

ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF CALIFORNIA, *et al.*,

Petitioners,

v.

ANDREW R. WHEELER, *et al.*,

Respondents.

No. 20-1167
(consolidated with
No. 20-1145)

**STATE AND MUNICIPAL PETITIONERS' NON-BINDING
STATEMENT OF ISSUES TO BE RAISED**

Pursuant to the Court's Order of May 28, 2020, the undersigned petitioners in *State of California, et al. v. Andrew R. Wheeler, et al.*, Case No. 20-1167 (collectively, the "State and Municipal Petitioners"), submit the following non-binding, preliminary statement of issues to be raised in this case regarding certain final actions of Respondents United States Environmental Protection Agency and Administrator Andrew R. Wheeler (collectively, "EPA") and Respondents National Highway Traffic Safety Administration and Acting Administrator James C. Owens (collectively "NHTSA"). In this case, the State and Municipal Petitioners challenge the actions taken by EPA and NHTSA set forth in the Federal Register notice published at 85 Fed. Reg. 24,174 (Apr. 30, 2020) and titled "The

Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks” (the “Federal Standards Rollback Rule”), and the action taken by EPA set forth in the Federal Register notice published at 83 Fed. Reg. 16,077 (Apr. 13, 2018) and titled “Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light-Duty Vehicles” (the “Revised Mid-Term Evaluation”).

Without waiving their right to modify these issues or raise additional issues in this matter, the State and Municipal Petitioners intend to raise the following issues with regard to EPA and NHTSA’s Federal Standards Rollback Rule and EPA’s Revised Mid-Term Evaluation:

1. Whether EPA’s adoption of the greenhouse gas emission standards for model year 2021–2026 vehicles set forth in the Federal Standards Rollback Rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, or other law because, *inter alia*:

- (a) In prescribing its greenhouse gas emission standards, EPA failed to comply with the Clean Air Act, including Section 202, 42 U.S.C. § 7521, and relied upon unreasonable interpretations of the statute, breached its statutory duties, and disregarded statutory limitations;

(b) EPA failed to adequately consider and reasonably weigh relevant factors including the impacts that the emission of air pollutants caused by EPA's action will have on public health and welfare, and EPA also failed to adequately consider and reasonably weigh the evidence before it, failed to consider important aspects of the problem the rule was intended to address, and improperly considered and/or gave undue weight to non-statutory factors;

(c) EPA violated its statutory duty to exercise its independent judgment and apply its own technical expertise;

(d) The analyses and modeling underlying EPA's decision were flawed, ignored contrary evidence, and contained multiple, substantial errors that render EPA's decision unsupported, arbitrary and capricious, and otherwise unlawful;

(e) EPA failed to provide the reasoned explanation required by the Administrative Procedure Act for its decision to adopt greenhouse gas standards that are substantially weaker than the standards it adopted in 2012;

(f) EPA violated numerous procedural requirements, including, without limitation, failing to provide a reasonable opportunity for public comment on the proposed rule, failing to make critical record material available for review and public comment, relying upon data, methodologies, and legal interpretations that were not provided in the proposed rule, relying upon data and methodologies

that were not subjected to peer review, failing to consider the full record before the agency, and failing to consider and respond to comments; and

(g) EPA failed to comply with its responsibilities under the Endangered Species Act.

2. Whether NHTSA's adoption of the corporate average fuel economy standards for model years 2021–2026 contained in the Federal Standards Rollback Rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the Energy Policy and Conservation Act, 49 U.S.C. §§ 32901 *et seq.* (as amended by the Energy Independence and Security Act), the Administrative Procedure Act, or other law because, *inter alia*:

(a) In setting the fuel economy standards, NHTSA failed to comply with the Energy Policy and Conservation Act, including, but not limited to, the requirement at 49 U.S.C. § 32902(a) that the standards “shall be the maximum feasible average fuel economy standard for each fleet for that model year,” and NHTSA relied upon unreasonable interpretations of the statute, breached its statutory duties, and disregarded statutory limitations;

(b) NHTSA failed to adequately consider and reasonably weigh relevant factors and the evidence before it, failed to consider important aspects of the problem the rule was intended to address, and improperly considered and/or gave undue weight to non-statutory factors;

(c) In the final rule, NHTSA unlawfully weakened the minimum domestic passenger car standards for Model Years 2021–2026 established by the Energy Policy and Conservation Act, 49 U.S.C. § 32902(b)(4);

(d) In conducting its analysis, NHTSA erroneously considered “the trading, transferring, or availability of credits” in violation of the Energy Policy and Conservation Act, 49 U.S.C. § 32902(h);

(e) The analyses and modeling underlying NHTSA’s decision were flawed, ignored contrary evidence, and contained multiple, substantial errors that render NHTSA’s decision unsupported, arbitrary and capricious, and otherwise unlawful;

(f) NHTSA failed to provide the reasoned explanation required by the Administrative Procedure Act for its decision to adopt fuel economy standards that are substantially weaker than the final standards it adopted in 2012 for model year 2021, and the “augural” standards it announced at that time for later model years;

(g) NHTSA violated numerous procedural requirements, including, without limitation, failing to provide a reasonable opportunity for public comment on the proposed rule, failing to make critical record material available for review and public comment, relying upon data, methodologies, and legal interpretations that were not provided in the proposed rule, relying upon data and methodologies

that were not subjected to peer review, failing to consider the full record before the agency, and failing to consider and respond to comments;

(h) NHTSA failed to comply with its responsibilities under the National Environmental Policy Act; and

(i) NHTSA failed to comply with its responsibilities under the Endangered Species Act.

3. Whether EPA's Revised Mid-Term Evaluation is arbitrary and capricious, an abuse of discretion, or otherwise not in accord with the Clean Air Act, the Administrative Procedure Act, EPA's own regulations, or other law because, *inter alia*:

(a) The Revised Mid-Term Evaluation failed to provide adequate explanation, lacked factual support and analysis, and ignored the detailed and extensive record before EPA, including the 2016 Technical Assessment Report, supplemental technical analyses, and significant public comment;

(b) The Revised Mid-Term Evaluation violated the procedural and substantive requirements found at 40 C.F.R. § 86.1818-12(h), including the requirements that the Administrator base his decision on a record that was made available for public review and comment and provide detailed assessments of enumerated factors set forth in the regulation; and

(c) EPA failed to provide a reasoned explanation for its departure from, and withdrawal of, its January 2017 Final Determination, in which it determined that the greenhouse gas emission standards for model years 2022–2025 vehicles remained appropriate under Section 202 of the Clean Air Act.

Dated: June 29, 2020

Respectfully Submitted,

FOR THE STATE OF CALIFORNIA

XAVIER BECERRA
Attorney General of California
ROBERT BYRNE
EDWARD H. OCHOA
Senior Assistant Attorneys General
GARY E. TAVETIAN
DAVID A. ZONANA
Supervising Deputy Attorneys General
JESSICA BARCLAY-STROBEL
JULIA K. FORGIE
MEREDITH HANKINS
JENNIFER KALNINS TEMPLE
KAVITA LESSER
M. ELAINE MECKENSTOCK
CAROLYN NELSON ROWAN
ROBERT D. SWANSON
Deputy Attorneys General

/s/ David Zaft

DAVID ZAFT
Deputy Attorney General
300 S. Spring St., Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6372
Fax: (916) 731-2128
David.Zaft@doj.ca.gov

*Attorneys for Petitioner State of
California, by and through its Governor
Gavin Newsom, Attorney General Xavier
Becerra, and California Air Resources
Board*

FOR THE STATE OF COLORADO

PHIL WEISER
Colorado Attorney General

/s/ Eric R. Olson

ERIC R. OLSON
Solicitor General
Office of the Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203
Telephone: (720) 508-6548
eric.olson@coag.gov

*Attorneys for Petitioner State of
Colorado*

FOR THE STATE OF CONNECTICUT

WILLIAM TONG
Attorney General of Connecticut
MATTHEW I. LEVINE
Assistant Attorney General

/s/ Scott N. Koschwitz

SCOTT N. KOSCHWITZ
Assistant Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
Telephone: (860) 808-5250
Fax: (860) 808-5386
Scott.Koschwitz@ct.gov

*Attorneys for Petitioner State of
Connecticut*

FOR THE STATE OF DELAWARE

KATHLEEN JENNINGS
Attorney General of the State of
Delaware

/s/ Kayli H. Spialter

KAYLI H. SPIALTER
CHRISTIAN WRIGHT
Deputy Attorneys General
Delaware Department of Justice
820 N. French Street, 6th Floor
Wilmington, DE 19801
Telephone: (302) 395-2604
Kayli.Spialter@delaware.gov

*Attorneys for Petitioner State of
Delaware*

FOR THE DISTRICT OF COLUMBIA

KARL A. RACINE
Attorney General for the District of
Columbia

/s/ Loren L. AliKhan

LOREN L. ALIKHAN
Solicitor General
Office of the Attorney General for the
District of Columbia
One Judiciary Square
441 4th Street, NW, Suite 630 South
Washington, D.C. 20001
Telephone: (202) 727-6287
Fax: (202) 730-1864
Loren.AliKhan@dc.gov

*Attorneys for Petitioner District of
Columbia*

FOR THE STATE OF HAWAII

CLARE E. CONNORS
Attorney General

/s/ William F. Cooper

WILLIAM F. COOPER
Deputy Attorney General
State of Hawaii Office of the Attorney
General

425 Queen Street
Honolulu, HI 96813
Telephone: (808) 586-4070
Bill.F.Cooper@Hawaii.gov

Attorneys for Petitioner State of Hawaii

FOR THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois
MATTHEW J. DUNN
Chief, Environmental Enforcement/
Asbestos Litigation Division
JASON E. JAMES
Assistant Attorney General

/s/ Daniel I. Rottenberg
DANIEL I. ROTTENBERG
Assistant Attorney General
69 W. Washington St., 18th Floor
Chicago, IL 60602
Telephone: (312) 814-3816
DRottenberg@atg.state.il.us

Attorneys for Petitioner State of Illinois

FOR THE STATE OF MAINE

AARON M. FREY
Attorney General of Maine

/s/ Laura E. Jensen

LAURA E. JENSEN
Assistant Attorney General
6 State House Station
Augusta, ME 04333
Telephone: (207) 626-8868
Fax: (207) 626-8812
Laura.Jensen@maine.gov

Attorneys for Petitioner State of Maine

FOR THE STATE OF MARYLAND

BRIAN E. FROSH
Attorney General of Maryland

/s/ Cynthia M. Weisz

CYNTHIA M. WEISZ
Assistant Attorney General
Office of the Attorney General
Maryland Department of the
Environment
1800 Washington Blvd.
Baltimore, MD 21230
Telephone: (410) 537-3014
cynthia.weisz2@maryland.gov

JOHN B. HOWARD, JR.
JOSHUA M. SEGAL
STEVEN J. GOLDSTEIN
Special Assistant Attorneys General
Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202
Telephone: (410) 576-6300
jbhoward@oag.state.md.us
jsegal@oag.state.md.us
sgoldstein@oag.state.md.us

*Attorneys for Petitioner State of
Maryland*

FOR THE COMMONWEALTH OF
MASSACHUSETTS

MAURA HEALEY
Attorney General
CHRISTOPHE COURCHESNE
Assistant Attorney General
Chief, Environmental Protection
Division
CAROL IANCU
Assistant Attorney General
MEGAN M. HERZOG
DAVID S. FRANKEL
Special Assistant Attorneys General

/s/ Matthew Ireland
MATTHEW IRELAND
Assistant Attorney General
Office of the Attorney General
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, MA 02108
Telephone: (617) 727-2200
matthew.ireland@mass.gov

*Attorneys for Petitioner Commonwealth
of Massachusetts*

FOR THE PEOPLE OF THE STATE OF
MICHIGAN

DANA NESSEL
Attorney General of Michigan

/s/ Neil D. Gordon
NEIL D. GORDON
GILLIAN E. WENER
Assistant Attorneys General
Michigan Department of Attorney
General
Environment, Natural Resources
and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
Telephone: (517) 335-7664
gordonn1@michigan.gov

*Attorneys for Petitioner People of the
State of Michigan*

FOR THE STATE OF MINNESOTA

KEITH ELLISON
Attorney General of Minnesota

/s/ Peter N. Surdo

PETER N. SURDO
Special Assistant Attorney General
445 Minnesota Street, Suite 900
St. Paul, MN, 55101
Telephone: (651) 757-1061
Peter.Surdo@ag.state.mn.us

*Attorneys for Petitioner State of
Minnesota*

FOR THE STATE OF NEW JERSEY

GURBIR S. GREWAL
Attorney General of New Jersey

/s/ Lisa Morelli

LISA MORELLI
Deputy Attorney General
25 Market St., PO Box 093
Trenton, NJ 08625-0093
Telephone: (609) 376-2745
Fax: (609) 341-5031
lisa.morelli@law.njoag.gov

*Attorneys for Petitioner State of New
Jersey*

FOR THE STATE OF NEVADA

AARON D. FORD
Attorney General of Nevada

/s/ Heidi Parry Stern

HEIDI PARRY STERN
Solicitor General
DANIEL P. NUBEL
Deputy Attorney General
Office of the Nevada Attorney General
100 N. Carson Street
Carson City, NV 89701
HStern@ag.nv.gov

Attorneys for Petitioner State of Nevada

FOR THE STATE OF NEW MEXICO

HECTOR BALDERAS
Attorney General of New Mexico

/s/ William Grantham

WILLIAM GRANTHAM
Assistant Attorney General
State of New Mexico Office of the
Attorney General
Consumer & Environmental Protection
Division
201 Third Street NW, Suite 300
Albuquerque, NM 87102
Telephone: (505) 717-3520
wgrantham@nmag.gov

*Attorneys for Petitioner State of New
Mexico*

FOR THE STATE OF NEW YORK

LETITIA JAMES
Attorney General of New York
YUEH-RU CHU
Chief, Affirmative Litigation Section
Environmental Protection Bureau
AUSTIN THOMPSON
Assistant Attorney General

/s/ Gavin G. McCabe

GAVIN G. MCCABE
Assistant Attorney General
28 Liberty Street, 19th Floor
New York, NY 10005
Telephone: (212) 416-8469
gavin.mccabe@ag.ny.gov

*Attorneys for Petitioner State of New
York*

FOR THE STATE OF NORTH CAROLINA

JOSHUA H. STEIN
Attorney General
DANIEL S. HIRSCHMAN
Senior Deputy Attorney General
FRANCISCO BENZONI
Special Deputy Attorney General

/s/ Asher P. Spiller

ASHER P. SPILLER
TAYLOR CRABTREE
Assistant Attorneys General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602
Telephone: (919) 716-6400

*Attorneys for Petitioner State of North
Carolina*

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
Attorney General of Oregon

/s/ Paul Garrahan

PAUL GARRAHAN
Attorney-in-Charge
STEVE NOVICK
Special Assistant Attorney General
Natural Resources Section
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
Telephone: (503) 947-4593
Paul.Garrahan@doj.state.or.us
Steve.Novick@doj.state.or.us

Attorneys for Petitioner State of Oregon

FOR THE STATE OF RHODE ISLAND

PETER F. NERONHA
Attorney General of Rhode Island

/s/ Gregory S. Schultz

GREGORY S. SCHULTZ
Special Assistant Attorney General
Office of Attorney General
150 South Main Street
Providence, RI 02903
Telephone: (401) 274-4400
gschultz@riag.ri.gov

Attorneys for Petitioner State of Rhode Island

FOR THE COMMONWEALTH OF PENNSYLVANIA

JOSH SHAPIRO
Attorney General of Pennsylvania
MICHAEL J. FISCHER
Chief Deputy Attorney General
JACOB B. BOYER
Deputy Attorney General

/s/ Ann R. Johnston

ANN R. JOHNSTON
Senior Deputy Attorney General
Office of Attorney General
1600 Arch St. Suite 300
Philadelphia, PA 19103
Telephone: (215) 560-2171
ajohnston@attorneygeneral.gov

Attorneys for Petitioner Commonwealth of Pennsylvania

FOR THE STATE OF VERMONT

THOMAS J. DONOVAN, JR.
Attorney General

/s/ Nicholas F. Persampieri

NICHOLAS F. PERSAMPIERI
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609
Telephone: (802) 828-3171
nick.persampieri@vermont.gov

Attorneys for Petitioner State of Vermont

FOR THE COMMONWEALTH OF VIRGINIA

MARK R. HERRING

Attorney General

PAUL KUGELMAN, JR.

Senior Assistant Attorney General

Chief, Environmental Section

/s/ Caitlin C. G. O'Dwyer

CAITLIN C. G. O'DWYER

Assistant Attorney General

Office of the Attorney General

Commonwealth of Virginia

202 North 9th Street

Richmond, VA 23219

Telephone: (804) 786-1780

godwyer@oag.state.va.us

*Attorneys for Petitioner Commonwealth
of Virginia*

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON

Attorney General

/s/ Emily C. Nelson

EMILY C. NELSON

Assistant Attorney General

Office of the Attorney General

P.O. Box 40117

Olympia, WA 98504

Telephone: (360) 586-4607

emily.nelson@atg.wa.gov

*Attorneys for Petitioner State of
Washington*

FOR THE STATE OF WISCONSIN

JOSHUA L. KAUL
Attorney General of Wisconsin

/s/ Gabe Johnson-Karp

JENNIFER L. VANDERMEUSE
GABE JOHNSON-KARP
Assistant Attorneys General
Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53702-7857
Telephone: (608) 266-7741 (JLV)
(608) 267-8904 (GJK)
Fax: (608) 267-2223
vandermeusejl@doj.state.wi.us
johnsonkarp@doj.state.wi.us

*Attorneys for Petitioner State of
Wisconsin*

FOR THE CITY OF LOS ANGELES

MICHAEL N. FEUER
Los Angeles City Attorney
MICHAEL J. BOSTROM
Assistant City Attorney

/s/ Michael J. Bostrom

MICHAEL J. BOSTROM
Assistant City Attorney
200 N. Spring Street, 14th Floor
Los Angeles, CA 90012
Telephone: (213) 978-1867
Fax: (213) 978-2286
Michael.Bostrom@lacity.org

*Attorneys for Petitioner City of Los
Angeles*

FOR THE CITY OF NEW YORK

JAMES E. JOHNSON
New York City Corporation Counsel
CHRISTOPHER G. KING
ROBERT L. MARTIN
Senior Counsel
SHIVA PRAKASH
Assistant Corporation Counsel

/s/ Christopher G. King

CHRISTOPHER G. KING
Senior Counsel
New York City Law Department
100 Church Street
New York, New York
Telephone: (212) 356-2074
Fax: (212) 356-2084
cking@law.nyc.gov

Attorneys for Petitioner City of New York

FOR THE CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney
ROBB W. KAPLA
Deputy City Attorney

/s/ Robb W. Kapla

ROBB W. KAPLA
Deputy City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4602
Telephone: (415) 554-4746
Fax: (415) 554-4715
Robb.Kapla@sfcityatty.org

Attorneys for Petitioner City and County of San Francisco

FOR THE CITY AND COUNTY OF DENVER

KRISTIN M. BRONSON

City Attorney

EDWARD J. GORMAN

LINDSAY S. CARDER

Assistant City Attorneys

/s/ Edward J. Gorman

EDWARD J. GORMAN

Assistant City Attorney

Denver City Attorney's Office

201 W. Colfax Avenue, Dept. 1207

Denver, Colorado 80202

Telephone: (720) 913-3275

Edward.Gorman@denvergov.org

*Attorneys for Petitioner City and County
of Denver*

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2020, I filed the foregoing State and Municipal Petitioners' Non-Binding Statement of Issues to be Raised in Case No. 20-1167 using the Court's CM/ECF system, and that service was thereby accomplished upon counsel of record registered with the Court's system.

/s/ David Zaft _____
David Zaft