

ORAL ARGUMENT NOT YET SCHEDULED
No. 22-1080 (and consolidated cases)

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

NATURAL RESOURCES DEFENSE COUNCIL,
Petitioner,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *et al.*,
Respondents.

On Petition for Review of a Final Rule of the
National Highway Traffic Safety Administration

**INITIAL REPLY BRIEF OF PETITIONER
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS
AND STATE PETITIONERS**

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GLOSSARY

CAFE

Corporate Average Fuel Economy

NHTSA

National Highway Traffic Safety Administration

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress could not have been clearer: in setting fuel-economy standards at the maximum feasible level, NHTSA may not consider the fuel economy of electric vehicles, the fuel economy of plug-in hybrids when operated on electricity, or the availability of compliance credits. Congress prohibited NHTSA from considering these factors because it intended them to be compliance flexibilities, and it recognized that if NHTSA could take them into account in determining the stringency of the standards, they would become effectively mandatory.

NHTSA prefers a different policy. To advance this administration's effort to force electrification of the Nation's vehicle fleet, NHTSA contrives nonexistent exceptions and qualifications to the statutory text. But NHTSA is not free to rewrite the statute to suit its policy preferences. Congress required NHTSA to set fuel-economy standards based on what is achievable by a fleet of internal-combustion-engine vehicles. NHTSA therefore may not set fuel-economy standards that are feasible only if automakers produce electric vehicles. If NHTSA thinks that policy is outdated, the remedy lies with Congress. NHTSA cannot amend the law by administrative fiat.

Nor was NHTSA's blatant and systematic disregard of Congress's constraints harmless. Indeed, NHTSA never claims that it would, much less could, have set the same standards had it confined its analysis, as required, to the level of fuel economy achievable by a fleet of conventional vehicles—without considering electric vehicles and the other compliance flexibilities Congress forbade NHTSA to consider. Nor could the agency credibly say so, because even when (unlawfully) accounting for those compliance flexibilities as NHTSA did here, the agency projected that automakers will not achieve compliance with the standards.

The standards are therefore unlawful and should be vacated.

ARGUMENT

I. NHTSA Unlawfully Considered Prohibited Factors.

NHTSA concedes that it violated Section 32902(h)(2) by considering the fuel economy of plug-in hybrids when operated on electricity. NHTSA Br. 73–74. But it defends its consideration of the fuel economy of electric vehicles and the use of compliance credits. According to NHTSA, Section 32902(h) merely “bars the agency from accounting for the possibility that manufacturers will produce additional” electric vehicles or use compliance credits “as a means of complying with [federal] fuel-economy standards” during the “model years for which NHTSA is setting standards.”

Id. at 53, 77. As a result, NHTSA contends that it may consider the fuel economy of (i) electric vehicles in the “pre-existing fleet,” (ii) electric vehicles that “would be produced even in the absence of NHTSA’s new standards,” such as those produced in response to state zero-emission-vehicle mandates, and even (iii) electric vehicles produced in response to NHTSA’s new standards “in years outside of the regulatory timeframe.”

Id. at 29. NHTSA is wrong. By considering the fuel economy of electric vehicles *at all*—for any of these purposes—NHTSA violated the Act.

A. The Act bars NHTSA from considering the fuel economy of any electric vehicles.

The statutory text is plain: “In carrying out subsections (c), (f), and (g),” NHTSA “*may not consider* the fuel economy of dedicated automobiles.” 49 U.S.C. § 32902(h)(1) (emphasis added).¹ The prohibition is clear and unambiguous, and it contains no qualifications or exceptions. That means that, when setting fuel-economy standards, NHTSA may not consider the fuel economy of electric vehicles in any way, for any purpose, or

¹ NHTSA does not and cannot dispute that in setting the standards at issue here, it was “carrying out” both subsection (f) (requiring NHTSA to consider specified factors “[w]hen deciding maximum feasible average fuel economy”) and subsection (g) (authorizing amendments to standards set under subsection (a)). *See* JA__[87Fed.Reg.25,730].

at any time. If a judge instructs a jury, “In rendering your verdict, you may not consider this testimony,” that does not mean the jury may consider the testimony in some ways but not others, for some reasons but not others, or at some times but not others. It means the jury may not consider the testimony, period—in any way, for any reason, at any time.

So too here. Congress forbade NHTSA to consider the fuel economy of electric vehicles—full stop, no exceptions. Thus, the short answer to all of NHTSA’s contentions is that agencies, like courts, “are not at liberty to create an exception where Congress has declined to do so.” *Freytag v. Comm’r*, 501 U.S. 868, 874 (1991). Section 32902(h)(1) does not just cover “new” or “additional” electric vehicles beyond those in the existing fleet. NHTSA Br. 26, 37. And its unqualified command does not turn on why the automaker decided to produce the vehicles—whether in response to NHTSA’s standards, in response to other legal requirements like state zero-emission-vehicle mandates, in response to consumer demand, or for other reasons. *See id.* at 53. Nor does it turn on whether the vehicles were produced “in years outside of the regulatory timeframe.” *Id.* at 68. Regardless of when or why an electric vehicle was produced, Section 32902(h)(1) is clear: NHTSA may not consider its fuel economy.

For the same reason, it is no answer for NHTSA to say that it “gives effect to the statutory prohibition” by excluding from consideration electric vehicles that automakers would have to produce during the model years at issue to comply with NHTSA’s standards. *Id.* at 42. The problem with NHTSA’s interpretation is not that it gives *no* effect to Section 32902(h)(1), but that it gives the provision only *partial* effect, and not the *full* effect demanded by Congress’s categorical prohibition. *See Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 372 (2007) (rejecting interpretation that “fail[ed] to give full effect to [Congress’s] express limitation”).

Because the statutory text is unambiguous, that should be the end of the matter. *See Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 138 S. Ct. 617, 631 (2018) (when “the plain language of [the statute] is unambiguous, our inquiry begins with the statutory text, and ends there as well”) (internal quotation marks omitted). All of NHTSA’s arguments ultimately founder on this basic point—Section 32902(h)’s text is clear, and NHTSA is not free to “rewrite” the provision by adding qualifications or limitations that do not appear there “to suit its own sense of how the statute should operate.” *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014).

B. NHTSA violated the Act by considering the fuel economy of electric vehicles in the 2020 fleet.

1. NHTSA first contends that Section 32902(h)(1) does not bar it from considering electric vehicles in the existing fleet (here, the 2020 fleet) because the statutory prohibition applies only “when determining what *increases* in the fuel-economy standards automakers can feasibly and practicably achieve.” NHTSA Br. 32 (emphasis added); *see also id.* at 35 (contending that Section 32902(h) “limits NHTSA’s considerations in determining how much automakers can improve fuel economy, not NHTSA’s determination of the pre-existing fuel-economy level”).²

The problem, of course, is the statute does not say that. If Congress had intended to confine Section 32902(h)’s reach in that way, it could easily have said that the statutory constraint applies only after NHTSA has assessed the fuel economy of the existing fleet, when NHTSA is determining whether to impose a more stringent requirement. Indeed, in a neighboring subsection, Congress imposed a similar limitation. *See* 49

² NHTSA faults petitioners for not objecting to its consideration of electric vehicles in the existing fleet during the 2020 rulemaking. NHTSA Br. 34. But that is not a prerequisite to challenging a later rulemaking, and the existing fleet there had far fewer electric vehicles than the existing fleet here. *Compare* 85 Fed. Reg. 24,174, 25,179 (Apr. 30, 2020) (0.6% of 2017 fleet), *with* JA__ [87Fed.Reg.25,924] (2% of 2020 fleet).

U.S.C. § 32902(g)(2) (requiring lead time when NHTSA makes an existing standard “more stringent”). Section 32902(h) contains no such limitations. It applies to every phase of what NHTSA does “[i]n carrying out,” *id.* § 32902(h), its functions of “amending an average fuel economy standard,” *id.* § 32902(g), and “consider[ing]” “technological feasibility,” “economic practicability,” and the other factors NHTSA must consider “[w]hen deciding maximum feasible average fuel economy,” *id.* § 32902(f).

NHTSA contends that because its standard-setting analysis is “forward-looking,” the factors set out in Section 32902(f) are relevant only “in determining how much automakers can *improve* existing fuel economy.” NHTSA Br. 36 (emphasis added). That is a non sequitur, has no basis in the statutory text, and is wrong. The statute requires NHTSA to consider those factors “[w]hen deciding maximum feasible average fuel economy,” 49 U.S.C. § 32902(f), not “when deciding the maximum feasible *improvement to* average fuel economy.” And the maximum feasible level may or may not be higher than the level achieved by the existing fleet. NHTSA cannot simply assume that it will be technologically feasible and economically practicable for manufacturers to achieve a given fuel-economy level or use a particular technology in the future simply because they did so in

the past, despite changed circumstances. *See Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992); JA__[87Fed.Reg.25,820] (acknowledging uncertainty about future availability of electric-vehicle batteries); 51 Fed. Reg. 35,594, 35,594, 35,600–01, 35,608 (Oct. 6, 1986) (decreasing model year 1987–1988 standards “from 27.5 mpg to 26.0 mpg”—a level below what GM and Ford reported achieving in the first half of model year 1986—because, among other things, there had “been a substantial shift in expected consumer demand toward larger cars and larger engines”).

Likewise, the State intervenors are wrong that Section 32902(h) constrains only “the reasons NHTSA may amend existing standards to make them more stringent.” State Intervenors Br. 21. Congress did not say that amendments can only make standards more stringent. To the contrary, by imposing a lead-time requirement only when an amendment makes a standard “more stringent,” 49 U.S.C. § 32902(g)(2), Congress obviously envisioned that amendments could make standards less stringent. Nor does the omission of subsections (a), (b), and (d) from subsection (h) show that “Congress did not constrain the standard-setting process from start to finish.” State Intervenors Br. 12. Congress did not need to cross-reference those provisions in subsection (h) because it provided that

the prohibitions apply in carrying out subsection (f), which governs the standard-setting process for both a new standard and an amendment. Congress's inclusion of subsections (c) and (g) in subsection (h) just confirms that the prohibitions in subsection (h) apply not only to NHTSA's standard-setting analysis, but also to the agency's discretionary decision whether to amend an existing standard. *See id.* at 20.³

2. Unable to ground its interpretation in the statutory text, NHTSA resorts to unabashed policy arguments. But NHTSA's "policy concerns cannot trump the best interpretation of the statutory text." *Patel v. Garland*, 142 S. Ct. 1614, 1627 (2022); *see* Pet. Br. 41–43.

NHTSA principally contends that calculating the existing fuel-economy level "based on a fictive fleet stripped of all battery-electric vehicles" would "ske[w]" the agency's assessment of what "additional improvements" could be achieved by conventional vehicles. NHTSA Br. 38. But there is no impediment to calculating the fuel-economy level achievable by a fleet of conventional vehicles. NHTSA can simply calculate the

³ Even on the State intervenors' reading, NHTSA violated Section 32902(h)(1) because it considered the fuel economy of electric vehicles in deciding that it was appropriate to amend the 2024–2026 standards. *See* JA__[87Fed.Reg.25,721].

level achieved by existing conventional vehicles and assess whether the fuel economy of those vehicles can practicably and feasibly be improved through technology that improves the performance of those vehicles.

What NHTSA really objects to is the practical effect of Congress's scheme. Because the statute forbids NHTSA to account for electric vehicles when setting standards—but allows automakers to count them toward compliance—automakers may be able to meet NHTSA's standards without making all the feasible improvements to their conventional vehicles. They can instead rely on production of electric vehicles as a means of compliance. But that is inherent in Congress's design and will occur even under NHTSA's interpretation. *Compare* JA__ [FRIA.App'x2.p.412], *with* JA__ [FRIA.App'x1.p.412] (showing that when manufacturers voluntarily produce more electric vehicles as a compliance option, they make fewer fuel-saving changes to their conventional vehicles).

NHTSA worries about the degree to which this may happen with increased market penetration of electric vehicles. *See* NHTSA Br. 39. But NHTSA's hypothetical is largely a function of the disparity between the fuel economy of an internal-combustion-engine vehicle and the enhanced fuel economy that Department of Energy regulations impute to electric

vehicles. *See* 88 Fed. Reg. 21,525, 21,530 (Apr. 11, 2023) (acknowledging that the current approach “allows manufacturers to maintain less efficient [internal-combustion-engine] vehicles in their fleet by utilizing a few [electric-vehicle] models to comply.”). The Department is thus proposing to revise its regulations to reduce the disparity in “the period covered by the next round of [NHTSA’s] standards.” *Id.* at 21,534. If NHTSA thinks that does not solve the problem, and that Section 32902(h)(1) is “bad policy or is working in unintended ways” given new circumstances, NHTSA “can ask Congress to change the law.” *Am. Hosp. Ass’n v. Becerra*, 142 S. Ct. 1896, 1905–06 (2022). But “this Court is not the forum” for such arguments. *Id.*

The flip side of the problem is that, under NHTSA’s interpretation, fuel-economy standards are a one-way electric-vehicle ratchet—once manufacturers produce any electric vehicles, they are essentially locked into producing electric vehicles forevermore because NHTSA will set future standards based on the existing level of electric-vehicle penetration. This fundamentally upends Congress’s design, which was to *incentivize* electric vehicles, without *mandating* them. *See* Pet. Br. 33–34. NHTSA itself has previously agreed that Section 32902(h) “reflect[s] Congress’

intent that statutorily-mandated compliance flexibilities remain flexibilities.” 77 Fed. Reg. 62,624, 62,670 n.124 (Oct. 15, 2012); *see also* 85 Fed. Reg. 24,174, 25,150–51 (Apr. 30, 2020) (explaining that if NHTSA “assume[s] manufacturer use of [compliance] flexibilities in setting new standards, higher standards would appear less costly and therefore more feasible, which would thus effectively require manufacturers to use those flexibilities in order to meet higher standards”).

NHTSA now argues that one sentence in a committee report shows that Congress did “not inten[d] to allow manufacturers to relax their fleets that are still fueled with gasoline.” NHTSA Br. 40 (quoting H.R. Rep. No. 100-476, at 12 (1987)). But under any interpretation—NHTSA’s or petitioners’—automakers could potentially “relax” the fuel economy of their conventional vehicles by producing more electric vehicles. The cited statement thus does not accurately reflect the law Congress enacted. Regardless, “when the statutory text is clear, legislative history should not be used to muddy its meaning.” *Carlson v. Postal Regul. Comm’n*, 938 F.3d 337, 350 (D.C. Cir. 2019); *see also Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2496 (2022) (“[T]he text of a law controls over purported legislative intentions unmoored from any statutory text.”).

3. In a related vein, the State intervenors maintain that petitioners' reading will produce results "contrary to common sense" that cannot be squared with Section 32902(b)(4). State Intervenors Br. 14–15. That provision requires domestic passenger cars to meet a separate "[m]inimum standard"—"92 percent of the average fuel economy projected by [NHTSA] for the combined domestic and non-domestic passenger automobile fleets." 49 U.S.C. § 32902(b)(4)(B). Intervenors claim that the average is derived from "*all* vehicles"—electric and conventional alike. State Intervenors Br. 14. So if NHTSA excludes electric vehicles when it sets the maximum-feasible standard, the "*maximum* standard" might "drop below the domestic *minimum* standard." *Id.* But intervenors misunderstand NHTSA's methodology. As the agency explained, the minimum standard "is calculated as 92 percent of the industry-wide average level required under the applicable attribute-based CAFE standard." JA__[87Fed.Reg.25,748]. In other words, the two standards are tethered—minimum derived from the maximum. As a result, removing electric vehicles from NHTSA's maximum-feasible determination would not cause the anomaly that intervenors describe.

C. NHTSA violated the Act by considering the fuel economy of electric vehicles it projected would be produced in response to state zero-emission-vehicle mandates.

For the same reasons, NHTSA cannot justify considering the fuel economy of electric vehicles that it projects manufacturers will add to their fleets after 2020 to comply with state zero-emission-vehicle mandates. NHTSA argues that because manufacturers would produce these electric vehicles anyway, they are outside the scope of Section 32902(h)(1), which NHTSA claims only “bars the agency from accounting for the possibility that manufacturers will produce *additional* [electric vehicles] *as a means of complying* with [NHTSA’s] fuel-economy standards.” NHTSA Br. 53 (emphases added). But this just doubles down on the same core flaw by adding even *more* qualifications that do not appear in the statutory text.

NHTSA claims that “Congress’s intent” was only to prevent NHTSA from setting standards so stringent that they “would require automakers to introduce new dedicated automobiles.” NHTSA Br. 53. But “the best evidence of Congress’s intent is the statutory text.” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012). Section 32902(h)(1) does not

say that NHTSA “may not consider the fuel economy of dedicated automobiles *unless those automobiles will be produced regardless of NHTSA’s fuel-economy standards.*” And NHTSA may not “introduc[e] a limitation not found in the statute.” *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020).

Moreover, if a state electric-vehicle mandate is repealed or struck down, then NHTSA’s standards *will* require automakers to produce additional electric vehicles as a means of complying with the standards. NHTSA offers no reason to believe that Congress—having in the very same statute preempted any state laws “related to” fuel economy, 49 U.S.C. § 32919(a)—would have authorized NHTSA to bake preempted state electric-vehicle mandates into federal fuel-economy standards. *See* Petitioner-Intervenors Br. 14–22. And once electric vehicles have been produced in response to those unlawful mandates, there is no going back—those electric vehicles will now be in the existing fleet that will be included in the “analytical baseline” for future fuel-economy standards.

D. NHTSA violated the Act by considering the use of compliance credits and the fuel economy of electric vehicles produced outside model years 2024–2026.

Finally, NHTSA cannot justify its consideration of compliance credits and electric vehicles produced outside model years 2024–2026 in response to NHTSA’s new standards. These electric vehicles are additional electric vehicles produced as a means of complying with NHTSA’s standards. That they are produced outside the model years for which NHTSA is setting standards does not remove them from Section 32902(h)(1), which prohibits NHTSA from considering the fuel economy of any electric vehicle—regardless of when it is produced.

NHTSA offers no textual justification for its consideration of forbidden factors “outside of the regulatory timeframe.” NHTSA Br. 68. It simply argues that it had good reasons for doing so. NHTSA’s brief argues that the agency allowed the CAFE model to add electric vehicles in model year 2023 just “to obtain a more accurate understanding of the state of the fleet entering model year 2024.” *Id.* at 66. And it claims that NHTSA allowed the model to add electric vehicles and use compliance credits in model years 2027–2029 only “to more accurately model how automakers

could further change their fleets after achieving compliance with the revised fuel-economy standards in model years 2024 to 2026.” *Id.* at 67. Those justifications do not help NHTSA get around the plain text.

In any event, those are not the reasons NHTSA gave in the rule. The rule said that the model was allowed to add electric vehicles in model year 2023 because “manufacturers could potentially make changes as early as that model year to affect future compliance positions (*i.e.*, multi-year planning) for the model years being regulated” in this rulemaking. JA__[87Fed.Reg.25,916]. And NHTSA allowed the model “to continue working out compliance solutions for the regulated model years for three model years after the last regulated model year, in recognition of the fact that manufacturers do not comply perfectly with CAFE standards in each model year.” JA__.n.30[87Fed.Reg.25,735.n.30]. That is, NHTSA’s model simulated how manufacturers would add electric vehicles in model years 2023 and 2027–2029 *to comply with the standards NHTSA was adopting for model years 2024–2026*. That was plainly unlawful.

E. NHTSA's reading is not entitled to deference.

As a last-ditch effort, NHTSA seeks *Chevron* deference. NHTSA Br. 48. But no deference is warranted because the “traditional tools of statutory construction” settle any doubt about Section 32902(h). *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

Chevron also does not apply here because the rule implicates a major question requiring “clear congressional authorization.” *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022); see Pet. Br. 26, 43–44. NHTSA has no clear congressional authorization to force electrification of the Nation’s vehicle fleet by setting fuel-economy standards whose feasibility depends on an ever-increasing degree of electric-vehicle penetration.⁴

II. NHTSA's Errors Cannot Be Dismissed As Harmless.

NHTSA’s violations of Section 32902(h) are “not some minor misstatement of law or fact that can be passed over as an unfortunate lapse” with no impact on the adoption of the standards. *Consol. Edison Co. of*

⁴ Petitioners preserve for Supreme Court review the argument that *Chevron* should be limited or overruled. See Petition for Writ of Certiorari, *Loper Bright Enters. v. Raimondo*, No. 22-451 (U.S. Nov. 10, 2022) (cert. granted).

N.Y., Inc. v. FERC, 823 F. 2d 630, 641–42 (D.C. Cir. 1987). NHTSA’s improper consideration of electric vehicles, plug-in hybrids, and compliance credits was integral to the standards. NHTSA’s modeling showed that to comply with the standards, manufacturers would need to produce increasing numbers of electric vehicles and plug-in hybrids, and these vehicles would comprise at least 10 percent of the industry-wide fleet by model year 2029.⁵ As amici Auto Innovators explain, without the high imputed fuel economy of electric vehicles and the electric-drive portion of plug-in hybrids, the average fuel economy of NHTSA’s compliance fleet would be reduced by 3.4 miles per gallon. Auto Innovators Br. 28–30.

NHTSA does not dispute Auto Innovators’ calculations. Nor does it cite any record evidence to refute petitioners’ and Auto Innovators’ showing that the annual increases required by NHTSA’s standards cannot feasibly be achieved by conventional vehicles. *See id.* 30–32; Pet. Br. 47–48. Indeed, NHTSA admits that the industry is not projected to reach the level of fuel economy required by the model year 2026 standards until

⁵ *See* Pet. Br. 14–20; JA__[87Fed.Reg.25,922] (Table V-30); JA__[87Fed.Reg.25,924] (Table V-36).

model year 2027 (when the model allows manufacturers to use compliance credits and electric vehicles as compliance options).⁶

NHTSA tries to minimize the impact of its improper consideration of electric vehicles and plug-in hybrids by focusing on its treatment of subgroups of these vehicles and plucking select data from its sensitivity analysis to argue that the consideration of each subgroup, in isolation, could not have affected the agency's conclusion. NHTSA's argument fails. Even if analyzed in this manner, the sensitivity analysis does not establish that NHTSA's errors were harmless.

More fundamentally, even if each error in isolation could be deemed harmless, NHTSA never claims that its errors were harmless in combination. Nor could it credibly do so. Thus, the rule as promulgated cannot

⁶ NHTSA claims this does not affect the feasibility of the standards—just that it is more cost-effective for manufacturers to pay civil penalties than to comply. But that argument turns the statute on its head. Civil money penalties are not a way to comply with the standard. They are a penalty imposed on “a manufacturer that *violates* a standard prescribed for a model year.” 49 U.S.C. § 32912(b) (emphasis added). And when so many manufacturers find it more “cost effective” to pay penalties that the “fleet-wide average fuel economy in model year 2026 will fall short of the standards by 0.7 miles per gallon,” NHTSA Br. 69, it cannot reasonably be said that the standard is “feasible” (or “economic[ally] practicab[le]”) for manufacturers to attain “in that model year,” 49 U.S.C. § 32902(a), (f).

stand. NHTSA cannot cry harmless error and free itself from congressional constraints. *See Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n*, 896 F.3d 520, 535 (D.C. Cir. 2018) (harmless-error analysis cannot excuse agency action that effects “a wholesale rewrite” of the statute).

A. NHTSA’s consideration of the fuel economy of electric vehicles and compliance credits was not harmless.

NHTSA’s brief seeks to justify the agency’s improper consideration of electric vehicles and compliance credits by separately analyzing the CAFE model’s consideration of (i) electric vehicles in the 2020 fleet; (ii) electric vehicles needed to comply with the state zero-emission-vehicle mandates; and (iii) the use of compliance credits and electric vehicles produced in model year 2023 or model years 2027–2029 to comply with NHTSA’s standards. Each was integral to NHTSA’s analysis, and none can be dismissed as harmless.

1. NHTSA’s consideration of the electric vehicles in the 2020 fleet was not harmless.

Notably, NHTSA does not even argue that its consideration of the high imputed fuel economy of electric vehicles in the 2020 fleet was harmless. Nor could NHTSA have made such an argument.

This Court applies the “harmless error rule consistent with *SEC v. Chenery Corp.*,” and thus generally will not “affirm an agency decision on

a ground other than that relied upon by the agency.” *Prohibition Juice Co. v. FDA*, 45 F. 4th 8, 24 (D.C. Cir. 2022). It is only “when there is not the slightest uncertainty as to the outcome of a proceeding on remand” that a court can affirm an agency decision that failed to do the analysis required by the statute. *Id.* Here, there is substantial uncertainty that NHTSA could have justified the standards without improperly considering the electric vehicles in the 2020 fleet. The Final Regulatory Impact Analysis issued with the rule does not analyze how the results would change if these electric vehicles were removed from the modeling. And NHTSA made no statement in the rule that it would have issued the same standards if it had not considered those electric vehicles. Accordingly, it is far from “certain” that NHTSA “would have adopted” the standards “even absent the flawed” analysis. *Nat’l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006).

2. NHTSA’s consideration of electric vehicles manufacturers will produce to comply with state zero-emission-vehicle mandates was not harmless.

NHTSA does argue that it would have reached the same result even if it had not considered the electric vehicles manufacturers will produce to comply with state zero-emission-vehicle mandates. NHTSA cites a

“sensitivity analysis” indicating that if “NHTSA did not account for state zero-emission vehicle programs, the incremental average cost of a model year 2029 vehicle was \$1,133,” compared to \$1,087 in the “main analysis” used to set the standards. NHTSA Br. 56–58. That sensitivity analysis—which is keyed to the price of vehicles in model year 2029—does not establish that NHTSA could have justified the standards for model years 2024–2026 without including the state-mandated electric vehicles.⁷

The statute requires NHTSA to set standards for each “model year” at “the maximum feasible average fuel economy level” the agency “decides the manufacturers can achieve in that model year,” 49 U.S.C. § 32902(a), considering (among other things) “technological feasibility” and “economic practicability,” *id.* § 32902(f); *see also id.* § 32902(c), (g) (same criteria for amendments). A sensitivity analysis showing how much the average cost of a vehicle would increase in *model year 2029* without considering state-mandated electric vehicles proves nothing about whether the standards would be feasible in *model years 2024, 2025,*

⁷ The rule reports the results of the sensitivity analysis “[a]s documented in the [Final Regulatory Impact Analysis],” JA__[87Fed.Reg.25,899], which reports only the results for model year 2029 vehicles.

and 2026 without those electric vehicles. As to those years, NHTSA is notably silent. NHTSA never found that the (unspecified) cost increases in those model years were “small” and “not dispositive.” NHTSA Br. 58.

NHTSA also made no statement in the rule that it would be technologically feasible and economically practicable for manufacturers to comply with the standards in model years 2024–2026 without considering the fuel economy of the state-mandated electric vehicles. Nor did the sensitivity analysis reported in the Final Regulatory Impact Analysis identify the alternative technologies NHTSA thinks manufacturers would use to comply with the standards in model years 2024, 2025, and 2026, or what average fuel economy manufacturers would achieve without those electric vehicles. Here too, the sensitivity analysis reported only how the technologies would differ in *model year 2029*. JA__–__[FRIA.pp.230–34] (Table 7-4). Thus, the model may have compensated (at least in part) for the removal of electric vehicles that had been added to comply with the state zero-emission-vehicle mandates by adding more electric vehicles in model years 2023 or 2027–2029. See JA__[87Fed.Reg.25,922]. This simply trades one violation of Section 32902(h)(1) for another.

Beyond that, the sensitivity analysis showed that the CAFE model compensated for the loss of electric vehicles by increasing the number of plug-in hybrids and strong hybrids in the model year 2029 fleet.⁸ JA__[FRIA.p.250], JA__[FRIA.p.233]. Insofar as the sensitivity analysis relied on additional plug-in hybrids, it simply increased the magnitude of NHTSA's violation of Section 32902(h)(2), because, as NHTSA now concedes, the model improperly considered the imputed fuel economy of the electric-drive portion of plug-in hybrid vehicles. NHTSA Br. 73–74. And insofar as the sensitivity analysis relied on more strong hybrids, NHTSA failed to explain how that could feasibly be done in model years 2024, 2025, and 2026. *See* JA__[87Fed.Reg.25,974] (acknowledging that it may be “challenging” for manufacturers to produce more strong hybrids during the rulemaking timeframe).

3. NHTSA's consideration of compliance credits and electric vehicles produced in model year 2023 and model years 2027–2029 was not harmless.

NHTSA also seeks to downplay the magnitude of its improper consideration of compliance credits and electric vehicles produced in model

⁸ A strong hybrid runs on gasoline and a battery that captures energy during deceleration or braking. JA__[87.Fed.Reg.25,808].

year 2023 and model years 2027–2029. It cites a sensitivity analysis that showed that if the model is not permitted to add electric vehicles or use compliance credits in model years 2023–2029 (except as necessary to comply with state zero-emission-vehicle mandates), the average price of a model year 2026 vehicle would increase from \$1,260 to \$1,371. NHTSA Br. 71. But although NHTSA reported these numbers in the rule, it made no corresponding finding that the cost difference was insignificant and would not have affected its analysis. *See* Pet. Br. 65–66. Thus, the error cannot be deemed harmless if there is even “the slightest uncertainty” as to whether it made a difference. *Prohibition Juice*, 45 F.4th at 24.

NHTSA nevertheless argues that it can meet this standard because it purportedly found that a larger price increase of \$1,574 in model year 2026 was “only ‘slightly beyond the level of economic practicability.’” NHTSA Br. 72. But NHTSA did not specify where the line fell between an acceptable increase of \$1,260 and an unacceptable increase of \$1,574. Moreover, the rule did not say a \$1,574 price increase is “slightly beyond the level of economic practicability.” It said “Alternative 3” is “slightly beyond the level of economic practicability.” JA__[87Fed.Reg.26,003]. NHTSA reported price increases for multiple years under Alternative 3.

And when discussing the economic practicability of those price increases, NHTSA cited not the \$1,574 figure for model year 2026 vehicles, but “the additional \$1,407 per vehicle estimated to be required under Alternative 3” in model year 2029. JA__[87Fed.Reg.25,971]. A price increase of \$1,371 is just slightly less than \$1,407.

Further, average vehicle price industry-wide is not the only relevant consideration. When the rule addressed the impact on vehicle prices in model years 2024–2026, it analyzed data beyond the impact on the industry-wide average price of a model year 2026 vehicle. To give just two examples: NHTSA analyzed how the price increases “vary by manufacturer, by year, and by fleet,” with special attention to how often average costs “increase beyond \$2,000 per vehicle.” JA__[87Fed.Reg.26,016]. It also analyzed the length of the “payback periods” (how long it would take for a purchaser to recover the increased costs of the fuel-saving technologies through reduced fuel costs) for each model year to assess consumers’ willingness to pay the increased costs. JA__[87Fed.Reg.25,972], JA__[87Fed.Reg.26,014]. NHTSA never claims that these analyses would have been unaffected if it had followed the statute.

B. NHTSA's consideration of plug-in hybrids was not harmless.

NHTSA now admits it erred by considering the fuel economy of plug-in hybrids when operated on electricity. NHTSA Br. 73–74. It nevertheless argues that the error was harmless because its sensitivity analysis showed that when the model treated plug-in hybrids as operating only on gasoline in model years 2024–2026, the average cost of a vehicle in model year 2029 declined by just \$15. *Id.* at 75. That argument does not withstand scrutiny.

First, the sensitivity analysis does not correct for the full extent of NHTSA's violation of Section 32902(h)(2). The analysis blocked the model from considering the enhanced fuel economy of plug-in hybrids when running on electricity only in model years 2024–2026, while continuing to consider their enhanced fuel economy for other model years. NHTSA admits this limitation, but argues that the analysis corrects for NHTSA's error because Section 32902(h)(2) bars consideration of the enhanced fuel economy only in model years 2024–2026. *See id.* at 76–77. That is an erroneous view of the statute. *See supra*, Part I.D.

Second, the sensitivity analysis did not block the model from considering electric vehicles. The model thus compensated for the “significant penetration[s]” of plug-in hybrids that it found necessary to meet the standards in model years 2024–2026, JA__[87Fed.Reg.25,808], by increasing the number of electric vehicles, JA__[87Fed.Reg.25,936]. But that again just trades one violation for another. *See* Pet. Br. 61.

III. NHTSA’s Errors Warrant Vacatur.

In a final bid to save its unlawful action, NHTSA asks this Court to remand without vacatur if it grants the petitions. NHTSA Br. 78. But “[v]acatur is the normal remedy under the APA,” *Long Island Power Auth. v. FERC*, 27 F.4th 705, 717 (D.C. Cir. 2022), and this case warrants no exception. Both of the relevant factors—(i) the “seriousness of the order’s deficiencies” and (ii) the likelihood of “disruptive consequences”—favor vacatur here. *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993).⁹

⁹ Petitioners preserve for further review the argument that 5 U.S.C. § 706 does not permit remand without vacatur.

A. NHTSA is unlikely to salvage the rule on remand.

As petitioners have shown, NHTSA repeatedly flouted all three of Congress’s clear commands in Section 32902(h). Those are serious errors—and the agency cannot just fix them by “shoring up its reasoning on remand.” *NRDC v. EPA*, 489 F.3d 1364, 1374 (D.C. Cir. 2007). In fact, NHTSA’s “errors could not be more serious insofar as it acted unlawfully, which is more than sufficient reason to vacate the rul[e].” *Id.*

NHTSA retorts that petitioners challenge only the “factors” it “considered”—not its “authority” to set “standards at the levels set in the final rule.” NHTSA Br. 79. But the two cannot be divorced: whether NHTSA has authority to set standards at those levels depends on whether the standards can be justified without considering forbidden factors. Regardless, the errors are serious because NHTSA “trespass[ed] beyond the bounds of its statutory authority by taking [forbidden] factors into account.” *Murray Energy Corp. v. EPA*, 936 F.3d 597, 623 (D.C. Cir. 2019).

Nor do NHTSA’s sensitivity analyses save the day. Again: those analyses do not show that the standards would be technologically feasible and economically practicable in model years 2024–2026 without the use of electric vehicles, plug-in hybrids, and compliance credits. Instead, they

simply project how the average cost of a vehicle would change in model year 2029, had NHTSA not accounted for various subsets of electric vehicles and plug-in hybrids that it considered when setting the 2024–2026 standards. Tellingly, NHTSA addresses its errors only piecemeal and has never claimed that its standards would pass muster if the agency had fully abided by Section 32902(h).

B. Any disruption would be minimal.

NHTSA is also wrong that “significant disruptive consequences” counsel remand without vacatur. NHTSA Br. 80. For starters, potential disruption matters “only insofar as the agency may be able to rehabilitate its rationale for the regulation.” *Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009). As just shown, that is unlikely here.

In all events, the sky would not fall. The “quintessential disruptive consequence arises when an agency cannot easily unravel a past transaction in order to impose a new outcome.” *Am. Great Lakes Ports Ass’n v. Schultz*, 962 F.3d 510, 519 (D.C. Cir. 2020). But there is no omelet to unscramble here, and it is hardly “too late to reverse course.” *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110–11 (D.C. Cir. 2014).

Far from it: NHTSA's amended standards have not yet taken effect, and they would not replace the current standards until model year 2024. In the meantime, vacatur would merely leave the current standards unamended, with fuel economy increasing by 1.5 percent per year through model year 2026. JA__[87Fed.Reg.25,743]. NHTSA might prefer a more aggressive policy, but preserving the status quo is the opposite of disruption. *See Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 179 (D.C. Cir. 2010) (no disruption when rule "ha[d] not yet gone into effect" and existing regulations would "remain in place").

Even if this Court vacated after NHTSA's amended standards took effect, neither the agency nor the industry would face undue disruption. As NHTSA itself recognizes, vacating the amended standards would "*automatically* resurrect" the current standards, NHTSA Br. 81, so the agency would not have to fill the gap, *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019). Meanwhile, automakers could continue to sell the vehicles they planned for model years 2024–2026, since a fleet designed to comply with NHTSA's amended standards would also meet the current standards.

Nor can NHTSA rely on “the environmental values covered by [its] rule.” NHTSA Br. 81. NHTSA’s statutory mandate concerns energy conservation, not reducing greenhouse-gas emissions. Regardless, NHTSA identifies no dire harms that would result from maintaining status quo gasoline consumption in the three years covered by its rule. *Id.*

On the other hand, “remanding without vacatur under these circumstances would give [NHTSA] incentive to allow ‘[promulgating] first and conducting comprehensive reviews later.’” *Env’t Def. Fund v. FERC*, 2 F. 4th 953, 976–77 (D.C. Cir. 2021) (alterations omitted) (quoting *Standing Rock Sioux Tribe v. Army Corps of Eng’rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021)). If NHTSA could amend fuel-economy standards based on consideration of prohibited factors and then plead “disruptive consequences” to ward off vacatur, the agency would have a free pass to flout the Act. This Court should not “encourage such an approach.” *Id.*

CONCLUSION

This Court should grant the petitions and vacate the rule.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

This brief complies with the type-volume requirements of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,481 words, not counting the parts excluded by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

/s/ Eric D. McArthur

CERTIFICATE OF SERVICE

I certify that on May 5, 2023, I electronically filed the foregoing brief with the Clerk of the Court using the CM/ECF System, which will send notice to all registered CM/ECF users.

/s/ Eric D. McArthur