

ORAL ARGUMENT NOT YET SCHEDULED

**No. 20-1145 (consolidated with 20-1167, 20-1168, 20-1169,
20-1173, 20-1174, 20-1176, 20-1177, 20-1230)**

**United States Court of Appeals
for the District of Columbia Circuit**

COMPETITIVE ENTERPRISE INSTITUTE, et al.,
Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, et al.
Respondents.

ALLIANCE FOR AUTOMOTIVE INNOVATION, et al.,
Intervenors.

**PROOF BRIEF OF PETITIONERS NATIONAL COALITION FOR
ADVANCED TRANSPORTATION, ADVANCED ENERGY ECONOMY,
CALPINE CORPORATION, CONSOLIDATED EDISON, INC.,
NATIONAL GRID USA, NEW YORK POWER AUTHORITY, AND
POWER COMPANIES CLIMATE COALITION**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioners National Coalition for Advanced Transportation, Advanced Energy Economy, Calpine Corporation, Consolidated Edison, Inc., National Grid USA, New York Power Authority, and Power Companies Climate Coalition (in Nos. 20-1174, 20-1176, 20-1177) state as follows:

A. Parties and Amici

Petitioners:

No. 20-1145: Competitive Enterprise Institute, Anthony Kreucher, Walter M. Kreucher, James Leedy, Marc Scribner.

No. 20-1167: State of Delaware; People of the State of Michigan; State of New Mexico; City of Los Angeles; City of New York; City and County of San Francisco; State of California; State of Colorado; State of Connecticut; State of Hawaii; State of Illinois; State of Maine; State of Maryland; State of Minnesota; State of Nevada; State of New Jersey; State of New York; State of Rhode Island; State of Vermont; State of Wisconsin; District of Columbia; Commonwealth of Virginia; Commonwealth of Massachusetts; State of North Carolina; State of Oregon; Commonwealth of Pennsylvania; State of Washington; City and County of Denver.

No. 20-1168: Natural Resources Defense Council, Inc.; Center for Biological Diversity; Chesapeake Bay Foundation, Inc.; Communities for a Better

Environment; Conservation Law Foundation; Consumer Federation of America; Environment America; Environmental Defense Fund; Environmental Law and Policy Center; Public Citizen, Inc.; Sierra Club; Union of Concerned Scientists.

No. 20-1169: Environmental Defense Fund; Center for Biological Diversity; Chesapeake Bay Foundation, Inc.; Communities for a Better Environment; Conservation Law Foundation; Consumer Federation of America; Environment America; Environmental Law and Policy Center; Natural Resources Defense Council, Inc.; Public Citizen, Inc.; Sierra Club.

No. 20-1173: South Coast Air Quality Management District; Bay Area Air Quality Management District; Sacramento Metropolitan Air Quality Management District.

No. 20-1174: National Coalition for Advanced Transportation.

No. 20-1176: Advanced Energy Economy.

No. 20-1177: Calpine Corporation; Consolidated Edison, Inc.; National Grid USA; New York Power Authority; Power Companies Climate Coalition.

No. 20-1230: Clean Fuels Development Coalition; Environmental and Energy Study Institute; The Farmers' Educational & Cooperative Union of America, d/b/a National Farmers Union; Farmers Union Enterprises, Inc.; Glacial Lakes Energy, LLC; Governors' Biofuels Coalition; Montana Farmers Union; North

Dakota Farmers Union; Siouxland Ethanol, LLC; South Dakota Farmers Union; Urban Air Initiative, Inc.

Respondents:

No. 20-1145, 20-1173: National Highway Traffic Safety Administration; James C. Owens, in his official capacity as Acting Administrator, National Highway Traffic Safety Administration; Environmental Protection Agency; Andrew Wheeler, in his official capacity as Administrator of the Environmental Protection Agency.

Nos. 20-1167, 20,-1174, 20-1176: Andrew Wheeler, in his official capacity as Administrator, United States Environmental Protection Agency; United States Environmental Protection Agency; Elaine L. Chao, in her official capacity as Secretary, United States Department of Transportation; United States Department of Transportation; James C. Owens, in his official capacity as Acting Administrator, National Highway Traffic Safety Administration; National Highway Traffic Safety Administration.

No. 20-1168: Andrew Wheeler, in his official capacity as Administrator of the United States Environmental Protection Agency; Environmental Protection Agency.

No. 20-1169: James C. Owens, in his official capacity as Acting Administrator of the National Highway Traffic Safety Administration; Elaine L.

Chao, in her official capacity as Secretary of the United States Department of Transportation; National Highway Traffic Safety Administration.

Nos. 20-1177, 20-1230: United States Environmental Protection Agency; United States Department of Transportation; National Highway Traffic Safety Administration.

Intervenors:

No. 20-1145: Alliance for Automotive Innovation; Bay Area Air Quality Management District; City and County of Denver; Commonwealth of Massachusetts; Commonwealth of Pennsylvania; Commonwealth of Virginia; Conservation Law Foundation; Consumer Federation of America; District of Columbia; Environment America; Environmental Defense Fund; Environmental Law and Policy Center; Ingevity Corporation; Natural Resources Defense Council, Inc.; Public Citizen, Inc.; Sacramento Metropolitan Air Quality Management District; Sierra Club; South Coast Air Quality Management District; State of California; State of Colorado; State of Connecticut; State of Hawaii; State of Illinois; State of Maine; State of Maryland; State of Minnesota; State of Nevada; State of New Jersey; State of New York; State of North Carolina; State of Oregon; State of Rhode Island; State of Vermont; State of Washington; State of Wisconsin; and Union of Concerned Scientists.

American Honda Motor Co., Inc., BMW of North America, LLC, Ford Motor Company, Rolls-Royce Motor Cars NA, LLC, and Volkswagen Group of America, Inc. also intervened in all consolidated cases solely with respect to the issue of remedy.

Amici Curiae:

No individuals or entities have sought leave to participate as amicus curiae. On December 21, 2020, all parties in these consolidated cases consented to the filing of amicus briefs provided amici comply with Federal Rule of Appellate Procedure 29, District of Columbia Circuit Rule 29, and applicable orders of this Court.

B. Ruling Under Review

These cases involve challenges to an action by the United States Environmental Protection Agency (83 Fed. Reg. 16,077 (Apr. 13, 2018)) as well as subsequent actions of the United States Environmental Protection Agency and Administrator Andrew Wheeler and respondents United States Department of Transportation, Secretary Elaine L. Chao, National Highway Traffic Safety Administration, and Deputy Administrator James C. Owens (collectively referred to herein as “NHTSA”) which were jointly published as “The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks” at 85 Fed. Reg. 24,174, on April 30, 2020.

C. Related Cases

By Orders on May 28, 2020, May 29, 2020, June 1, 2020, and July 1, 2020, this Court consolidated the cases filed by the petitioners listed above in Nos. 20-1167, 20-1168, 20-1169, 20-1173, 20-1174, 20-1176, 20-1177, and 20-1230 into Lead No. 20-1145. Petitioners are not aware of any other related cases.

Dated: January 14, 2021

Respectfully submitted,

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**RULE 26.1 CORPORATE DISCLOSURE STATEMENT FOR
PETITIONER NATIONAL COALITION FOR ADVANCED
TRANSPORTATION**

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Petitioner National Coalition for Advanced Transportation (“Transportation Coalition”) states as follows:

The National Coalition for Advanced Transportation is a coalition of companies and non-profit organizations that supports electric vehicle and other advanced transportation technologies and related infrastructure, including business leaders engaged in energy supply, transmission, and distribution; vehicle and component design and manufacturing; and charging infrastructure production and implementation, among other activities. The Transportation Coalition is an unincorporated association and does not have a parent corporation. No publicly-held entity owns 10% or more of the Transportation Coalition.

The Transportation Coalition currently has the following members*:

- Atlantic City Electric
- Baltimore Gas & Electric
- ChargePoint

* Transportation Coalition member Center for Climate and Energy Solutions is not participating in this litigation, because the organization does not participate in litigation as a matter of general practice.

- Commonwealth Edison Company
- Delmarva Power
- Edison International
- EVgo
- Exelon Corporation
- Pacific Gas and Electric Company
- PECO
- PEPCO
- Plug In America
- Portland General Electric
- Rivian Automotive
- Sacramento Municipal Utility District
- Tesla, Inc.

Dated: January 14, 2021

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**RULE 26.1 DISCLOSURE STATEMENT FOR
PETITIONER ADVANCED ENERGY ECONOMY**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Petitioner Advanced Energy Economy provides the following disclosure statement.

Advanced Energy Economy (“AEE”) certifies that AEE is a not-for-profit business association dedicated to making energy secure, clean, and affordable. AEE does not have any parent companies or issue stock, and no publicly held company has a 10% or greater ownership interest in AEE.

Dated: January 14, 2021

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RULE 26.1 DISCLOSURE STATEMENT FOR PETITIONERS CALPINE CORPORATION, CONSOLIDATED EDISON, INC., NATIONAL GRID USA, NEW YORK POWER AUTHORITY, AND POWER COMPANIES CLIMATE COALITION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Petitioners Calpine Corporation, Consolidated Edison, Inc., National Grid USA, New York Power Authority, and Power Companies Climate Coalition provide the following disclosure statements.

Calpine Corporation (“Calpine”) certifies that it is a privately held corporation. CPN Management, LP owns 100 percent of the common stock of Calpine. Volt Parent GP, LLC is the General Partner of CPN Management, LP. Energy Capital Partners III, LLC owns the controlling interest in Volt Parent GP, LLC. Calpine is among America’s largest generators of electricity from natural gas and geothermal resources, with 77 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.

Consolidated Edison, Inc. (“Con Edison”) states that it 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. Con Edison has outstanding shares and debt held by the public and may issue additional securities to the public. Con Edison has no parent corporation and no publicly held company has a ten percent or greater ownership interest in it.

National Grid USA states that it 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. All of the outstanding shares of common stock of National Grid USA are

owned by National Grid North America Inc. All of the outstanding shares of common stock of National Grid North America Inc. are owned by National Grid (US) Partner 1 Limited. All of the outstanding ordinary shares of National Grid (US) Partner 1 Limited are owned by National Grid (US) Investments 4 Limited. All of the outstanding ordinary shares of National Grid (US) Investments 4 Limited are owned by National Grid (US) Holdings Limited. All of the outstanding ordinary shares of National Grid (US) Holdings Limited are owned by National Grid plc. National Grid plc is a public limited company organized under the laws of England and Wales, with ordinary shares listed on the London Stock Exchange, and American Depositary Shares listed on the New York Stock Exchange. No publicly held corporation directly owns more than 10 percent of National Grid plc's outstanding ordinary shares.

New York Power Authority (“NYPA”) states that it is a New York State public-benefit corporation. It is the largest state public power utility in the United States, 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. NYPA has no parent corporation and no publicly held company owns greater than 10 percent ownership interest in it.

Power Companies Climate Coalition states that it is an unincorporated association of companies engaged in the generation and distribution of electricity and natural gas, organized to advocate for responsible solutions to address climate change and reduce emissions of greenhouse gases and other pollutants, including through participation in litigation concerning federal regulation. Its members include the Los Angeles Department of Water and Power (“LADWP”), Seattle City Light, NYPA, as well as Con Edison, National Grid USA and each of their respective subsidiaries, as enumerated and described elsewhere in this disclosure statement.*

LADWP states that it is a vertically integrated publicly-owned electric utility of the City of Los Angeles, serving a population of over 4 million people within a 465 square mile service territory covering the City of Los Angeles and portions of the Owens Valley. LADWP is the third largest electric utility in the state, one of five California balancing authorities, and the nation’s largest municipal utility. LADWP owns and operates a diverse portfolio of generation, transmission, and

* Other members of Power Companies Climate Coalition, including Exelon Corporation and its subsidiaries (Atlantic City Electric Company, Baltimore Gas and Electric Company, Commonwealth Edison Company, Constellation, Delmarva Power, Exelon Generation Company, PECO, and Potomac Electric Power), Pacific Gas and Electric Company, and Sacramento Municipal Utility District, are participating in litigation challenging these actions as members of the National Coalition for Advanced Transportation. Power Companies Climate Coalition members Public Service Enterprise Group Incorporated and its subsidiaries (PSEG Energy Resources & Trade, PSEG Fossil, PSEG Nuclear, PSEG Power, and Public Service Electric and Gas Company) are not participating in this litigation.

distribution assets across several states. LADWP's diverse portfolio includes electricity produced from natural gas, hydropower, coal, nuclear, wind, biomass, geothermal, and solar energy resources. LADWP owns and/or operates the majority of its conventional generating resources, with a net dependable generating capacity of 7,967 megawatts. Its transmission system, which includes more than 3,700 circuit-miles of transmission lines, transports power from the Pacific Northwest, Utah, Wyoming, Arizona, Nevada, and elsewhere within California to the City of Los Angeles. LADWP's mission is to provide clean, reliable water and power in a safe, environmentally responsible, and cost-effective manner.

Dated: January 14, 2021

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GLOSSARY

Agencies	United States Environmental Protection Agency and National Highway Traffic Safety Administration
EPA	United States Environmental Protection Agency
Industry Petitioners	National Coalition for Advanced Transportation, Calpine Corporation, Consolidated Edison, Inc., National Grid USA, New York Power Authority, Power Companies Climate Coalition, and Advanced Energy Economy
NHTSA	National Highway Traffic Safety Administration
Proposal	Respondent EPA's and NHTSA's notice of proposed rulemaking, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, published at 83 Fed. Reg. 42,986 (Aug. 24, 2018)
Public Interest Petitioners Brief	Brief of Public Interest Petitioners
Rollbacks	Respondent EPA and NHTSA's final rule under review, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, published at 85 Fed. Reg. 24,174 (Apr. 30, 2020)
Standards	EPA's greenhouse gas emissions performance standards and NHTSA's corporate average fuel economy standards for passenger cars and light trucks
State Petitioners Brief	Brief of State and Local Government Petitioners
Tesla	Tesla, Inc.
Transportation Coalition	National Coalition for Advanced Transportation

JURISDICTIONAL STATEMENT

Industry Petitioners adopt the Jurisdictional Statement appearing in the brief of State and Local Government Petitioners (“State Petitioners Brief”).

ISSUES PRESENTED

Industry Petitioners adopt the State Petitioners Brief’s Issues Presented.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in Volume A of the Addendum to the State Petitioners Brief.

STATEMENT OF THE CASE

Industry Petitioners adopt the State Petitioners Brief’s Statement of the Case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The transportation and energy sectors are undergoing transformational change as electric and other advanced vehicle technologies provide cleaner, more efficient alternatives to the internal combustion engine. Electric vehicles powered by an increasingly clean electricity grid do not themselves emit carbon dioxide or other harmful pollutants, and their deployment is essential to fight climate change. Electric vehicles also cost consumers less and have several other advantages over their gas-fueled counterparts. They offer consumers reduced maintenance costs, passive fueling, superior performance, and rapidly expanding new model choices

that align with consumer preferences. Over the last decade, the cost of electric vehicle technologies has fallen dramatically, while their capabilities have advanced.

Industry Petitioners are leading this transformation. Collectively, they have invested billions of dollars in electric vehicle technology, charging infrastructure, and improvements to the electric grid needed to fuel electric vehicles with increasingly clean power sources. The market penetration of electric vehicles is on track to far exceed the levels the United States Environmental Protection Agency (“EPA”) deemed necessary when it affirmed that its pre-existing standards remained appropriate four years ago.

Despite this, in April 2020, EPA and the National Highway Traffic Safety Administration (“NHTSA”) (collectively, the “Agencies”) finalized weaker greenhouse gas emissions and fuel economy standards for vehicles (“Rollbacks”), contrary to their respective statutory authorities. Nearly every major automaker has projected that the industry’s future is electric; but the Agencies reject this reality and instead conjure their own set of facts, in which electric vehicles remain a niche product with little consumer appeal.

In their effort to justify the Rollbacks, the Agencies put a thumb on the scale and effectively ignore the production and sales volume of Tesla Inc. (“Tesla”)—the most successful electric vehicle manufacturer to-date—artificially inflating electric vehicle costs. To support their claim that the pre-existing standards could cause

automakers to produce vehicles consumers do not want, the Agencies distort the record on consumer acceptance of electric vehicles, ignoring record-based evidence that demonstrates strong consumer demand for a host of reasons beside fuel savings. The Agencies also mischaracterize automakers' reliance on credits—long a staple of automakers' strategy for meeting standards—as evincing the infeasibility of the pre-existing standards, rather than a product of economic choices. Finally, the Agencies disregard the inherent safety benefits of electric vehicles. The Agencies' reasoning is irrational, arbitrary and grossly inconsistent with the record. The Rollbacks must be vacated.

STANDING

National Coalition for Advanced Transportation (“Transportation Coalition”), Advanced Energy Economy, and Power Companies Climate Coalition (collectively “Industry Petitioners”) each have standing to challenge the Respondent Agencies' Rollbacks because their members have such standing, their interests are germane to the purpose of the Rollbacks and the claims asserted do not require participation of individual members. *See Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002).

Transportation Coalition member Tesla manufactures all-electric vehicles that are sold throughout the United States, and is thus directly subject to the Standards

established in the Rollback. *See* Mendelson Decl. ¶ 7 (ADD3-ADD4).¹ If a petitioner “is ‘an object of the [agency] action (or forgone action) at issue’ . . . there should be ‘little question’” regarding the petitioner’s standing. *Sierra Club*, 292 F.3d at 900 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992)). Under the Standards, electric vehicle manufacturers earn and sell tradable compliance credits by producing vehicles that outperform the minimum requirements. *See, e.g.*, 85 Fed. Reg. 24,174, 24,209 (Apr. 30, 2020); Mendelson Decl. ¶ 9 (ADD6). In the Rollbacks, the Agencies weaken the Model Year 2021-2026 Standards, which reduces the economic value of these credits for past over-performance of the standards. Mendelson Decl. ¶¶ 9, 12-13 (ADD6, ADD8-ADD9).

More broadly, Industry Petitioners seek to redress actual and imminent injury to their investment-backed expectations; the Rollbacks cause that injury and the requested relief would remedy it. *See Lujan*, 504 U.S. at 560-61; *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017) (finding economic harm an injury-in-fact for standing purposes). The pre-existing standards, which required manufacturers to produce new vehicles with lower greenhouse gas emissions and improved fuel economy, rewarded the production of vehicles that outperform the minimum standards and played a critical role in driving investments in zero or low

¹ Industry Petitioners submit declarations in support of standing in the separate Addendum filed herewith at ADD1-ADD15. *See* D.C. Cir. Rule 28(7).

greenhouse gas emissions vehicles and related infrastructure. Industry Petitioners collectively have invested billions of dollars in electric vehicle technology and infrastructure based on the pre-existing standards. *See, e.g.*, Mendelson Decl. ¶ 10 (ADD7); Sutley Decl. ¶¶ 4, 8 (ADD11, ADD13). In the Rollbacks, the Agencies issue new, weaker Standards for Model Years 2021-2026, *see* 85 Fed. Reg. at 24,186, which undermine incentives to develop and deploy electric vehicles and related technologies. *See Chamber of Commerce of the U.S. v. EPA*, 642 F.3d 192, 200 (D.C. Cir. 2011) (imminent future harm sufficient to show standing). Because the Rollbacks weaken the pre-existing standards so greatly that they effectively require *no* fuel economy improvements beyond what market forces were already projected to deliver, they eliminate a strong incentive in support of Industry Petitioners' efforts to support vehicle electrification and, in so doing, impede realization of the benefits of their investments. *See* Sutley Decl. ¶ 11 (ADD14-15).

ARGUMENT

I. The Agencies' Treatment of Electric Vehicles and Related Technologies Demonstrates That the Rollbacks Are Arbitrary and Capricious

The Agencies' Rollbacks are arbitrary and capricious for the multitude of reasons described in the State Petitioners Brief and Public Interest Petitioners Brief. In addition, the Agencies' treatment of electric vehicle and related technologies alone would constitute fatal defects, as explained below.

This Court will set aside an agency action if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). Under this standard, “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). This Court has already held that, if EPA changes the pre-existing standards as it has done in the Rollbacks, it “will be required to provide a reasoned explanation and cannot ignore prior factual findings and the supporting record evidence contradicting the new policy.” *California v. EPA*, 940 F.3d 1342, 1353 (D.C. Cir. 2019). The Agencies have failed to provide a reasoned explanation and ignored factual findings and record evidence, rendering the Rollbacks unlawful.

A. The Agencies Significantly Overstated Electric Vehicle Costs

The Agencies rely on deeply flawed assumptions to significantly inflate electric vehicle battery costs in a manner that undermines the cost-benefit analysis. The Agencies use the BatPaC model, which projects battery costs based in part on assumptions regarding manufacturing production volumes—the higher the production volume, the lower the per-unit battery prices. 85 Fed. Reg. at 24,500-02. While the Proposal assumed 100,000 units per manufacturing plant per year, the final Rollbacks only assume 25,000 units. *Id.* at 24,500. The Agencies’ defense of

this drastic reduction is illogical: they ignore the evidence-based 100,000 units assumption because Tesla was the only entity that had so far achieved that volume. *See id.* at 24,501-02 (acknowledging that Tesla had exceeded that volume in both 2018 and 2019). On this irrational basis, the Agencies unreasonably exclude “the outlying and vertically integrated volumes of Tesla[.]” *Id.* at 24,501.

However, Tesla is an industry leader whose volumes demonstrate that larger scale battery manufacturing is already occurring—and can continue to occur—at lower cost. Tesla Comments at 4-5, 18-20, EPA-HQ-OAR-2018-0283-4186 (JA __, __); Transportation Coalition Comments at 16, EPA-HQ-OAR-2018-0283-5067 (JA __). It is irrational to exclude Tesla’s production data based on the company’s success in selling zero-emission electric vehicles. As the record reflects, all evidence points to battery production volumes continuing to increase and prices continuing to fall dramatically. *E.g.*, Transportation Coalition Comments at 15-17 (JA __); Tesla Comments at 18-20 (JA __). That record evidence further refutes the Agencies’ 25,000 units assumption. *See id.* The Agencies were required to take actual production volumes and reductions in battery costs into account in determining the Standards’ feasibility under their respective Congressional mandates.

The Agencies’ failure to do so is consequential. Their own analysis shows that its 25,000 units assumption “has a significant impact on battery pack costs and therefore it is important to use realistic production volume estimates for the battery

pack cost analysis.” 85 Fed. Reg. at 24,502. Because battery-related costs are a primary driver of electric vehicle costs, *id.* at 24,492; Transportation Coalition Comments at 15 (JA__), the Agencies’ flawed approach leads them to overstate electric vehicle technology costs. This and countless other errors in their cost-benefit analysis result in Rollbacks that in reality impose net *costs*, not benefits, on society. *See* State Petitioners Brief at 87-88, 94-95. The Agencies’ approach runs contrary to the record and fails to show a “rational connection between the facts found and the choice made.” *State Farm*, 463 U.S. at 43 (citation omitted).

B. The Agencies Arbitrarily Downplayed Consumer Acceptance of Electric Vehicles and Growth in the Electric-Vehicle Market

Consumer interest in and demand for electric vehicles is rapidly increasing, but the substantial evidence of this trend is conspicuously absent from the Agencies’ reasoning. In its place, the Agencies raise vague “concern[s]” regarding consumer acceptance of electrification technologies, seeking to marginalize electric vehicles as “a departure” from what car buyers have “traditionally” purchased. 85 Fed. Reg. at 25,116. The Agencies’ efforts to characterize electric vehicles as exotic and to sow doubt regarding consumer acceptance—in the face of record evidence to the contrary—render the Rollbacks arbitrary and capricious.

While neither agency’s governing statute mandates consideration of consumer acceptance or demand in determining an achievable level of emission reduction or fuel economy, the Agencies erroneously assess consumer demand for electric

vehicles solely through the lens of fuel savings, to the exclusion of electric vehicles' other attributes. *See id.* Beyond fuel efficiency, which is central to NHTSA's statutory mandate of energy conservation, electric vehicles possess many unique advantages that offer direct, tangible benefits. These include safer design, significantly reduced maintenance costs, inherently superior acceleration, no tailpipe emissions, quiet operation, and passive refueling at home and work. *E.g.*, Tesla Comments at 14-16, 22 (JA __, __). These are positive differentiators that contribute to consumer demand for electric vehicles, which the Agencies simply ignore.

Electric vehicles likewise do not require consumers to sacrifice performance, utility or other features found in vehicles they have "traditionally" purchased. 85 Fed. Reg. at 25,116. Batteries and power cords are not novel and are compatible with all vehicle classes and types, with dozens of plug-in models already available and many more in the production pipeline. Transportation Coalition Comments 10-12 (JA __). By 2022, at least *81 models* will be on the market, including many SUVs, crossovers and pickup trucks. M.J. Bradley & Associates, Electric Vehicle Market Status Update at 7-9, EPA-HQ-OAR-2018-0283-7561 (JA __). EPA's vague claim that the degree of electrification required by the pre-existing standards "could lead to automotive companies needing to change the choice of vehicle types they are able

to offer to consumers” is therefore baseless. 85 Fed. Reg. at 25,116.² NHTSA concedes as much when it identifies several pickup-truck models currently in development, including an all-electric version of the best-selling truck in the United States, the Ford F-150. *Id.* at 25,229, n.3307. In fact, a report cited by NHTSA in describing the all-electric F-150 notes that a prototype demonstrated the superior power and torque of an electric motor by towing 10 double-decker freight-train cars loaded with 42 conventional F-150s inside, for a combined weight of over a million pounds. *Id.* In sum, vehicle manufacturers can and will meet consumer demand by producing plug-in models that satisfy consumer preferences, without sacrificing utility or performance.

Although the Agencies try hard to engineer doubt regarding consumer acceptance of electric vehicles, they provide no citation to studies that quantify obstacles to consumer acceptance or future demand. Record evidence overwhelmingly demonstrates increasing consumer interest in electric vehicles. A 2018 survey by AAA found that 20 percent of Americans will “likely” go electric for their next vehicle purchase, up from 15 percent the year before. Transportation Coalition Comments at 18 (JA__). A separate report by McKinsey & Company

² As discussed *infra* at 14-16 and in the State Petitioners Brief at 80-82, 84, there is also no merit to EPA’s claim that use of credits in the 2016 and 2017 model years for compliance flexibility demonstrates infeasibility.

found a comparable 29 percent are considering purchasing an electric vehicle, while data compiled by Consumer Federation of America likewise demonstrate increasing year-over-year consumer interest in purchasing electric vehicles. *Id.* Data from a coalition of consumer groups similarly demonstrate “strong interest” in electric vehicles, with survey results showing that 57 percent of consumers are willing to pay more for one than a comparable gasoline-fueled vehicle. Consumer Groups Comments at 71-72, EPA-HQ-OAR-2018-0283-5693 (JA__).

Put simply, a sizeable and expanding segment of consumers *want* to purchase electric vehicles. Against this evidence, it is both disingenuous and arbitrary for the Agencies to conclude that “significant further electrification of the fleet is not practicable at this time due to concerns about consumer acceptance,” 85 Fed. Reg. at 25,256, and that the “unknown degree of consumer acceptance” of electric vehicles warrants the Rollbacks, *id.* at 24,176.

Growing consumer interest in electric vehicles is also proven by actual sales. Annual sales of plug-in vehicles in the United States have grown from 18,000 vehicles in 2011, to well over 300,000 in 2018. Transportation Coalition Comments at 9 (JA__); BloombergNEF Electric Vehicle Outlook at 32-33, EPA-HQ-OAR-2018-0283-7561 (JA__). This reflects growth not only in raw numbers, but as a percentage of total light-duty vehicles sold, rising from less than 0.2 percent in 2011 to 2 percent in 2018. *Id.* It also comes despite static overall light-duty vehicle sales

in the U.S., relatively stable and low gasoline prices, and with a significant segment of consumers still lacking familiarity with electric vehicles. Transportation Coalition Comments at 18 (JA__).

Market penetration is widely forecast to continue expanding, as consumer awareness grows and prices decline. Electric vehicles are projected to hold a 4.7 percent share of the light-duty vehicle market by 2023 and to reach full price parity (without incentives) with gasoline-fueled vehicles by 2025. BloombergNEF at 33 (JA__); M.J. Bradley & Associates at 11-12 (JA__). Further, there is broad analyst agreement that plug-in vehicle sales will continue rising significantly; according to one projection, plug-in vehicles will comprise *32 percent* of sales in 2030, before eventually surpassing sales of gasoline-fueled vehicles entirely. BloombergNEF at 33 (JA__). This is neither controversial nor disputed; “[n]early every major automaker has, in some form or another, publicly indicated that they believe the future of the automotive industry is electric.” ICCT Comments at 14, EPA-HQ-OAR-2018-0283-5456 (JA__).

The Agencies’ rationale for weakening the pre-existing standards based on their purported concerns regarding consumer acceptance of electric vehicles is all the more disingenuous, given the low penetration rates they project would be needed to achieve those standards. When EPA previously determined that its pre-existing standards remained appropriate in 2017, it found that they would require “very low

levels” of electrification—a plug-in vehicle penetration rate of 5 percent by 2025. Final Determination at 4 (JA__). Upon finalizing the Rollbacks, the Agencies project that their pre-existing standards would still only require a 6.1 percent penetration rate to comply with EPA’s program in model year 2030 and a 7.9 percent penetration rate to meet NHTSA’s program during that same year. 85 Fed. Reg. at 24,926, 24,976. As demonstrated above, electric vehicle penetration is projected to dramatically exceed these levels. *See* BloombergNEF at 33 (JA__) (projecting 32 percent market-penetration by 2030).

Yet, in the Rollbacks, EPA concludes that its Standards will require no more than a 3.9 percent penetration rate for plug-in vehicles in 2030, which it says is “more in line” with what it “believes is a more appropriate projected level of market penetration.” *Id.* at 25,107. EPA provides no explanation for why a 3.9 percent penetration rate is more appropriate, or why, given the dramatically higher penetration rates projected by market analysts, its projected 6.1 percent penetration rate to meet its pre-existing standards for 2030 is infeasible. In premising the Rollbacks upon unrealistically low penetration rates and baseless concerns about consumer acceptance of electric vehicles, the Agencies’ conclusions are unmoored from reality, arbitrary and capricious.

C. The Agencies' Treatment of Compliance Credits and Advanced Technology Incentives Is Unreasonable

Credit banking and trading are an essential part of both EPA's Clean Air Act and NHTSA's Energy Policy and Conservation Act regulatory regimes; they provide flexibility for manufacturers to choose compliance pathways that minimize cost and maximize efficiency, and reward the production of vehicles that outperform the minimum standards. *See* 49 U.S.C. § 32903; 77 Fed. Reg. 62,624, 62,648-49 (Oct. 15, 2012). The Rollbacks turn the function of the credit provisions on its head as justification to weaken the pre-existing standards. The Agencies incorrectly claim that manufacturers' use of banked credits from previous years to achieve compliance with the Model Year 2016 and 2017 pre-existing standards demonstrates their infeasibility. *See* 85 Fed. Reg. at 25,116-17, 25,183-84. On the contrary, manufacturers' use of credits simply shows regulated entities making calculated compliance decisions, as the regulatory system intended.

Furthermore, EPA's decision not to adopt certain advanced technology credit multipliers is internally inconsistent and lacks a reasoned explanation. In 2012 when EPA issued the Model Year 2017-2025 Standards, EPA adopted advanced technology "multiplier" incentives for all-electric, plug-in hybrid electric, fuel cell, and compressed natural gas vehicles sold in Model Years 2017-2021. 77 Fed. Reg. at 62,628, 62,813. For example, a manufacturer that sold a battery electric vehicle in 2019 would receive compliance credit for a vehicle with zero grams of carbon

dioxide emissions per mile (because this type of vehicle does not emit tailpipe carbon dioxide) multiplied by two as a result of the 2.0 multiplier incentive applicable under the 2019 Standard. *See id.* EPA intentionally adopted these credit multipliers to spur early adoption of advanced technologies to increase potential for significant long-term emissions reductions despite fewer emissions reductions in the short-term. *Id.* at 62,813.

Extension and enhancement of the advanced technology credit multipliers would incentivize investment in zero-emissions technologies, both ensuring lower emissions in future model years (by accelerating the introduction of advanced technologies at scale) and reducing manufacturer compliance burdens, consistent with EPA's Clean Air Act obligations. Transportation Coalition Comments at 6-7 (JA__). Throughout the Rollbacks, the Agencies incorrectly insist that electric vehicle and other advanced vehicle technologies have not been adopted at significant levels.³ *Supra* at 8-13. Yet, EPA ignores the benefits of extending the credit multipliers beyond Model Year 2021, instead claiming to be concerned that the multipliers “would reduce the emissions benefits associated with the program.” 85 Fed. Reg. at 25,208. Meanwhile, EPA expresses no such concern when adopting incentives for “off-cycle” technologies and natural gas vehicles, and more generally

³ Industry Petitioners disagree with the Agencies' characterization of future electric vehicle market penetration. *Supra* at 8-13.

when weakening the pre-existing standards through the Rollbacks. EPA justifies its adoption of a 2.0 credit multiplier for natural gas vehicles based on the lack of such vehicle offerings in the market. *Id.* at 25,211. But EPA’s attempt to distinguish other alternative fuel vehicles on the basis that such vehicles “are increasingly available in the light-duty marketplace” plainly contradicts its positions elsewhere in the Rollbacks, rendering its decision arbitrary and capricious. *See id.; supra* at 8-13.

EPA simply disregards the potential for significant long-term environmental benefits of adopting the credit multiplier for all electric, plug-in hybrid electric, and fuel cell vehicles, which the agency recognized in the 2012 rulemaking. Again, EPA’s disparate treatment of such vehicles under the Rollbacks is inconsistent with the intent of the Clean Air Act and is arbitrary and capricious.

D. The Agencies Failed to Consider the Safety Benefits of Electric Vehicles

In addition to the numerous flaws in the Agencies’ safety analyses explained in the State Petitioners Brief, the Agencies fail to meaningfully consider the safety advantages of electric vehicles in the Rollbacks. As Tesla described in its comments, “the basic characteristics of [electric vehicle] design, including small or no motors in front, large crush space for energy absorption, lack of combustible fuel, and low centered batteries that result in extremely low center of gravity and nearly perfect weight distribution, mean they are [t]he safest vehicles in the world.” Tesla

Comments at 22 (JA__); *see also id.* at 21-29 (JA__). The Agencies fail entirely to consider these comments on substantial safety benefits of electric vehicles as compared to internal combustion engine vehicles. This oversight renders the Agencies' decision arbitrary and capricious, particularly given the Agencies' reliance on the purported safety benefits of this action entitled the "*Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule.*" 85 Fed. Reg. at 24,174 (emphasis added); *see State Farm*, 463 U.S. at 43 ("an agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem").

CONCLUSION

For the foregoing reasons, the Court should grant the Petitions for Review.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of the Court's Order filed October 19, 2020 (Doc. # 1867064) because it contains 3,600 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

This brief complies with the typeface and type style requirements of Rules 32(a)(5) and 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in proportionally spaced, 14-point Times New Roman typeface using Microsoft Word 2016.

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