedure Act ("APA"), 5 U.S.C. § 704.

35. Under the APA, this Court must "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

36. NHTSA lacks authority delegated from Congress to issue regulations or other legally-effective determinations under EPCA regarding the scope of that statute's preemptive force, and thus acted in excess of its delegated statutory authority by issuing the Preemption Rule.

37. The Preemption Rule must be set aside and declared unlawful because it is "in excess of statutory jurisdiction, authority, or limitations" within the meaning of the APA.

COUNT II

(Violation of the Administrative Procedure Act - arbitrary, capricious, and not in accordance with law)

38. Plaintiffs incorporate by reference the preceding allegations.

39. The Preemption Rule is a "final agency action" within the meaning of the APA, 5 U.S.C. § 704.

40. Under the APA, this Court shall "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Preemption Rule is unsupported by law and is not consistent with the plain language of EPCA.

41. The Preemption Rule is not in accordance with law within the meaning of the APA because it interprets EPCA to preempt state laws which regulate or prohibit tailpipe greenhouse gas emissions and which have "the direct or substantial effect of regulating or prohibiting" fuel economy, without regard to whether CAA preemption has already been waived by the federal government for such laws under Section 209 of the CAA. 84 Fed. Reg. at 51,362.

42. The Preemption Rule is arbitrary, capricious, and not in accordance with law because its interpretation of the scope of preemption under EPCA is vague, overbroad, and lacks a coherent and binding limiting principle.

43. The Preemption Rule is arbitrary, capricious, and not accordance with law because it violates NHTSA's general conformity obligations under the CAA. By purporting to void California's GHG and ZEV standards, which are relied upon by multiple states to achieve the

NAAQS, the action will cause increased criteria pollution, frustrating states' abilities to comply with the CAA through mechanisms that are enforceable under federal law in EPA-approved SIPs. NHTSA fails to explain how preemption of existing federally-enforceable laws essential to meeting federal air quality standards does not interfere with states' ability to meet those standards.

44. The Preemption Rule is arbitrary and capricious because NHTSA does not provide a reasonable explanation for its abrupt departure from its consistent interpretation of EPCA to accommodate California's standards consistent with Congressional intent.

45. The Preemption Rule is arbitrary and capricious because it is based on incorrect statements of law and is in flagrant conflict with two district court decisions.

46. The Preemption Rule is arbitrary and capricious because its interpretation of the term "related to" (49 U.S.C. § 32919(a)) is illogical and irreconcilable with the CAA and EPCA as it renders hollow the EPA's authority to grant preemption waivers under Section 209 of the CAA.

COUNT III

(*Ultra vires* action)

47. Plaintiffs incorporate by reference the preceding allegations.

48. Executive agencies and officers may only act pursuant to delegated powers. Actions outside the scope of those powers are *ultra vires*, and can be set aside by courts pursuant to their equitable jurisdiction.

49. The Preemption Rule is outside the scope of authority delegated to the Defendants, and does not identify any statute or other authority to authorize it.

50. The Preemption Rule is therefore *ultra vires* and must be declared unlawful and set aside.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the following relief:

1. A declaration that the Preemption Rule is invalid because it is contrary to the APA, CAA, EPCA, and is *ultra vires*;

2. An order vacating the Preemption Rule and permanently enjoining the United States and its agencies and officers from relying on or enforcing the rule;

3. An award of Plaintiffs' reasonable costs and attorney fees in this matter; and

4. Any other relief that the Court deems just and proper.

Dated: December 4, 2019

Respectfully submitted,

/s/ Kevin Poloncarz
KEVIN POLONCARZ
D.D.C. Bar No. CA00049
Donald L. Ristow
Jake Levine
COVINGTON & BURLING LLP
Salesforce Tower
415 Mission Street, 54th Floor
San Francisco, CA 94105-2533
(415) 591-7070
kpoloncarz@cov.com

Counsel for Calpine Corporation, Consolidated Edison, Inc., National Grid USA, New York Power Authority, and Power Companies Climate Coalition