ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 20-1145 (and consolidated cases)

COMPETITIVE ENTERPRISE INSTITUTE et al.,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION et al.,

Respondents.

On Petition for Review of Final Action by the National Highway
Traffic Safety Administration and Environmental Protection Agency
85 Fed. Reg. 24,174 (Apr. 30, 2020)

BRIEF OF THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW AS AMICUS CURIAE IN SUPPORT OF STATE AND LOCAL GOVERNMENT, PUBLIC INTEREST ORGANIZATION, AND ADVANCED ENERGY AND TRANSPORTATION PETITIONERS

Richard L. Revesz
Bethany A. Davis Noll
Max Sarinsky
Jason A. Schwartz (admitted in Colorado)
INSTITUTE FOR POLICY INTEGRITY
139 MacDougal Street, 3rd Floor
New York, NY 10012
(212) 998-6185
richard.revesz@nyu.edu
Counsel for Amicus Curiae
Institute for Policy Integrity

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Circuit Rule 28(a)(1), counsel for the Institute for Policy Integrity at New York University School of Law certifies as follows:

1) All parties, amici, and intervenors appearing in this case are listed in the Opening Brief of Public Interest Organization Petitioners, except for the following amici curiae who noticed their intention to participate in this case after January 14, 2021: Coalition to Protect America's National Parks, National Parks Conservation Association, and New Mexico Wilderness Alliance; American Thoracic Society, American Lung Association, American Medical Association, and Medical Society of the District of Columbia; National League of Cities, U.S. Conference of Mayors, Annapolis, Boulder County, Glen Rock, Harris County, Tx., Houston, Minneapolis, Pittsburgh, Providence, Saint Paul, Salt Lake City, Santa Fe, and the Mayors of Durham, Fayetteville, Las Cruces, and Phoenix; Andrew Dessler, Philip Duffy, Michael MacCracken, James McWilliams, Noelle Eckley Selin, Drew Shindell, James Stock, Kevin Trenberth, and Gernot Wagner; Michael Greenstone; Consumer Reports; and the Institute for Policy Integrity.

2) References to the final agency action under review and related and consolidated cases appear in the Opening Brief of Public Interest Organization Petitioners.

RULE 26.1 DISCLOSURE STATEMENT

The Institute for Policy Integrity ("Policy Integrity") is a nonpartisan, not-for-profit organization at New York University School of Law.[i] Policy Integrity has no parent companies. No publicly held entity owns an interest in Policy Integrity. Policy Integrity does not have any members who have issued shares or debt securities to the public.

[i] This brief does not purport to represent the views, if any, of New York University School of Law.

STATEMENT REGARDING SEPARATE BRIEFING, AUTHORSHIP, AND MONETARY CONTRIBUTIONS

Because a single joint brief of all amici is not practicable in this case given the numerous factual and legal issues at stake, the Institute for Policy Integrity files this separate amicus brief in compliance with the word limits set forth in this Court's Order of October 19, 2020. All parties granted blanket consent to amicus filings by notice dated December 21, 2020.

Under Federal Rule of Appellate Procedure 29(a)(4)(E), Policy Integrity states that no party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person contributed money intended to fund the preparation or submission of this brief.

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

EPA	Environmental Protection Agency
EPCA	Energy Policy and Conservation Act
Final Rule	The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (Apr. 30, 2020)
GHG	Greenhouse Gas
NHTSA	National Highway Traffic Safety Administration

INTEREST OF AMICUS CURIAE AND AUTHORITY TO FILE

The Institute for Policy Integrity at New York University School of Law ("Policy Integrity") submits this amicus curiae brief in support of the challenges by Coordinating Petitioners to The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (Apr. 30, 2020) ("Final Rule").

The Final Rule was promulgated by the Environmental Protection Agency and National Highway Traffic Safety Administration ("EPA" and "NHTSA" or, collectively, "the agencies"), and reduces the stringency of greenhouse gas ("GHG") standards and fuel-economy standards that were promulgated in the 2012 rule, 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,624 (Oct. 15, 2012) ("pre-existing standards"), while also setting new fuel-economy standards for model years 2022–2026. All parties consent to this filing, pursuant to the blanket consent filed on December 21, 2020.

Policy Integrity is a nonpartisan, not-for-profit think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy, with a primary focus on environmental issues. Our economists and lawyers have produced extensive scholarship on the use of economic analysis in regulatory decisionmaking,

including on the balanced consideration of costs and benefits. Our director, Professor Richard L. Revesz, has published over eighty articles and books on environmental and administrative law, including many on the legal and economic principles informing rational regulatory decisions.[1] And our staff has written extensively on important considerations in regulatory impact analysis including consumer valuation, discounting, and the role of regulators in promoting societal benefits.

Most relevant for this proceeding, Policy Integrity has submitted extensive comments and published scholarship on both the proposed and finalized versions of the Final Rule. Policy Integrity submitted several sets of comments on the regulatory proposal for the Final Rule criticizing the agencies' disregard for key forgone benefits and explaining that their economic justifications for the rule were fundamentally flawed.[2] And since the rule was finalized, Policy Integrity has authored several reports highlighting critical errors in the agencies' economic justifications.[3] As those comments and reports explain, the agencies not only understate critical economic, health, and environmental harms resulting from the Final Rule, but also fail to supply a reasoned explanation for the rule that justifies

[1] A full list of publications is on Prof. Revesz's profile, https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.publications&personid=20228.

[2] *Available at* https://policyintegrity.org/projects/update/comments-on-vehicle-emissions-standards.

[3] *Available at* https://policyintegrity.org/projects/update/report-series-the-flawed-analysis-underlying-the-rollback-of-the-clean-car-standards.

the harms they do acknowledge—which, as explained herein, outweigh the rule's purported benefits under the agencies' own analysis.

In this case, Coordinating Petitioners contend that the agencies fail to provide a reasoned explanation for this rollback, as they do not adequately consider or reasonably weigh critical harms such as increases in pollution and fuel usage. *See, e.g.*, Brief of State and Local Government Petitioners 87–91 ("State Br.") (explaining that the Final Rule "would impose substantial net costs"); *id.* at 50–95 (detailing numerous errors in agencies' cost-benefit analysis); Brief of Public Interest Organization Petitioners 8–40 ("Pub. Inter. Br.") (explaining how agencies undervalue pollution harms and overvalue cost savings and other impacts). Policy Integrity's experience with the Final Rule and expertise in the assessment of regulatory impacts give it a unique perspective on these arguments.

SUMMARY OF ARGUMENT

As Coordinating Petitioners and other amici argue, the agencies consistently elevate unsound assumptions over empirical evidence to understate the harms and inflate the benefits of the Final Rule. But even setting aside those fatal errors, the agencies' analysis of regulatory costs and benefits still does not justify the Final Rule, and in fact contradicts the rationales that the agencies proffer in several key respects. This brief focuses on the agencies' decision to adopt a net-costly rule and on economic problems with their justifications for that decision.

The agencies' own analysis concludes that the Final Rule causes more economic, health, and environmental costs than benefits, *infra* at pp. 7–9, making it a regulation that does "significantly more harm than good," which the Supreme Court has characterized as inappropriate, *Michigan v. EPA*, 576 U.S. 743, 752 (2015). Yet the agencies obfuscate this conclusion, sweep it aside, and proceed anyway under the vague and unsubstantiated theory that upfront costs to comply with the pre-existing standards were "too high," 85 Fed. Reg. at 24,176. In doing so, they unreasonably dismiss the fact that costs under the rollback—such as forgone fuel savings and health benefits that are of critical significance under the governing statutes—are, according to the agencies' own analysis, even greater. By "rely[ing] on considerations beyond net benefits" in this manner, *id.* at 25,172—that is, arbitrarily prioritizing smaller purported regulatory benefits over larger costs—the agencies fail to "reasonabl[y] balance" regulatory impacts as they purport to do, *id.* at 24,176, 24,181.

Moreover, while the agencies emphasize several purported regulatory impacts to support their outsized focus on upfront cost savings, their rationales are unavailing and frequently belied by their own analysis. For instance, while the agencies suggest that "the $26.1 billion in private losses to consumers" from the Final Rule can be dismissed because impacts such as fuel expenses are felt over time and consumers "may have time preferences that cause them to discount the future" at extremely high

rates, *id.* at 24,612, this claim violates not only common sense and voluminous regulatory precedent but also the agencies' own analysis, which concludes that consumers benefit from long-term fuel savings and are thus greatly harmed by the excess costs imposed by this rule, *id.* at 24,201–08 (counting full "retail fuel savings" as a forgone benefit). Likewise, while the agencies tout the possibility that the Final Rule will enable "more consumers . . . to afford new vehicles, which will result in a quicker fleet turnover to safer, more efficient vehicles," *id*. at 25,111, that assertion disregards their own conclusion that the rule's countervailing harms will have a far greater effect, *see, e.g.*, *id.* at 24,203 (showing that rule is net costly).

With only unsupported and one-sided rationales to buttress a net-costly rule, the agencies fail to provide a "reasoned explanation" for rolling back the pre-existing standards. *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). For this reason, the Final Rule violates the Administrative Procedure Act's and Clean Air Act's standards of rationality and must be vacated.

ARGUMENT

THE AGENCIES IRRATIONALLY PROMULGATE A RULE THAT CAUSES MORE HARM THAN GOOD

Final agency actions are arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2), if the agency fails to "examine the relevant data," "consider an important aspect of the problem," or "articulate a satisfactory explanation for its action including a rational connection between the facts found

and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).[4]

Under that standard, a failure to adequately consider the costs of a rulemaking can be fatal. Cost—meaning "any disadvantage" resulting from a rule, including "harms that regulation might do to human health or the environment"—is typically a "centrally relevant factor when deciding whether to regulate." *Michigan*, 576 U.S. at 752–53. Failing to sufficiently "account for" harms that are "matter[s] of importance under the statute," *Gresham v. Azar*, 950 F.3d 93, 102 (D.C. Cir. 2020), *cert. granted* (Dec. 4, 2020), and forgone benefits in a regulatory rollback, *see Air All. Houston v. EPA*, 906 F.3d 1049, 1068 (D.C. Cir. 2018), is especially problematic.

The agencies violate these principles in the Final Rule, as despite their own finding that the costs of the rollback exceed the benefits, the agencies puzzlingly "plac[e] greater weight" on those supposed benefits in deciding to roll back the pre-existing standards, 85 Fed. Reg. at 25,114, and attempt to bolster them with theories that are contradicted by their own analysis. This lopsided approach to regulation—

[4] EPA promulgates the Final Rule under the Clean Air Act, which supplies its own arbitrary-and-capricious requirement, 42 U.S.C. § 7607(d)(9)(A). This Court "appl[ies] the same standard of review under the Clean Air Act as [it] do[es] under the Administrative Procedure Act." *Maryland v. EPA*, 958 F.3d 1185, 1196 (D.C. Cir. 2020) (internal quotation marks omitted).

relying on smaller and unsupported benefits as the basis to incur larger and substantiated costs—is irrational.

A. The Agencies' Own Analysis Shows That the Final Rule Is Net Costly

As is standard practice for major rulemakings, the agencies prepare a regulatory impact analysis of the Final Rule in which they quantify expected regulatory costs and compare them to the rule's purported benefits. EPA & NHTSA, Final Regulatory Impact Analysis: The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Year 2021–2026 Passenger Cars and Light Trucks (2020) ("Final Rule RIA"). As detailed herein, this analysis concludes that the Final Rule's costs likely exceed its benefits by billions of dollars.

As noted above, costs in a regulatory analysis encompass not only "adverse effects on the efficient functioning of the economy [and] private markets" but also harms to "health, safety, and the natural environment." Exec. Order No. 12,866, § 6(a)(3)(C), 58 Fed. Reg. 51,735 (Oct. 4, 1993). In their analysis, therefore, the agencies assess, quantify, and compare various "good and bad" regulatory impacts—consumer purchase-price savings against increased fuel usage, alleged safety benefits against health damage from greater pollution, to name a few—to determine if "the benefits of [the Final Rule] are likely to justify the costs." Office of Mgmt. & Budget, Circular A-4 on Regulatory Analysis 2 (2003) ("Circular A-4"). The agencies then hold up their analysis as "supporting" the Final Rule, 85 Fed. Reg. at

24,613, and repeatedly showcase its various findings, *see, e.g.*, *id.* at 24,178–81 (detailing results at top of preamble).

The analysis's ultimate takeaway is that the Final Rule's costs exceed its benefits. For instance, the agencies project that the rule's GHG standards will result in $22 billion in net costs when analyzed at a 3% discount rate (*i.e.*, the annual rate of converting future impacts to present value). *Id*. at 24,181 tbl.I-6. This is very problematic, given that longstanding executive guidance directs agencies to regulate in a manner that "maximize[s] net benefits." Exec. Order No. 12,866, § 1(a).

To be sure, the agencies find that the GHG standards result in net benefits of $6 billion when assessed at a 7% discount rate. 85 Fed. Reg. at 24,181 tbl.I-6. The rule appears more beneficial at that discount rate because its harms, such as fuel costs and environmental impacts, occur, on average, later in time than its purported benefits, so applying a higher discount rate decreases the costs estimate more than the benefits estimate. In addition, as Coordinating Petitioners argue, the agencies only find net benefits under the higher discount rate due to analytical errors. State Br. 88; Pub. Inter. Br. 32 & n.15. In any event, even if their analysis were accurate, the agencies express no preference for that higher rate, and acknowledge that discount rates of 3% or lower are appropriate for rulemakings like this one that impose long-term climate harm. 85 Fed. Reg. at 24,735.

Even setting aside that concession and assuming that the agencies are agnostic about the proper discount rate, longstanding guidance counsels agencies to assess "the average or the expected value of benefits and costs" when key parameters are uncertain. Circular A-4 at 42. Indeed, when assessing regulatory impacts of the Final Rule that are uncertain, such as alleged effects on purchase prices and fuel economy, the agencies repeatedly use averaging. *See, e.g.*, 85 Fed. Reg. at 24,186 (referring to averaging numerous times). Here, as noted above, there is alleged uncertainty about the direction of net impacts because the agencies' projections show that the rule is net costly at a 3% discount rate, but not under a 7% discount rate. And averaging the results at both discount rates makes clear that the Final Rule is net costly, with costs of the GHG standards that exceed purported benefits by $8 billion.[5]

A closer look at the agencies' analysis reveals the severity of these costs. The agencies project that the Final Rule will increase gasoline consumption by 78 to 84 billion gallons by pushing consumers into less-efficient vehicles, costing the average driver $1,110 to $1,461 in excess fuel costs per vehicle. *Id.* at 24,180–81 tbls.I-5 &

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[5] This figure represents an average of the purported net benefits of the GHG standards at the 3% (-$22 billion) and 7% (+$6 billion) discount rates. 85 Fed. Reg. at 24,181 tbl.I-6. Using this same methodology, the fuel-economy standards purportedly result in net benefits of $1.5 billion. *See id*. at 24,180 tbl.I-5 (reporting net benefits of -$13 billion at 3% discount rate and +$16 billion at 7% rate). But the fact that the average net costs of the GHG standards ($8 billion) greatly exceed, in absolute terms, the purported average net benefits of the fuel-economy standards ($1.5 billion) strongly indicates that the Final Rule is net costly on the whole, and the agencies offer nothing to doubt that conclusion.

I-6.[6] Pollution impacts are similarly jarring, as the agencies project that the rule will result in 867 to 923 million additional metric tons of carbon dioxide emissions, *id.* at 24,176, causing more than $40 billion in total climate harm, Final Rule RIA at 1803 (projecting global climate damages at 3% discount rate), along with increases in local pollution causing "premature deaths, asthma exacerbation, respiratory symptoms, non-fatal heart attacks, and a wide range of other health impacts," 85 Fed. Reg. at 25,112.[7]

In short, the agencies conclude that the Final Rule causes significantly more harm than good. And as detailed below, they fail to provide any rationale that can reasonably justify this net-costly rule.

B. The Agencies Fail to Provide a Reasoned Explanation for Issuing a Net-Costly Rule

Despite projecting that the Final Rule is net costly, the agencies nonetheless claim that the rule is desirable because upfront costs—that is, the "costs to both industry and automotive consumers" of the pre-existing standards—were "too high"

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[6] The agencies project an additional 78 billion gallons of fuel consumption for the GHG standards, 85 Fed. Reg at 24,181 tbl.I-6, and 84 billion for the corporate average fuel economy standards, *id.* at 24,180 tbl.I-5. For the sake of simplicity, this brief reports divergent effects between the two standards as ranges.

[7] As Coordinating Petitioners explain, these emissions and forgone fuel savings projections are likely underestimates. *See, e.g.*, State Br. 51–57 (explaining how agencies overstate the transition to newer, cleaner fleet due to Final Rule's alleged cost savings); *id.* at 91–94 (explaining how agencies overstate the "rebound" effect of pre-existing standards).

and that lowering those costs produces alleged emissions and safety benefits. *Id*. at 24,176. But this explanation overlooks the agencies' own finding that the Final Rule's purported cost savings are outweighed by its economic and social harms. In justifying the Final Rule by those alleged cost savings in spite of that finding, the agencies effectively double-count those benefits, and thereby "inconsistently and opportunistically frame[] the costs and benefits of the rule." *Bus. Roundtable v. Secs. & Exch. Comm'n*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011).

The agencies' approach is irrational. As the Supreme Court has explained, normally "[n]o regulation is 'appropriate' if it does significantly more harm than good." *Michigan*, 576 U.S. at 752 (defining "appropriate" in statutory provision). A "reasonable regulation" thus entails meaningfully considering a rule's "advantages *and* . . . disadvantages." *Id.* at 753. Accordingly, "agencies are ordinarily required to consider the relative costs and benefits of a regulation," *Cooling Water Intake Structure Coal. v. EPA*, 905 F.3d 49, 67 (2d Cir. 2018), and courts strike down regulations when the agency "does not explain why the costs saved were worth the benefits sacrificed," *Pub. Citizen v. Mineta*, 340 F.3d 39, 58 (2d Cir. 2003).

Executive guidance reflects these principles. For instance, the primary Executive Order on regulatory impact analysis, which has been in effect for over twenty-five years, instructs agencies to quantify regulatory impacts and, "unless a

statute requires another regulatory approach," to "adopt a regulation only upon a reasoned determination that the benefits . . . justify its costs." Exec. Order No. 12,866, §§ 1(a), (b)(6). And guidance from the Office of Management and Budget on best practices for cost-benefit analysis, which dates to the George W. Bush administration and was endorsed by the Trump administration,[8] similarly advises agencies to regulate in a manner that "generates the largest net benefits to society." Circular A-4 at 2.

By promulgating the Final Rule despite the conclusion of their own analysis that the rule is net costly, the agencies disregard that guidance. Making matters worse, the principal costs of the Final Rule—namely forgone fuel savings and climate benefits—are of critical "importance under the statute[s]" at issue. *Gresham*, 950 F.3d at 102. For instance, "pollution prevention" is the "primary goal" of the Clean Air Act. 42 U.S.C. § 7401(c). And "the need . . . to conserve energy" is a critical factor in setting standards under NHTSA's national fuel-economy program, 49 U.S.C. § 32902(f), which was enacted as part of the Energy Policy and Conservation Act ("EPCA") to preserve "energy supply" following the 1970s energy crisis, *see* 42 U.S.C. § 6201(2).

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[8] Office of Mgmt. & Budget, Guidance Implementing Executive Order 13771, at 9 (Apr. 5, 2017).

In light of the fact that the Final Rule "does significantly more harm than good" according to their own analysis, *Michigan*, 576 U.S. at 752, the agencies must at minimum provide "a satisfactory explanation" for the rule that duly considers this "relevant factor[]," *State Farm,* 463 U.S. at 42–43. But the agencies repeatedly muddle their own finding that the Final Rule is net costly. And their justification for the rule—which focuses on upfront cost savings—arbitrarily "put[s] a thumb on the scale" by prioritizing these benefits over the rule's larger costs. *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1198 (9th Cir. 2008). To boot, several of the supposed benefits that the agencies claim justify focusing on upfront cost savings do not find support in their own analysis.

1. The Agencies Repeatedly Obfuscate the Bottom-Line Conclusion of Their Own Analysis

The agencies obscure their presentation of the net costs of this rule in several ways, undermining any attempt to acknowledge or meaningfully assess them.

As detailed above, basic arithmetic (averaging) reveals that the agencies' analysis finds the Final Rule to be net costly. But the agencies never perform that arithmetic, nor clearly acknowledge that the rule is net costly on average. In fact, the phrase "net costly" does not appear in the Final Rule.

Instead, the agencies provide a series of explanations that obfuscate the key takeaway of their cost-benefit analysis. First, they emphasize that the rule's net benefits allegedly "straddle zero," 85 Fed. Reg. at 24,176—a reference to the fact

that the rule is purportedly net beneficial at a 7% discount rate but net costly at 3%. *Id.* at 25,172. But "[r]egulators by nature work under conditions of serious uncertainty," and "[t]he mere fact that" that the rule's net impacts are allegedly "uncertain is no justification for disregarding" the cost-benefit analysis's bottom-line findings. *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1219, 1221 (D.C. Cir. 2004) (emphasis omitted). Instead of throwing their hands up, the agencies should have "analyze[d] uncertainty," Circular A-4 at 39, and as detailed above, doing so through averaging, *see id.* at 42—a method the agencies otherwise apply to examine the Final Rule's effects—shows that the rule is net costly.

The agencies next suggest that any net costs that may result from the Final Rule are insignificant because they "are very small relative to" certain regulatory effects such as "reduced retail fuel savings." 85 Fed. Reg. at 24,176. But the mere fact that the Final Rule's average net costs are a small fraction of its "$108.6 billion to $185.1 billion" in forgone fuel savings, *id.*, does not mitigate the fact that the rule likely imposes "significantly more harm than good," *Michigan*, 576 U.S. at 752. Indeed, the analysis's average net cost of $8 billion for the GHG standards is a "gargantuan . . . [cost] on its own terms." *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1032 (5th Cir. 2019). And the presence of that substantial net cost is particularly telling in light of the fact that the cost-benefit analysis repeatedly undervalues the

rule's harms, as otherwise the agencies would find net costs to be even higher. *See, e.g.*, Pub. Inter. Br. 26–37; State Br. 50–95.

Additionally, while the agencies' own analysis shows that more stringent standards produce greater net benefits (when averaging results at the two discount rates), 85 Fed. Reg. at 24,179 tbls.I-3 & I-4, the agencies obscure that finding too, as they claim that all alternatives have "small" net impacts "ranging from $18.4 billion to -$31.1 billion," without further analysis, *id.* at 24,176–77. But executive guidance instructs agencies to "select those approaches that maximize net benefits" when "choosing among alternative regulatory approaches." Exec. Order No. 12,866, § 1(a). The agencies contradict that guidance by analyzing a limited range of alternatives, *see* 85 Fed. Reg. at 24,179 (most stringent alternative assessed is itself a substantial rollback), not meaningfully assessing their own analysis showing that more stringent alternatives are more beneficial, and failing to provide a rational basis to choose the Final Rule's standards over these alternatives.

By obscuring the finding of their own analysis that the Final Rule is net costly—in violation of regulatory precedent and executive guidance instructing agencies to promote and maximize net benefits—the agencies do not "deal with" the bottom-line finding of their cost-benefit analysis "in a meaningful way." *City & Cty. of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 981 F.3d 742, 760 (9th Cir. 2020).

2. The Agencies Arbitrarily Prioritize Upfront Cost Savings Over More Substantial Regulatory Impacts

While muddling their finding that the Final Rule is net costly, the agencies also seek to justify the rule by claiming that "costs to both industry and automotive consumers would have been too high under the [pre-existing] standards," 85 Fed. Reg. at 24,176. But this is not supported by the record and displays a fundamentally imbalanced approach.

As an initial matter, justifying the Final Rule based on "costs to . . . automotive consumers" blatantly ignores the agencies' own conclusion that consumers would have *saved* money under the pre-existing standards—and thus the Final Rule will result in more consumer cost, not less. This is because, as noted above, while the agencies project that the pre-existing standards would have increased the purchase price of new vehicles, their analysis shows it would also have reduced consumer fuel costs by an even greater amount through efficiency improvements. *Id*. at 24,180–81 tbls.I-5 & I-6 (projecting that Final Rule will lower average purchase price by $977–$1,083 while increasing fuel costs by $1,110–$1,461 per vehicle). In total, the Final Rule thus costs the average consumer between $110 and $678, according to the agencies' estimates, *id.*, resulting in at least "$26.1 billion in private losses to consumers" nationwide, *id.* at 24,612.[9]

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[9] The $26.1 billion figure discounts future fuel savings at an annual rate of

Nor are the agencies correct to suggest that most consumers will save much in "upfront purchase prices" through the Final Rule, *id.* at 25,103. This is because, as the agencies acknowledge, the vast majority of vehicle purchases—about 85%—are financed through loans, with an "average finance term length . . . [of] 68 months." *Id.* at 24,706–07. For the vast majority of consumers, therefore, any purchase-price savings from the Final Rule will be spread out over years—during which time they will face increased fuel costs as they drive less-efficient vehicles. The agencies' focus on upfront cost savings effectively disregards the Final Rule's effects on these consumers. By suggesting that all consumers experience upfront cost savings—and not just the 15% of non-financing consumers to whom this rationale is applicable—the agencies "[r]el[y] on facts that [they] know[] are false." *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1075 (D.C. Cir. 2003).

The agencies' assertion that the pre-existing standards produced "costs to . . . industry" that were "too high" to remain in effect, 85 Fed. Reg. at 24,176, also fails to supply a rational justification for the Final Rule. For one, the agencies "assume all regulatory [compliance] costs are passed through" from automakers to consumers. *Id.* at 24,596. In any event, the Supreme Court has recognized that an agency's assessment of "whether it is 'reasonable' to bear a particular cost" should

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7%. 85 Fed. Reg. at 24,612. When using a 3% discount rate, the agencies find that private consumer losses total $78.6–$84.8 billion. Final Rule RIA at 49–50.

"depend on the resulting benefits" rather than some arbitrary threshold. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 225–26 (2009); *see also Competitive Enter. Inst. v. NHTSA*, 956 F.2d 321, 327 (D.C. Cir. 1992) (to set fuel-economy standards, NHTSA must "conduct[] a serious analysis of the data" to determine whether benefits "are worth" the costs). And here, as previously detailed, the agencies' own analysis finds that any costs to manufacturers to comply with the pre-existing standards yielded greater economic and social benefits. Thus, the agencies' own analysis reveals that manufacturer costs to comply with the pre-existing standards were reasonable, not "too high," 85 Fed. Reg. at 24,176.

While the agencies seek to avoid this fundamental fact by asserting that "additional incremental fuel savings, emissions reductions, and environmental benefits of higher standards [are] not significant enough to outweigh the immediate economic costs," *id.* at 25,185, their analysis shows the opposite. In their cost-benefit analysis, the agencies compare future effects like long-term "fuel savings" against more "immediate economic costs," *id.*, by applying a discount rate, which translates future costs and benefits into present-day value so that all effects can be compared on equal footing. Specifically, as noted above, the agencies use discount rates of 3% and 7%, consistent with longstanding White House guidance, Circular A-4 at 33–34, and find that the rule on average produces more costs than benefits, *see* 85 Fed. Reg. at 24,180–81 tbls.I-5 & I-6.

Their insistence that, despite this analysis, future benefits do not actually "outweigh the immediate economic costs" of the pre-existing standards, *id*. at 25,185, can be justified only through the implicit application of discount rates higher than the 3% and 7% figures used in their analysis, since only higher rates could justify the Final Rule's prioritization of upfront price effects over long-term fuel costs and environmental harms. But as explained above, executive guidance has long endorsed the lower 3% and 7% discount rates, and the agencies in fact apply those rates in their analysis without attempting to justify higher rates. Under the agencies' approach, current savings, no matter how small, could justify future harms, no matter how large. Such an approach is obviously irrational. *See Entergy Corp.*, 556 U.S. at 234 (Breyer, J., concurring in part) (recognizing that it is not "reasonable[] . . . to impose massive costs far in excess of any benefit").

Thus, keying in narrowly on upfront cost savings as justification for the Final Rule rather than larger economic and social costs "inconsistently and opportunistically frame[s] the costs and benefits of the rule." *Bus. Roundtable*, 647 F.3d at 1148–49. And as detailed further below, none of the purported benefits from upfront cost savings justifies this one-sided treatment.

3. The Agencies' Attempts to Justify Their Reliance on Upfront Cost Savings Are Unavailing

Although upfront cost savings clearly cannot justify the Final Rule's forgone benefits, the agencies nonetheless espouse several theories in an attempt to

rationalize their conclusion, suggesting at times that consumers hardly value long-term fuel savings, that more stringent standards may prevent automakers from investing in other vehicle attributes, and that the Final Rule's purported safety benefits justify its substantial economic and health costs.

But these scattershot and unsupported theories cannot justify a singular focus on upfront cost savings. In fact, as detailed below, the agencies frequently relegate these theories to alternative "sensitivity analyses" that they acknowledge do not "reflect the[ir] best judgments." Final Rule RIA at 1766. Thus, these three rationales are contradicted by the agencies' own analysis.

a. Suggesting That Consumer Fuel Savings Have Little Value Belies the Agencies' Own Analysis and Longstanding Practice

As one way to justify a focus on upfront cost savings, the agencies suggest that the added "costs of new vehicles" from the pre-existing standards—despite being lower than long-term fuel savings from those standards—nonetheless "would outweigh, for many consumers, the additional fuel costs." 85 Fed. Reg. at 25,171. To make this claim, the agencies suggest that drivers "may have time preferences that cause them to discount" future fuel savings at unusually high rates. *Id.* at 24,612. The agencies suggest, in other words, that consumers barely value long-term fuel savings, and so those forgone savings merit little attention.

But this theory is as baseless as it sounds, and the agencies contradict it in their own analysis. While the agencies hypothesize in the preamble that consumers may discount future fuel savings by as much as 24% annually, *id.* at 24,605, their regulatory analysis rejects that suggestion and instead—consistent with longstanding guidance informed by considerable economic research, *see* Circular A-4 at 33–34—fully values fuel savings and discounts them at the modest rates (3% and 7%) that they apply to other regulatory impacts.[10] Instead, the agencies relegate their theories about consumer valuation to a "sensitivity" analysis that they recognize is not sufficiently robust to provide a "justification" for the rule. Final Rule RIA at 1767. By fully valuing future fuel savings and discounting them at rates recommended by federal guidance, the agencies adopt the same approach that they have consistently used since the Carter administration. *See* Inst. for Pol'y Integrity, Supplemental Comments on Proposed Rule 5–13 (Dec. 21, 2018).[11] Neither now nor

[10] The effects of applying a 24% discount rate are considerable. At a 24% discount rate, a $1,000 savings in five years is worth only $254 in present value. By contrast, at a 3% rate, that same $1,000 savings is worth $859 in present value. In effect, therefore, by suggesting such a high discount rate for consumer fuel savings, the agencies propose to disregard most of the Final Rule's economic harms.

[11] *Available at* https://www.regulations.gov/document?D=NHTSA-2018-0067-12362 (first attachment). Starting in 1972, federal guidance recommended a discount rate of 10% in regulatory analysis. Office of Mgmt. & Budget, Circular A-94 on Discount Rate to Be Used in Evaluating Time-Distributed Costs and Benefits 4 (1972). Recommended discount rates dropped over time, and since 2003's publication of Circular A-4, federal guidance has recommended discount rates of 3% and 7%.

ever, therefore, have the agencies stood behind the conjecture that consumers barely value long-term fuel savings.

Nor should they. While consumers often irrationally undervalue fuel-efficient vehicles, research demonstrates, and the agencies have previously acknowledged, that this is the result of market failures such as a lack of "full information, perfect foresight, [and] perfect competition," not a genuine apathy toward long-term savings. 75 Fed. Reg. 25,324, 25,510 (May 7, 2010). For instance, consumers "might lack . . . a full appreciation of information" about long-term fuel savings, the agencies have explained, or be "especially averse to the short-term losses associated with the higher prices of energy efficient products relative to the uncertain future fuel savings." *Id.* at 25,511. Indeed, a key purpose animating EPCA is that purchasers irrationally undervalue the "energy efficiency of motor vehicles," *see* 42 U.S.C. § 6201(5)—a market failure that the agencies now attempt to assume away, *see* 85 Fed. Reg. at 24,612–13 (failing to recognize that the "fuel efficiency gap exists or constitutes a failure of private markets").

Moreover, the agencies' speculation that consumers may not "place as much weight on fuel savings that will be realized by subsequent owners" fails to justify the "greater weight" they place on "the up-front vehicle cost savings to consumers." *id*. at 25,114. As the agencies elsewhere recognize, initial purchasers directly benefit from the fuel savings of subsequent owners even when they resell the car before the

end of its expected lifespan, because "fuel savings are capitalized into sales prices in the used car market." Final Rule RIA at 1012; *see also* 77 Fed. Reg. at 62,947 (explaining that "the price of used cars" should "increase" if cars are more efficient). And in any event, regardless of whether the initial purchaser is fully compensated, the fuel savings for subsequent owners represents a "benefit[] to society" meriting full consideration. Circular A-4 at 2.

In short, the agencies' speculative suggestion that long-term fuel savings may have little value is belied by economic theory, decades of agency practice, and the agencies' own analysis for the Final Rule. Relying on that explanation to justify the rule evinces "a complete failure to reasonably reflect upon the information contained in the record and grapple with contrary evidence—disregarding entirely the need for reasoned decisionmaking" in a manner that this Court disallows. *Fred Meyer Stores, Inc. v. Nat'l Labor Rel. Bd.*, 865 F.3d 630, 638 (D.C. Cir. 2017).

b. Focusing on Speculative Opportunity Costs Also Contradicts the Agencies' Own Analysis

The agencies also attempt to bolster their emphasis on upfront cost savings by speculating that "other vehicle features . . . may be sacrificed for costly technologies that improve fuel economy," 85 Fed. Reg. at 24,177, positing this "opportunity cost" as a key reason why upfront cost savings may "outweigh, for many consumers, the additional fuel costs" incurred under the Final Rule, *id.* at 25,171. Yet once again, the agencies' analysis does not support this conjecture.

Specifically, the agencies' central analysis assumes the opposite of the agencies' speculation: that investments in fuel savings do *not* come at the expense of other vehicle attributes. *See id.* at 24,612.[12] Evidence that energy-efficiency improvements come at the expense of other vehicle attributes is quite limited, and in fact, as the agencies have recognized, many technologies that improve fuel efficiency also improve other attributes such as engine performance. *See* EPA et al., Draft Technical Assessment Report: Midterm Evaluation of Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards for Model Years 2022–2025, at 4-26 to 4-36 (2016); *see also* Final Rule RIA at 326 (recognizing that "technology can provide both improved fuel economy and performance" and highlighting examples). Indeed, the agencies acknowledge that "extraordinarily efficient models are available in nearly every vehicle class or market segment," 85 Fed. Reg. at 24,612, "including in the luxury and performance segments," *id.* at 24,611—belying the theory that fuel-economy improvements could come at the expense of these other attributes.

The agencies also suggest that improvements in other vehicle attributes could be costless, as they simultaneously tout both the full savings in "upfront purchase prices" from reduced investment in fuel-economy, *id.* at 25,103, and the possibility

[12] Indeed, the agencies hold vehicle attributes "at constant levels" when modeling the Final Rule's effects to "maintain performance neutrality." Final Rule RIA at 303, 318.

that "other vehicle features" may provide "consumer benefits," *id.* at 24,177. But these two assumptions are "internally inconsistent." *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 857 (D.C. Cir. 1987). In reality, insofar as there is any merit to the agencies' occasional suggestion that the Final Rule permits investment in other vehicle attributes, those hypothetical improvements would come at an expense to consumers.

Given the lack of empirical foundation and inconsistency with other analytical assumptions, the agencies relegate their assessment of potential opportunity costs to a "sensitivity analysis," 85 Fed. Reg. at 24,612—that is, one of numerous alternative analyses that "explore[s] a range of potential inputs" for "uncertain" assumptions, Final Rule RIA at 1766. The agencies conduct dozens of sensitivity analyses adjusting different parameters, *id.* at 1767–71 tbl.VII-471, and recognize that "[n]one of these sensitivity cases is more likely than . . . the central analysis," which "represents [the agencies'] best estimate of each individual assumption" regarding the Final Rule's impacts, *id.* at 1767.

In other words, the agencies' "best estimate," *id.*, concludes that the Final Rule does not forgo opportunity costs from hypothetical tradeoffs between vehicle performance and efficiency. Suggesting otherwise in seeking to justify the rule "is inaccurate and thus unreasonable." *Clean Air Council v. Pruitt*, 862 F.3d 1, 10 (D.C. Cir. 2017).

c. Emphasizing Turnover and Safety Benefits Overlooks Larger Economic and Social Costs

Finally, while the agencies repeatedly tout the purported turnover and safety benefits stemming from a reduction in upfront costs, those claims too cannot justify the Final Rule.

The agencies offer as a justification for the rule their theory that through a "reduction in per-vehicle costs to consumers, the standards enhance the ability of the fleet to turn over to newer, cleaner and safer vehicles." 85 Fed. Reg. at 24,176. Yet their analysis still concludes, after accounting for the Final Rule's purported turnover and safety benefits, that those benefits are outweighed by the rule's economic, environmental, and health costs. By disregarding that conclusion and "placing greater weight" on safety and turnover impacts, *id.* at 25,114, the agencies essentially double-count these benefits and thereby improperly "put [their] thumb on the scale" in favor of weaker standards, *Ctr. for Biological Diversity*, 538 F.3d at 1198.

Moreover, the agencies inflate the Final Rule's turnover and safety benefits through numerous methodological errors. For instance, as detailed by the State and Local Government Petitioners, the agencies' attempt to model fleet turnover relies on speculation and produces inconsistent and inexplicable results. State Br. 54–55. Compounding the issue, the agencies' "fleet turnover fatality estimates are exaggerated because they rely on sales projections that are themselves exaggerated"—namely because the agencies assume an unrealistically strong

relationship between price changes and new vehicle sales. *Id*. 55–57. All told, the result is that the Final Rule's turnover and safety benefits are far lower than the agencies project, making the agencies' reliance on these benefits to justify the rule all the more unfounded.

* * *

In sum, the limited explanations that the agencies offer to justify a net-costly rule are unsupported and illogical, and are dismissed by the agencies' own central analysis and relegated to alternative analyses that the agencies recognize are less robust. Because the Final Rule is "not supported by the reasons that the agencies adduce," it is not "logical and rational" and must be struck down. *Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 437 F.3d 75, 77 (D.C. Cir. 2006) (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, this Court should grant the petitions for review of the Coordinating Petitioners.

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Respectfully submitted,

/s/ Richard L. Revesz
Richard L. Revesz
Bethany A. Davis Noll
Max Sarinsky
Jason A. Schwartz (admitted in Colorado)
INSTITUTE FOR POLICY INTEGRITY
139 MacDougal Street, Third Floor
New York, NY 10012
(212) 998-6185
richard.revesz@nyu.edu
Counsel for Amicus Curiae
Institute for Policy Integrity

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing brief contains 6,455 words, as counted by counsel's word processing system, and this complies with the applicable word limit established by the Court.

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Respectfully submitted,

/s/ Richard L. Revesz

Richard L. Revesz
Bethany A. Davis Noll
Max Sarinsky
Jason A. Schwartz (admitted in Colorado)
INSTITUTE FOR POLICY INTEGRITY
139 MacDougal Street, Third Floor
New York, NY 10012
(212) 998-6185
richard.revesz@nyu.edu
Counsel for Amicus Curiae
Institute for Policy Integrity

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 21st day of January 2021, a true and correct copy of the foregoing amicus curiae brief was filed with the Clerk of the United States Court of Appeals for the District of Columbia Circuit via the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

DATED: January 21, 2021

Respectfully submitted,

/s/ Richard L. Revesz

Richard L. Revesz
Bethany A. Davis Noll
Max Sarinsky
Jason A. Schwartz (admitted in Colorado)
INSTITUTE FOR POLICY INTEGRITY
139 MacDougal Street, Third Floor
New York, NY 10012
(212) 998-6185
richard.revesz@nyu.edu
Counsel for Amicus Curiae
Institute for Policy Integrity