

ORAL ARGUMENT NOT YET SCHEDULED

Nos. 19-1230, 19-1239, 19-1241, 19-1242, 19-1243, 19-1245, 19-1246, 19-1249,
20-1175, 20-1178

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

UNION OF CONCERNED SCIENTISTS, et al.,
Petitioners,

v.

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

AUTOMOTIVE REGULATORY COUNCIL, INC., et al.,
Intervenors.

On Petitions for Review of Final Actions of the Environmental Protection Agency
and National Highway Traffic Safety Administration

**BRIEF OF *AMICUS CURIAE* EDISON ELECTRIC INSTITUTE
IN SUPPORT OF PETITIONERS**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* the Edison Electric Institute (“EEI”) certifies that:

(A) Parties and Amici

Except for the following *amici curiae*, all parties, intervenors, and *amici* appearing in this Court are listed in the Brief of State and Local Government Petitioners and Public Interest Petitioners:

EEI is hereby filing a brief as *amicus curiae* in support of Petitioners.

The following have filed a notice of intent to appear as *amici curiae* in support of Petitioners or neither party: Climate Science and Economics Professors David Dickinson Ackerly, Maximilian Auffhammer, Allen Goldstein, John Harte, David Sedlak, Scott Lewis Stephens, and LeRoy Westerling; the National Parks Conservation Association and the Coalition to Protect America’s National Parks; Professor Leah M. Litman; the Institute for Policy Integrity at New York University School of Law; the National League of Cities, the U.S. Conference of Mayors, and the International Municipal Lawyers Association; the American Thoracic Society, American Lung Association, American Medical Association, American Public Health Association, and California Medical Association; Thomas C. Jorling, Michael P. Walsh, and Margo T. Oge; and the National Association of Clean Air Agencies.

(B) Rulings Under Review

Reference to the agency actions at issue appears in the Brief of State and Local Government Petitioners and Public Interest Petitioners.

(C) Related Cases

Related cases are discussed in the Brief of State and Local Government Petitioners and Public Interest Petitioners.

Date: July 6, 2020

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CORPORATE DISCLOSURE STATEMENT

The Edison Electric Institute (“EEI”) is an incorporated, not-for-profit trade association representing all U.S. investor-owned electric companies. EEI has no parent corporation and no publicly held company has 10% or greater ownership in EEI.

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**CERTIFICATE OF COUNSEL REGARDING AUTHORITY TO FILE AND
SEPARATE BRIEFING**

On May 26, 2020, all parties in these consolidated cases filed a notice stating that they “have consented to the filing of amicus briefs in support of any party, or no party, provided amici comply with” applicable rules and orders of this Court. On July 6, 2020, *amicus curiae* Edison Electric Institute (“EEI”) filed a written representation of the parties’ consent pursuant to D.C. Cir. R. 29(b).¹

Pursuant to D.C. Cir. R. 29(d), counsel for *amicus curiae* hereby certify that no other non-government *amicus* brief of which they are aware focuses on all of the subjects addressed herein, i.e., the impact that the action at issue will have on state efforts to control criteria air pollutants, the additional emissions reduction burden that will necessarily fall on stationary sources under the action, and the agencies’ failure to consider those impacts. As the association representing all U.S. investor-owned electric companies, EEI is well suited to provide the Court important context on these subjects that will assist it in resolving this case. EEI has endeavored to avoid duplication of Petitioners’ briefing.

¹ Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

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GLOSSARY

As used herein,

Action means The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310 (Sept. 27, 2019).

EEI means the Edison Electric Institute.

EEI Comment means the comment EEI submitted to the National Highway Traffic Safety Administration as part of the notice and comment process for the challenged agency actions, titled Comments of the Edison Electric Institute on the National Highway Traffic Safety Administration and Environmental Protection Agency's Safer Affordable Fuel-Efficient Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks (AR-10336 & R-6495).

EIS means Environmental Impact Statement.

EPA means the Environmental Protection Agency.

EPCA means the Energy Policy and Conservation Act.

GHG means greenhouse gas.

NAAQS means National Ambient Air Quality Standards.

NHTSA means the National Highway Traffic Safety Administration.

NO_x means nitrogen oxides.

Primary Pet'rs Br. means the Proof Brief of State and Local Government Petitioners and Public Interest Petitioners filed in this matter on June 26, 2020.

SIP means State Implementation Plan.

SO₂ means sulfur dioxide.

States' Compl. means First Am. & Supplemented Compl. for Declaratory & Injunctive Relief, *California v. Chao*, No. 1:19-cv-02826-KBJ (D.D.C. Oct. 15, 2019), ECF No. 37.

VOCs means volatile organic compounds.

ZEV means zero-emission vehicle.

STATUTES AND REGULATIONS

Relevant statutes and regulations are contained in the addendum to the Brief of State and Local Government Petitioners and Public Interest Petitioners (“Primary Pet’rs Br.”).

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Edison Electric Institute (“EEI”) is an association that represents all U.S. investor-owned electric companies.² EEI’s members provide electricity for about 220 million Americans and operate in all 50 states and the District of Columbia. An important function of EEI is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. EEI regularly files *amicus curiae* briefs in cases raising issues of concern to its members, including cases involving the Clean Air Act.

As the trade association representing all investor-owned electric companies in the United States, EEI has a significant interest in, and can offer a unique perspective on, the issues presented in this case. Petitioners in these consolidated appeals challenge a September 2019 joint final action by the Department of Transportation’s National Highway Traffic Safety Administration (“NHTSA”) and the

² Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

Environmental Protection Agency (“EPA”). *See* The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310 (Sept. 27, 2019) (“Action”). In the Action, NHTSA adopts an expansive interpretation of the scope of preemption of state regulations under the Energy Policy and Conservation Act (“EPCA”).³ *See id.* at 51,361–63. As discussed in more detail below, NHTSA’s final action regarding EPCA preemption will hamstring state efforts to regulate automobile emissions and therefore compel states to mandate further emissions reductions from a sector—electric generating stations—that has already made *significant* cuts to air emissions.⁴ EEI’s members have an interest in

³ As part of the Action, EPA finalized separate actions under the Clean Air Act, including withdrawing the waiver for California’s greenhouse-gas and zero-emission-vehicle standards that EPA had previously granted under section 209(b) of the Act. *See* 84 Fed. Reg. at 51,328–52. This brief focuses primarily on NHTSA’s final action regarding EPCA preemption. After finalizing the Action, NHTSA and EPA issued a separate final action reducing the stringency of motor-vehicle carbon-dioxide and fuel-economy standards for model years 2021 to 2026. *See* 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). Petitions for review of that action have been consolidated in this Court under the lead case *Competitive Enterprise Institute v. NHTSA*, No. 20-1145.

⁴ EEI submitted comments on the proposal that preceded NHTSA’s final action. In those comments, EEI objected to NHTSA’s proposed preemption determination. EEI’s principal comment can be found at AR-10336 & R-6495, Comments of the Edison Electric Institute on the National Highway Traffic Safety Administration and Environmental Protection Agency’s Safer Affordable Fuel-Efficient Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks at 21–24 (“EEI Comment”).

ensuring that the nation's emissions-reduction burden is fairly shared among the responsible sectors, consistent with congressional intent.

SUMMARY OF ARGUMENT

In The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310 (Sept. 27, 2019), NHTSA codifies a new interpretation of the scope of preemption of state regulations under EPCA—over four decades after Congress enacted EPCA's preemption provision. *See* 84 Fed. Reg. at 51,361–63. Although courts have construed EPCA's preemption provision narrowly, *see Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007), the Action interprets EPCA preemption “broadly,” 84 Fed. Reg. at 51,313, taking the position that the statute preempts all state regulations having a “direct or substantial effect of regulating or prohibiting tailpipe carbon dioxide emissions from automobiles or automobile fuel economy,” *id.* at 51,362.

Although the Action is ostensibly directed at state regulations of carbon-dioxide emissions, a ruling by this Court upholding the Action will likely be used to argue that there is, in fact, no limiting principle on EPCA preemption of state motor-vehicle emissions regulations. While such an expansive view is not directly presented in this case, such an argument could be used—however erroneously—to

attack the entirety of California's authority over motor-vehicle emissions, which Congress expressly granted to California in the Clean Air Act. *See* 42 U.S.C. § 7543(a)-(b). Exercising that authority, California has imposed limits on greenhouse-gas ("GHG") emissions from motor vehicles and mandated that automakers market more zero-emission vehicles ("ZEVs"). *See* 84 Fed. Reg. at 51,311–28. California's GHG and ZEV standards do not only result in reductions of GHG emissions; they also reduce motor vehicles' contribution to the accumulation of "criteria pollutants" subject to National Ambient Air Quality Standards ("NAAQS"), which states are required to implement under the Clean Air Act.⁵ California also imposes other, direct restrictions on motor vehicles' criteria-pollutant emissions. *See id.* at 51,329 n.209. Numerous states have adopted California's standards under section 177 of the Clean Air Act, 42 U.S.C. § 7507, to make progress toward attaining compliance with the NAAQS, as required under the Clean Air Act. While the Action's preamble seeks to narrow the scope of preemption to California's GHG and ZEV regulations, *see, e.g.*, 84 Fed. Reg. at 51,356, a ruling in NHTSA's favor here might well be viewed, however implausibly, as an invitation to future Administrations and parties, relying on the same logic

⁵ The criteria pollutants subject to NAAQS are particulate matter, sulfur dioxide ("SO₂"), ozone, nitrogen dioxide, carbon monoxide, and lead. *See* 40 C.F.R. pt. 50.

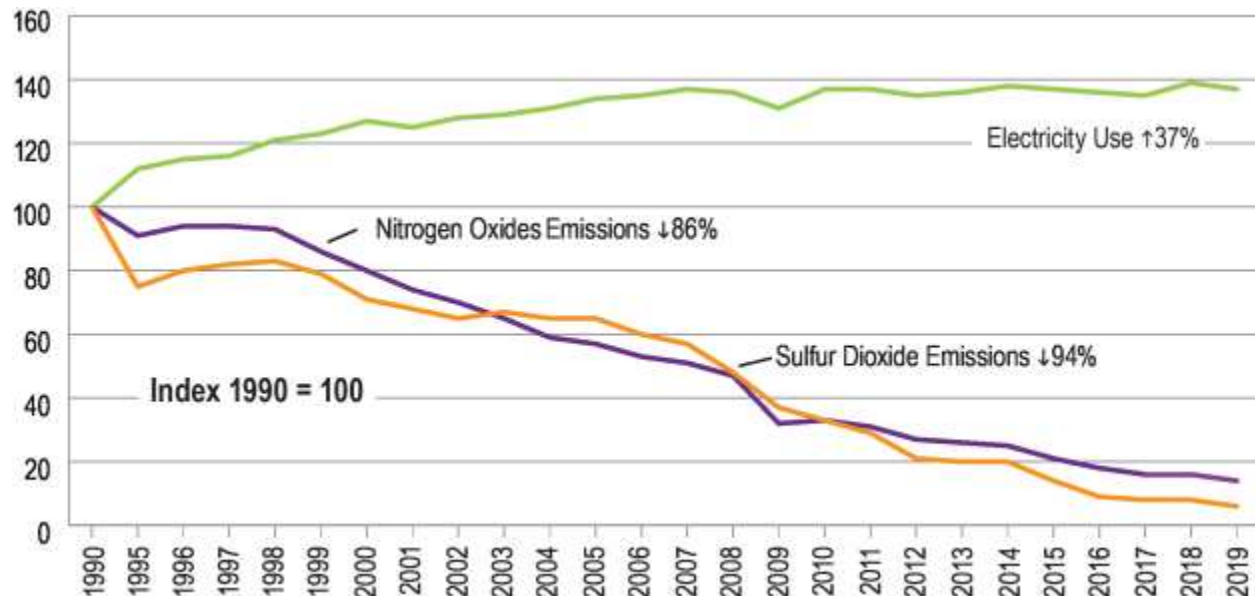
NHTSA uses here and based on the precedent set in this case, to attempt to preempt all of California's vehicle emissions regulations.

Even if NHTSA's Action only extends as far as it explicitly purports to, it prevents California from promulgating its GHG and ZEV standards, and prevents other states from adopting those standards. By doing so, the Action deprives states of an important tool for achieving the emissions reductions required to attain NAAQS compliance. Automobiles produce massive amounts of criteria pollutants subject to the NAAQS; given this fact, most feasible methods of reducing these emissions are likely to have a "direct or substantial effect of regulating or prohibiting tailpipe carbon dioxide emissions from automobiles or automobile fuel economy," thus triggering preemption under NHTSA's Action. *Id.* at 51,362. Critically, the most effective mechanism for reducing aggregate criteria-pollutant emissions from automobiles is to require that a percentage of new vehicles not produce any tailpipe emissions—an approach that NHTSA's Action expressly preempts. *See id.* at 51,314.

As a result, the Action will compel states to shift the emissions reductions they need for NAAQS attainment from automobiles to stationary sources, including electric power generators. The power sector, however, has already dramatically reduced its emissions. As Figure 1 below shows, the power sector has reduced

emissions of nitrogen oxides (“NO_x”) by 86% since 1990, despite a 37% increase in electricity demand.⁶

Figure 1: Power Plant Emissions (1990–2019)⁷



The motor-vehicle sector has come nowhere close to achieving similar reductions, and is now the largest anthropogenic source of NO_x.⁸ As Figure 2 below shows, the power sector’s overall share of NO_x emissions has decreased significantly—today it is responsible for about 11% of total anthropogenic NO_x

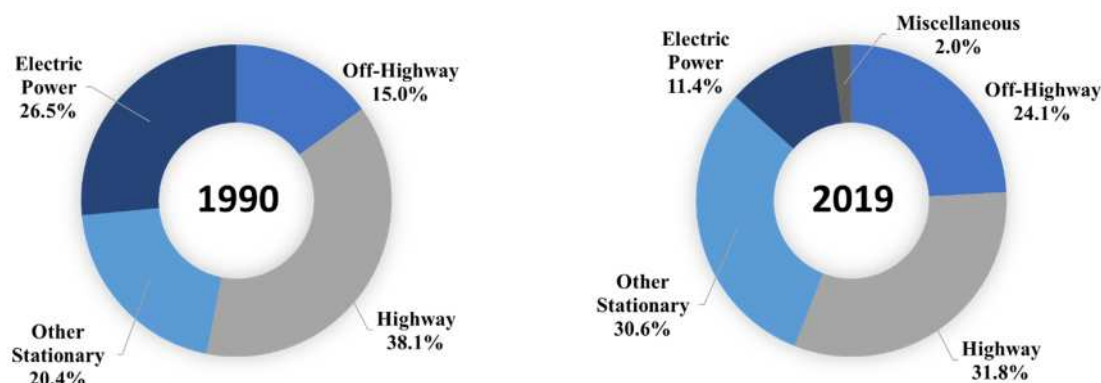
⁶ As Figure 1 shows, the power sector also has reduced SO₂ emissions by 94% since 1990.

⁷ A graph similar to Figure 1 containing data from 1990 to 2017 appeared in EEI’s comment letter on the proposed action. *See* EEI Comment 6 (listing data sources).

⁸ *See* EPA, 2017 National Emissions Inventory Complete Release, Technical Support Document 2-11 to 2-12 (Apr. 2020), <https://bit.ly/2UWxgvr>. The transportation sector also has surpassed power generation as the leading source of GHG emissions in the United States. *See* EPA, Sources of Greenhouse Gas Emissions, <http://bit.ly/37eBWA0> (last visited July 5, 2020).

emissions, down from over 26% in 1990. Over that same period, mobile source emissions have represented more than half of total NO_x emissions, and “highway” emissions—i.e., emissions from on-road motor vehicles such as cars and trucks—have remained greater than 30% of total NO_x emissions for three decades. Automobiles also are a significant source of volatile organic compounds (“VOCs”). See EPA, Air Pollutant Emissions Trends Data, National Annual Emissions Trend, <https://bit.ly/3fOR77Z> (last visited July 5, 2020).

Figure 2: Sources of NO_x Emissions (1990 and 2019)⁹



Despite the historic, ongoing, and dramatic emissions reductions in the power sector, it is highly likely that NHTSA’s Action will cause stationary sources to bear an emissions-reduction burden that far exceeds their relative impact. This increased

⁹ Figures from EPA, Air Pollutant Emissions Trends Data, National Annual Emissions Trend, <https://bit.ly/3fOR77Z> (last visited July 5, 2020). Under the NO_x tab, individual emissions categories have been compared to the row indicating total NO_x emissions without wildfires.

burden would provide little recognition of the power sector's significant progress in reducing emissions.

NHTSA's Action thus squarely conflicts with Congress's objective in enacting section 177 of the Clean Air Act, which authorizes states with NAAQS nonattainment areas to adopt California's motor-vehicle standards. 42 U.S.C. § 7507. Congress enacted that provision to provide nonattainment states with "flexibility" to shift some of the burden of achieving emissions reductions from stationary sources to automobiles, thus "permit[ting] more stationary source economic growth and jobs in the State." H.R. Rep. No. 95-294, at 213 (1977). NHTSA's Action deprives states of the flexibility to distribute the burdens of attaining the NAAQS among mobile and stationary sources in a proportionate manner reflecting their relative contributions to the problem of nonattainment. Indeed, in some regions, especially those without large, fossil-fuel based stationary sources they can retire, NAAQS attainment is impossible without substantial reductions in automobile emissions.

In addition to these substantive problems, the Action is procedurally flawed because NHTSA entirely failed to consider the adverse and inequitable impact of its preemption determination on stationary sources. This error provides independent grounds for setting the Action aside as arbitrary and capricious.

In sum, NHTSA's Action should be vacated because it creates unnecessary and harmful conflict between EPCA and the Clean Air Act by limiting states' tools for attaining the NAAQS, and will result in substantial and unfair regulatory burdens on stationary sources without any consideration of those impacts.

ARGUMENT

I. NHTSA's Interpretation Of EPCA's Preemption Provision Is Incorrect And Damaging

NHTSA's unfounded interpretation of EPCA negates California's express authority to regulate vehicle emissions under the Clean Air Act, unsettles decades of progress and reasonable reliance premised on that authority, and will cause unnecessary conflict between EPCA and the Clean Air Act, thus violating the fundamental interpretive principle that statutory regimes "touching on the same topic" should, if possible, "be harmonized." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018); *see also Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (expressing confidence that NHTSA and EPA can "avoid inconsistency" in administering EPCA and the Clean Air Act). By restricting states' authority to reduce automobile emissions, NHTSA's expansive interpretation of EPCA's preemptive scope will impede state efforts to comply with the NAAQS, which are "the engine that drives" Title I of the Clean Air Act. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

A. States' Authority To Regulate Automobile Emissions Under The Clean Air Act Is Critical For NAAQS Attainment

EPA has set NAAQS for six “criteria pollutants”—particulate matter, SO₂, ozone, nitrogen dioxide, carbon monoxide, and lead. *See* 40 C.F.R. pt. 50. Regions of the country are designated as in “attainment” or “nonattainment” (or “unclassifiable”) based on whether they satisfy the NAAQS for those pollutants. *See* 42 U.S.C. § 7407.

States must adopt state implementation plans (“SIPs”) specifying the measures they will implement to achieve and maintain NAAQS attainment. *See id.* § 7410. Nonattainment areas are subject to more stringent requirements aimed at ensuring progress toward attainment. *See id.* § 7502(c). States’ SIPs are subject to review and approval by EPA. *See id.* § 7410(a), (k). EPA may impose sanctions on states with nonattainment areas that do not adopt adequate SIPs or fail to implement their SIPs. *See id.* § 7509.

Automobiles contribute significantly to criteria-pollutant levels. For example, as explained above, *see supra* pp. 6–7, automobiles are *the* largest anthropogenic source of NO_x and also are a significant source of VOCs—the precursors to the formation of the criteria pollutant ozone (and, with the addition of sunlight, the familiar phenomenon of “smog”). *See, e.g.,* Approval and Promulgation of Air Quality Implementation Plans; Maryland; Low Emission Vehicle Program, 79 Fed. Reg. 38,787, 38,788 (July 9, 2014); *Wisconsin v. EPA*, 938 F.3d 303, 309 (D.C. Cir.

2019) (per curiam). EPA has found that ozone control requires NO_x reduction. *See, e.g.*, Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504, 74,505 (Oct. 26, 2016). But in some nonattainment areas—especially those without major stationary sources they can retire—mobile sources produce so much NO_x that even eliminating stationary sources *entirely* would not be sufficient to attain the ozone NAAQS. *See* California Air Resources Board, San Joaquin Valley Air Pollution Control District, 2016 Ozone Plan for 2008 8-Hour Ozone Standard at ES-5, <https://bit.ly/2YODwq1>; *see also* South Coast Air Quality Management District, Final 2016 Air Quality Management Plan at 3-22, 4-2, <https://bit.ly/3efxR2P> (even if the 62 tons per day of NO_x from stationary sources in California’s South Coast Air Quality Management District were eliminated, the District would *still* be above the 141 tons per day ceiling for ozone-NAAQS attainment, given that mobile sources currently produce 291 tons per day).

Despite automobiles’ significant contributions to criteria pollution, the Clean Air Act generally prohibits states from directly regulating emissions from new motor vehicles. *See* 42 U.S.C. § 7543(a) (“No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part.”). Congress, however, provided California a specific exception from that general rule in light of the state’s long history of regulating automobile emissions. *See id.*

§ 7543(b); *see also* Primary Pet’rs Br. 5–8. The exception provides that EPA “shall” waive the prohibition on state automobile emissions regulations if California “determines that [its] standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards,” unless EPA finds that the state’s determination “is arbitrary and capricious,” California does not need the standards “to meet compelling and extraordinary conditions,” or California’s standards are inconsistent with section 202(a) of the Clean Air Act. 42 U.S.C. § 7543(b)(1).

California has adopted standards governing both GHG and criteria-pollutant emissions from light-duty vehicles, as well as mandates that automobile manufacturers market more ZEVs, and EPA in 2013 granted waivers for the latest round of those requirements. *See* Primary Pet’rs Br. 20. But six years later, EPA purported to withdraw those waivers as part of this Action. *See supra* note 3.

Section 177 of the Clean Air Act authorizes other states to adopt California’s motor-vehicle standards. 42 U.S.C. § 7507. When Congress enacted section 177 as part of the Clean Air Act Amendments of 1977, it explained that the provision would provide nonattainment states with “flexibility” to shift some of the burden of achieving emissions reductions from stationary sources to automobiles, thus “permit[ting] more stationary source economic growth and jobs in the State.” H.R. Rep. No. 95-294, at 213 (1977).

States have made ample use of their authority to adopt California's motor-vehicle emissions standards to help attain the NAAQS. Thirteen states have adopted California's criteria-pollutant standards. California Air Resources Board, *States that have Adopted California's Vehicle Standards under Section 177 of the Federal Clean Air Act*, <https://bit.ly/2zKcJD1> (last visited July 5, 2020). Twelve of those states have adopted its GHG standards, and ten of those twelve also have adopted California's ZEV standards.¹⁰ See First Am. & Supplemented Compl. for Declaratory & Injunctive Relief ("States' Compl.") ¶ 82, *California v. Chao*, No. 1:19-cv-02826-KBJ (D.D.C. Oct. 15, 2019), ECF No. 37 (noting twelve states have adopted GHG standards); see also California Air Resources Board, *States that have Adopted California's Vehicle Standards under Section 177 of the Federal Clean Air Act*, <https://bit.ly/2zKcJD1> (listing ten states that have adopted ZEV rules); 84 Fed. Reg. at 51,320 (similar). To take just one example, Connecticut has adopted

¹⁰ Since NHTSA's Action, Nevada, New Mexico, and Minnesota have announced their intent to adopt California's criteria-pollutant, GHG, and ZEV regulations. See *Clean Cars Nevada*, Nevada Division of Environmental Protection, <https://bit.ly/2VMRM26> (last visited July 5, 2020); Press Release, Office of Governor Michelle Lujan Grisham, Gov. Lujan Grisham Commits New Mexico to Bold Clean Car Standards at Climate Week Event (Sept. 24, 2019), <https://bit.ly/3hJuGCD>; *About Clean Cars Minnesota*, Minnesota Pollution Control Agency, <https://bit.ly/37IVrT3> (last visited July 5, 2020). Washington, which has already adopted California's criteria-pollutant and GHG standards, has announced its intent to adopt California's ZEV standards. *Washington Clean Car Standards*, State of Washington Department of Ecology, <https://bit.ly/2VeNf8c> (last visited July 5, 2020).

California's ZEV standards and incorporated them into its SIP with the express goal of reducing "emissions of volatile organic compounds (VOC) and nitrogen oxides (NO_x)," in addition to GHGs. Approval and Promulgation of Air Quality Implementation Plans; Connecticut; Low Emission Vehicle Program, 80 Fed. Reg. 13,768, 13,768 (Mar. 17, 2015); *accord* Approval and Promulgation of Air Quality Implementation Plans; Rhode Island; Rhode Island Low Emission Vehicle Program, 80 Fed. Reg. 50,203, 50,203–04 (Aug. 19, 2015) (same for Rhode Island); *see also*, *e.g.*, Air Plan Approval; Connecticut; Revision of the Low Emission Vehicles Program, 83 Fed. Reg. 2097, 2097 (Jan. 16, 2018) (Connecticut proposed to adopt updates to ZEV regulations "to reduce emissions of volatile organic compounds (VOC), particulate matter (PM), and nitrogen oxides (NO_x)," as well as GHGs); 79 Fed. Reg. at 38,790 (EPA recognizes that Maryland's adoption of California's standards "will result in a *further reduction of ozone precursors emissions of NO_x and VOCs*, as well as air toxic and GHG emissions" (emphasis added)); Primary Pet'rs Br. 12 (EPA has "approved several States' inclusion of [ZEV] standards in [SIPs] to achieve [NAAQS]").

B. NHTSA's Novel Action Upsets Settled Understandings Of EPCA's Preemptive Scope

Under EPCA, NHTSA is responsible for establishing average fuel economy standards for automobile manufacturers. *See* 49 U.S.C. § 32902(a). EPCA provides that states "may not adopt or enforce a law or regulation related to fuel economy

standards or average fuel economy standards for automobiles covered by an average fuel economy standard” issued by NHTSA. *Id.* § 32919(a).

In the Action, NHTSA codifies at 49 C.F.R. §§ 531.7(a) and 533.7(a) language that parrots verbatim EPCA’s preemption provision. *See* 84 Fed. Reg. at 51,361–62. And in new appendices to Parts 531 and 533 of the Code of Federal Regulations, NHTSA articulates a “broad” interpretation of the scope of EPCA preemption. *Id.* at 51,313. According to NHTSA, EPCA preempts state laws “regulating or prohibiting tailpipe carbon dioxide emissions from automobiles,” as well as state laws “having the direct or substantial effect of regulating or prohibiting tailpipe carbon dioxide emissions from automobiles or automobile fuel economy.” 84 Fed. Reg. at 51,362–63 (codified at 49 C.F.R. pt. 531, app. B(a)(2)-(3), (b)(2)-(3), and 49 C.F.R. pt. 533, app. B(a)(2)-(3), (b)(2)-(3)).

NHTSA’s Action conflicts with established case law construing EPCA’s preemptive scope. Two district court decisions have rejected arguments that EPCA preempts California from establishing GHG standards (and other states from adopting those standards). *See Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007). In doing so, the courts concluded that “the preemptive force of 49 U.S.C. § 32919 extends very narrowly,” *Central Valley*, 529 F. Supp. 2d at 1176, and that “Congress did not intend [in EPCA] that

regulations adopted by California for which EPA granted a waiver under Section 209(b) of the [Clean Air Act] be preempted,” *Green Mountain*, 508 F. Supp. 2d at 398. In issuing the Action, NHTSA expressly “disagree[d] with those district courts’ characterization of the ‘related to’ language in EPCA’s preemption provision as narrow.” 84 Fed. Reg. at 51,314. Instead, by taking the position that the scope of preemption under EPCA is “broad,” *id.* at 51,313, NHTSA has upset settled understandings regarding EPCA’s preemptive scope.

C. NHTSA’s Action Creates Conflict Between EPCA And The Clean Air Act

NHTSA’s Action restricts California’s ability to adopt automobile-emissions standards that go beyond the federal baseline, despite Congress’s clearly expressed intent in section 209(b) of the Clean Air Act for California to retain that authority. *See* 42 U.S.C. § 7543(b). NHTSA’s Action also deprives other states of the “flexibility” that Congress accorded in section 177 of the Clean Air Act to make progress toward NAAQS attainment by adopting California’s automobile-emissions regulations. H.R. Rep. No. 95-294, at 213. As a result, the Action introduces unnecessary conflict between EPCA and the Clean Air Act by stripping states of a key tool to achieve NAAQS attainment. *See* Primary Pet’rs Br. 59–65 (explaining that GHG and ZEV standards assist in addressing criteria pollution).

NHTSA’s preemption of state ZEV mandates alone will significantly undermine state efforts to attain the NAAQS. *See* 84 Fed. Reg. at 51,314; *see also*

id. at 51,324 (noting that “States’ SIPs . . . may need review because they include preempted ZEV mandates”); R-5054, Comment submitted by Richard W. Corey, Executive Officer, California Air Resources Board (CARB) at 308 (“California’s ZEV regulation is a practical necessity to meeting the National Ambient Air Quality Standards for ozone”). Because the most effective mechanism for reducing aggregate criteria-pollutant emissions from automobiles is to require that a certain percentage of new motor vehicles not produce any emissions at all, ZEV standards “have been an integral part of California’s air-quality planning since the State first adopted them in 1990 to reduce emissions of criteria pollutants.” Primary Pet’rs Br. 102. ZEV mandates are directly related to NAAQS attainment: Qualifying electric vehicles *have no tailpipe emissions*—emissions which are the leading cause of ozone nonattainment in numerous states that have adopted or are moving to adopt California’s standards. *See supra* pp. 6–7; *see also infra* pp. 18–19.

Additionally, a ruling from this Court endorsing the logic of NHTSA’s Action might well be viewed as an invitation for future Administrations or parties to argue that EPCA extends even further, preempting what remains of California’s authority over automobile emissions. The Action’s plain language provides that a state emissions regulation is preempted if it has the “substantial effect of regulating . . . automobile fuel economy.” 84 Fed. Reg. at 51,362–63. The precise scope of that expansive preemption standard is unclear. Indicative of the potentially expansive

scope of NHTSA's reasoning, the Action's preamble is only able to muster two examples of state motor-vehicle regulations that would *not* be preempted—"a State regulation of vehicular refrigerant leakage" and "State safety requirements that have only an incidental impact on fuel economy, such as a requirement to use child seats." *Id.* at 51,314. Both examples of permitted regulations are distantly removed from anything that would directly affect emissions, and that distance is telling. One might certainly ask whether NHTSA's inability to identify a single permissible tailpipe emissions regulation is indicative of whether NHTSA believes California may enact meaningful motor-vehicle emissions regulations of any sort.¹¹ Weakening states' authority to achieve reductions of criteria-pollutant emissions from motor vehicles conflicts with both congressional intent and EPA's longstanding recognition of the important role that motor-vehicle emissions play in making progress toward NAAQS attainment. *See, e.g.,* Approval and Promulgation of Air Quality Implementation Plans, 68 Fed. Reg. 67,948, 67,948 (Dec. 5, 2003) ("approving amendments to the 2005 highway (on road) motor vehicle emission inventory for . . . 1-hour ozone attainment plan as a revision to the Delaware SIP").

Because automobiles are major emitters of the ozone precursors NO_x and VOCs, *see supra* p. 7, NHTSA's Action will be particularly deleterious to state

¹¹ As noted *supra*, a question that may be asked in the future by other Administrations or parties.

efforts to attain the ozone NAAQS. Portions of 22 states¹² and the District of Columbia currently are out of compliance with EPA's 2015 eight-hour ozone NAAQS. In addition to California, seven of those states have adopted California's criteria-pollutant standards, and at least six of those states have adopted California's GHG standards, ZEV standards, or both.¹³ The District of Columbia is in the process of adopting the GHG standards.¹⁴ Nevada and New Mexico also have announced their intent to adopt California's criteria pollutant, GHG, and ZEV standards. *See supra* note 10.

If states with nonattainment areas cannot obtain further reductions of criteria-pollutant emissions from automobiles, they will be forced to exact further reductions from stationary sources. *See, e.g.*, Primary Pet'rs Br. 30 ("If anticipated emission

¹² Portions of Arizona, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, Nevada, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Texas, Utah, Virginia, and Wisconsin are out of compliance with the 2015 eight-hour ozone NAAQS. *8-Hour Ozone (2015) Designated Area/State Information*, EPA.gov, <https://bit.ly/2N6JKMC> (last visited July 5, 2020).

¹³ Colorado, Connecticut, Delaware, Maryland, New Jersey, New York, and Pennsylvania have adopted California's criteria-pollutant standards. Additionally, Delaware has adopted California's GHG standards, and Colorado, Connecticut, Maryland, New Jersey, and New York have adopted both California's GHG standards and its ZEV standards. *See States' Compl.* ¶ 82; California Air Resources Board, *States that have Adopted California's Vehicle Standards under Section 177 of the Federal Clean Air Act*, <https://bit.ly/2zKcJD1>.

¹⁴ *See* Delegation—Authority Pursuant to D.C. Law 17-151, the Clean Cars Act of 2008, 65 D.C. Reg. 004915 (May 4, 2018).

reductions will not materialize from the automobile sector . . . , California must consider requiring further reductions from other sectors of the economy.”). NHTSA’s Action, especially when combined with its separate final action lowering fuel-efficiency standards for model years 2021–2026, *see supra* note 3, will thus impose disproportionate regulatory burdens on stationary sources.

Because electric generation is the largest contributor to stationary source NO_x emissions,¹⁵ electric generation stations will be especially hard hit if states are forced to reallocate emissions reductions from automobiles to stationary sources to make progress toward NAAQS attainment. NHTSA itself acknowledged this fact in the Final Environmental Impact Statement (“EIS”) for its separate final action addressing fuel-efficiency standards for model years 2021–2026. That EIS recognized that lowering fuel-efficiency standards could require states that were relying on higher standards to revise their SIPs, and would thus “have the effect of shifting some of the responsibility to meet air quality requirements from the transportation sector to other sectors such as industry or *electric utilities*.” NHTSA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Year 2021 – 2026, Passenger Cars and Light Trucks, Final Environmental Impact Statement 4-39 (March 2020) (emphasis added). The additional emissions-reduction burden on

¹⁵ *See* EPA, 2017 National Emissions Inventory Complete Release, Technical Support Document 2-11 to 2-12 (Apr. 2020), <https://bit.ly/2UWxgvr>.

electric generation stations will come despite the substantial emissions reductions the power sector already has provided in recent years, despite the fact that mobile sources have not achieved similar reductions in either absolute or percentage terms, and despite the fact that automobiles are the larger source of NO_x. *See supra* pp. 6–7.

Requiring reallocation of emissions-reduction burdens from mobile sources to electric generation stations and other stationary sources is a predictable effect of NHTSA’s Action. This is directly contrary to Congress’s intent in enacting section 177 of the Clean Air Act, which was to authorize states to shift some of the emissions-reduction burden to automobiles in order “to permit more stationary source economic growth and jobs.” H.R. Rep. No. 95-294, at 213. NHTSA’s Action is thus “arbitrary,” “capricious,” and “not in accordance with law” because it creates unnecessary conflict between EPCA and the Clean Air Act. 5 U.S.C. § 706(2)(A).

II. NHTSA’s Action Is Procedurally Flawed

An agency acts in an arbitrary and capricious manner if it fails to respond to all “relevant” and “significant” public comments received during a notice-and-comment process. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35–36 & n.58 (D.C. Cir. 1977) (per curiam). The requirement that agencies respond to public comments is necessary to ensure that the agency has not “failed to consider an important aspect

of the problem” before it. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

When faced with a significant comment, the agency cannot “defer[] consideration” of the issue until a later action. *Carlson v. Postal Regulatory Comm’n*, 938 F.3d 337, 350–51 (D.C. Cir. 2019). For example, in *Carlson*, this Court rejected the Postal Regulatory Commission’s argument that it could defer consideration of whether new postage rates complied with federal law until it held a statutorily required annual review of such rates. *Id.* This Court required the Commission to consider all aspects of its decision at the time of the rulemaking adopting the new rates. *Id.*

NHTSA here received several comments explaining that its proposal would deprive states of an important emissions-reduction tool and force states to further regulate stationary sources in order to attain the NAAQS.¹⁶ Although the Action’s preamble makes passing references to the role ZEV and GHG standards play in SIPs

¹⁶ See, e.g., EEI Comment 3–4, 34–35, 38; R-4185, Comment submitted by Steven E. Flint, Co-Chair, NACAA Mobile Sources and Fuels Committee (New York) and Eric C. White, Co-Chair, NACAA Mobile Sources and Fuels Committee (Placer County, CA) at 7; R-5930, Comment submitted by Brandy Toft, Environmental Deputy Director, Environmental Department, Division of Resource Management, The Leech Lake Band of Ojibwe at 4; R-4159, Comment submitted by Kay Rhoads, Principal Chief, Sac and Fox Nation at 3-4; R-5684, Comment submitted by Wilfred J. Nabahe, Chairman, National Tribal Air Association at 3; R-5845, Comment submitted by Elysia Treanor, Manager, Federal Environmental Policy, Portland General Electric Company at 4-5.

and in NAAQS attainment, *see, e.g.*, 84 Fed. Reg. at 51,324, 51,331, 51,338 n.256, 51,354–55, at no point did NHTSA (or, for that matter, EPA) clearly respond to the objection that the Action would harm stationary sources. In fact, despite acknowledging that section 177 of the Clean Air Act was enacted to provide states with flexibility in attaining the NAAQS, *see id.* at 51,350–51, the Action makes no mention whatsoever of the fact that it will result in additional emissions regulations for stationary sources. Given that Congress intended for section 177 to grant states “flexibility” in allocating emissions-reduction burdens between mobile and stationary sources, H.R. Rep. No. 95-294, at 213, NHTSA at minimum was required to respond to comments noting the Action’s adverse effects on stationary sources before finalizing the Action.

Instead, in the Action’s preamble, EPA and NHTSA state that they need not consider the effect of the Action on either SIPs or NAAQS compliance because EPA can consider those effects in later SIP reviews. *See* 84 Fed. Reg. at 51,338 n.256. That, however, is *precisely* the type of reasoning that this Court rejected in *Carlson*. *See* 938 F.3d at 350–51. Similar to *Carlson*, NHTSA cannot defer consideration of a significant comment until a later time, to be examined by another agency (EPA) under separate statutory provisions (those governing SIPs). *See id.*

The Action fails to respond to and fully consider significant comments concerning the regulatory burden that it will place on stationary sources. As a result, the Action is arbitrary and capricious, and must be “set aside.” 5 U.S.C. § 706(2).

CONCLUSION

This Court should grant the petitions for review.

Dated: July 6, 2020

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation set forth in this Court's May 20, 2020 Order because this brief contains 5,286 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 ProPlus in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 2020, a true and correct copy of the foregoing Brief of *Amicus Curiae* the Edison Electric Institute in Support of Petitioners was filed with the Clerk of the United States Court of Appeals for the D.C. 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.

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