IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY, et al.,
Petitioners,

v.

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

On Petition for Review of a Final Rule
Issued by the Department of Transportation,
National Highway Traffic Safety Administration

# BRIEF FOR THE RESPONDENTS

ROSALIND A. KNAPP
*Acting General Counsel*
PAUL M. GEIER
*Assistant General Counsel*
PETER J. PLOCKI
*Attorney*

ANTHONY M. COOKE
*Chief Counsel*
LLOYD S. GUERCI
*Assistant Chief Counsel*
KATHERINE C. GEHRINGER
TIMOTHY H. GOODMAN
DAVID W. CASE
*Attorneys, National Highway Traffic Safety Administration*

*Department of Transportation*
*Washington, D.C. 20590*

PETER D. KEISLER
*Assistant Attorney General*
MATTHEW J. McKEOWN
*Acting Assistant Attorney General*

RONALD M. SPRITZER
*Attorney, Environment and Natural Resources Division*

DOUGLAS N. LETTER
(202) 514-3602
H. THOMAS BYRON III
(202) 616-5367
*Attorneys, Appellate Staff*
*Civil Division, Main Room 7260*
*U.S. Department of Justice*
*950 Pennsylvania Avenue, N.W.*
*Washington, D.C. 20530-0001*

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Nos. 06-71891, 06-72317, 06-72641, 06-72694, 06-73807, 06-73826

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# BRIEF FOR THE RESPONDENTS

## JURISDICTIONAL STATEMENT

The regulation under review was issued by the Department of Transportation, National Highway Traffic Safety Administration (NHTSA) on March 28, 2006, and filed with the Federal Register on March 29, 2006. See 71 Fed. Reg. 17566, 17679 (ER 1373, 1486) (Apr. 6, 2006). In No. 06-71891, the petition for review was filed on April 6, 2006. In No. 06-72317, the petition for review was filed on May 3, 2006. In Nos. 06-72641 and 06-72694, the petitions for review were filed on May 23, 2006. In No. 06-73807, the petition for review was filed in the Second Circuit (No. 06-2436) on May 24, 2006, and was transferred to this Court on June 22, 2006. In No. 06-73826, the petition for review was filed in the Second Circuit (No. 06-1745) on

April 13, 2006, and was transferred to this Court on July 17, 2006. All petitioners invoke this Court's jurisdiction under 49 U.S.C. § 32909(a).

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

In the regulation under review, NHTSA adopted Corporate Average Fuel Economy (CAFE) requirements for light trucks (defined in the regulation as discussed below) manufactured in model years (MYs) 2008-2011. NHTSA also reformed the structure of the CAFE regulatory regime, providing a transition period (MYs 2008-2010) to phase in the Reformed CAFE requirements, which become fully effective and mandatory in MY 2011.

**1.** These consolidated petitions for review generally present the question whether the light truck CAFE regulation is arbitrary, capricious, or otherwise contrary to law. In that context, petitioners challenge NHTSA's analysis of costs and benefits, the decision not to adopt a backstop CAFE standard, the transition period between unreformed and Reformed CAFE, and the scope of the light truck CAFE regulation.

**2.** NHTSA also prepared an Environmental Assessment (EA), pursuant to the National Environmental Policy Act (NEPA), prior to promulgating the light truck CAFE regulation. Petitioners raise the question whether the EA was arbitrary or capricious.

**3.** In the preamble accompanying the regulation under review, NHTSA offered the agency's expert views concerning the preemptive effect of the Energy Policy and Conservation Act (EPCA) and the CAFE regulations on state regulation of greenhouse gases (principally, carbon dioxide). If petitioners have stated a

justiciable challenge to NHTSA's discussion of preemption principles in the preamble, they raise the question whether NHTSA correctly concluded that state regulations limiting carbon dioxide emissions from motor vehicles are precluded both expressly and impliedly under EPCA, notwithstanding the possibility of a future EPA decision waiving the preemptive effect of the Clean Air Act.

## STATEMENT OF THE CASE

### A. Nature of the Case

These consolidated petitions for review challenge NHTSA's regulation adopting CAFE standards for light trucks in MYs 2008-2011. In that regulation, NHTSA adopted a new regulatory structure, Reformed CAFE, which improves the prior approach to regulating fuel economy in light trucks, a category that generally includes pickup trucks, minivans, and sport utility vehicles, among others. Reformed CAFE identifies a fuel economy target for each size (footprint) of light truck, requiring more stringent fuel economy targets for smaller vehicles and recognizing that larger vehicles have more limited ability to achieve higher levels of fuel economy. By contrast, the prior method of regulating light truck fuel economy established a single national average standard. Reformed CAFE thus imposes higher fuel economy requirements on a wider variety of vehicles and manufacturers.

NHTSA's regulation includes a fuel economy standard calculated under the old method (unreformed CAFE) for MY 2008-2010 vehicles, as well as a transition period for those model years, in which vehicle manufacturers can comply with either

the unreformed or the reformed standard. Reformed CAFE will take effect exclusively beginning with MY 2011.

In the course of the extensive rulemaking proceedings, NHTSA prepared an Environmental Assessment (EA), considering the environmental significance and effect of the new regulation. The EA concluded that the CAFE regulation would not have a significant effect on the environment. Accordingly, NHTSA concluded that an Environmental Impact Statement (EIS) was not required.

### B. Statutory and Regulatory Scheme

#### 1. The Energy Policy and Conservation Act (EPCA)

NHTSA promulgated the light truck CAFE regulation pursuant to authority delegated by the Secretary of Transportation (49 C.F.R. § 1.50(f)) under the Energy Policy and Conservation Act (EPCA), Pub. L. No. 94-163, § 301, 89 Stat. 871, 901-916, as amended and recodified, 49 U.S.C. Chapter 329. EPCA directs the Secretary of Transportation to "prescribe by regulation average fuel economy standards" for light trucks, and provides that "[e]ach standard shall be the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year." 49 U.S.C. § 32902(a).[1] The statute provides that the regulation must be promulgated "[a]t least 18 months before the beginning of each model year," and authorizes the Secretary to prescribe "separate standards for different classes of automobiles." Ibid. The statute identifies factors that the Secretary must consider in "deciding maximum feasible average fuel economy," including "technological

[1] Passenger automobiles are governed separately by 49 U.S.C. § 32902(b)-(c).

feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy." 49 U.S.C. § 32902(f).

EPCA provides for judicial review of NHTSA's regulation in an appropriate court of appeals. The statute provides that "[a] person that may be adversely affected by a regulation" under 49 U.S.C. § 32902 may file a petition for review in the D.C. Circuit or in "the circuit in which the person resides or has its principal place of business." 49 U.S.C. § 32909(a)(1). Such a petition "must be filed not later than 59 days after the regulation is prescribed." 49 U.S.C. § 32909(b).

EPCA also expressly preempts state laws or regulations "related to fuel economy standards or average fuel economy standards." 49 U.S.C. § 32919(a). A state or political subdivision "may not adopt or enforce" such a law or regulation "for automobiles covered by an average fuel economy standard under this chapter." Ibid.

**2. The National Environmental Policy Act (NEPA)**

The National Environmental Policy Act (NEPA) does not require that an agency prepare an Environmental Impact Statement (EIS) for every agency action, but only for a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332. The Council on Environmental Quality (CEQ) has promulgated regulations providing specific guidance for complying with NEPA. See 40 C.F.R. §§ 1500.1-1508.28; DOT v. Public Citizen, 541 U.S. 752, 757 (2004) (CEQ regulations are authoritative interpretations of NEPA). Under the CEQ regulations, federal agencies prepare an environmental assessment (EA) to determine whether a

proposed action is likely to have a significant impact on the environment, based on potential environmental impacts and alternatives. 40 C.F.R. §§ 1501.4(c), 1508.9. If the EA shows that the proposed action will significantly impact the environment, the agency must prepare a more thorough EIS, analyzing more specifically the effects of the proposed action. 42 U.S.C. § 4332(2)(C). See also 40 C.F.R. § 1502.3. If, on the other hand, the EA results in an agency finding of no significant impact (FONSI), NEPA does not require preparation of an EIS. Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1356 (9th Cir. 1994); see also Native Ecosystems Council v. Forest Service, 428 F.3d 1233, 1239 (9th Cir. 2005) (summarizing EA requirements, and affirming agency's decision not to prepare an EIS).

**3. Corporate Average Fuel Economy (CAFE) Standards**

The light truck CAFE standards appear in 49 C.F.R. Part 533, which applies to light trucks, as defined in 49 C.F.R. § 523.5. See 49 C.F.R. § 533.4(b)(2). The CAFE program generally applies to automobiles, defined in the regulations as four-wheeled, fuel-powered, on-road vehicles that are within certain weight limits. All such vehicles under 6,000 pounds are subject to CAFE requirements, and NHTSA has determined that certain other vehicles, weighing between 6,000 and 10,000 pounds, also are subject to CAFE standards. See 49 C.F.R. § 523.3.

The CAFE regulations, following the statutory lead of EPCA, 49 U.S.C. § 32902(a)-(c), generally divide the category of automobiles (subject to CAFE regulation) into passenger cars and light trucks. Passenger cars are on-road vehicles (i.e., not vehicles capable of off-highway operation) intended primarily for the

transportation of 10 or fewer people, and light trucks are other automobiles. See 49 C.F.R. §§ 523.4-523.5. Thus, the light truck category includes vehicles that transport more than 10 people, those that provide temporary living quarters (such as recreational vehicles), and transport vehicles (including open-bed trucks and those vehicles that provide greater cargo-carrying volume than passenger capacity). See 49 C.F.R. § 523.5(a)(1)-(4). The light truck category also includes vehicles that "[p]ermit expanded use of the automobile for cargo-carrying [or similar] purposes" by lowering or removing seats to create a flat floor surface. 49 C.F.R. § 523.5(a)(5). In the regulation under review, NHTSA clarified that provision to specify that, beginning with MY 2011, vehicles with three rows of seats come within the flat-floor provision if they achieve additional cargo capacity by lowering seats as well as by removing them. See 71 Fed. Reg. at 17650-17652 (ER 1457-1459).

In the regulation under review, NHTSA amended the definition of a light truck, expanding the scope of the CAFE regulation to add medium duty passenger vehicles (MDPVs). MDPVs are very large vehicles (weighing between 8,500 and 10,000 pounds) that are designed primarily for transportation of people (rather than cargo). As the agency explained, "[t]he MDPV definition essentially includes [the very largest] SUVs [sport-utility vehicles], short bed pick-up trucks, and passenger vans," not previously subject to CAFE standards. 71 Fed. Reg. at 17648 (ER 1455).

Under unreformed CAFE, the regulatory scheme in place prior to the order under review, NHTSA established light truck fuel economy standards by designating a single average number, in miles per gallon (mpg), with which each manufacturer

must comply. Thus, under the prior regulation, the light truck CAFE standard for MY 2007 was 22.2 mpg, and that same standard applied to every manufacturer of light trucks. See 49 C.F.R. § 533.5(a). For MYs 2008-2010, the CAFE regulation under review establishes unreformed CAFE standards of 22.5 mpg, 23.1 mpg, and 23.5 mpg, respectively.

The regulation under review also establishes the Reformed CAFE system, which sets a target fuel economy level for each vehicle based on the vehicle's footprint (a measure of size), and calculates the applicable CAFE standard for each manufacturer based on the manufacturer's actual fleet mix. The regulation defines vehicle footprint as the area (in square feet, rounded to the nearest tenth of a square foot) bounded by the vehicle's track width (the distance between the wheels on the same axle) and wheelbase (the distance between the front and rear wheels). See 49 C.F.R. § 523.2. Vehicles with smaller footprints have a higher fuel economy target than those with larger footprints. Reformed CAFE determines the production-weighted harmonic average fuel economy standard for each manufacturer, based on the target for each model's footprint. See 49 C.F.R. § 533.5(a), Fig. 1, Table 5. The regulations include illustrative examples of calculations using a hypothetical mix of light trucks with different footprint sizes. See 49 C.F.R. § 533.6, App. A. NHTSA projects that the overall average Reformed CAFE level for MY 2011 will be 24.0 mpg. See 71 Fed. Reg. 17645 (ER 1396), Table 15.

The change from unreformed to Reformed CAFE will impose substantial new burdens on many light truck manufacturers, and NHTSA accordingly adopted a three-year transition period during which both systems are in effect. As we have explained, the CAFE regulation includes unreformed CAFE standards for MYs 2008-2010. During those years, a manufacturer may choose to continue complying with unreformed CAFE, or may instead choose to comply with the Reformed CAFE requirements. See 49 C.F.R. § 533.5(g). The choice is "irrevocabl[e]" once made for a particular model year. Ibid. Beginning with MY 2011, Reformed CAFE governs exclusively, and all manufacturers are required to comply with the standards computed using the Reformed CAFE formulas. See 49 C.F.R. § 533.5(h).

## STATEMENT OF FACTS

### A. Prior Light Truck CAFE Regulations

The regulation under review is the latest iteration of light truck CAFE regulations, which have a history dating back three decades. See 49 C.F.R. § 533.5(a). From the outset, NHTSA has differentiated between passenger cars and light trucks for CAFE purposes, along EPCA's statutory lines. See id. §§ 523.4, 523.5. As explained earlier, light trucks are automobiles (a statutory term of art, see id. § 523.3) other than passenger cars, which are capable of off-highway operation or designed for a specialized function identified by NHTSA, including the ability to transport more then 10 people, provide temporary living quarters, transport items on an open truck bed, provide greater volume for carrying cargo than passengers, or permit expanded use for cargo-carrying purposes. Id. § 523.5. NHTSA adopted this

definition in 1977 for light trucks under 6,000 pounds GVWR, and extended it the following year to light trucks under 8,500 pounds GVWR.[2] See 43 Fed. Reg. 11995 (Mar. 23, 1978); 42 Fed. Reg. 38362 (July 28, 1977).

In 1977, NHTSA promulgated the first such regulations, establishing separate CAFE standards for MY 1979 light trucks with 4-wheel drive (4WD) and those with 2-wheel drive (2WD). See 42 Fed. Reg. 13807. Beginning with the following year, NHTSA added another set of categories. To limit the incentive for domestic manufacturers to import and sell large numbers of smaller, lighter trucks manufactured abroad, the MY 1980 and MY 1981 standards established separate standards for captive imports (imported vehicles sold by domestic manufacturers) within each of the 4WD and 2WD categories. Also in MY 1980, NHTSA established a separate single standard for manufacturers who built only trucks (referred to as "limited product line" manufacturers). See 43 Fed. Reg. 11995 (Mar. 23, 1978). The limited product line standard was eliminated beginning with the MY 1982 standard, which also added the option for manufacturers to comply with a combined standard instead of separate CAFE standards for 4WD and 2WD fleets. See 45 Fed. Reg. 20871 (Mar. 31, 1980).

In 1984, NHTSA amended its previously promulgated light truck CAFE standard for MY 1985, reducing that standard in light of higher than anticipated consumer demand for larger, less fuel-efficient vehicles, and establishing a MY 1986

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[2] GVWR (gross vehicle weight rating) is "the value specified by the manufacturer as the loaded weight of a single vehicle." 49 C.F.R. § 523.2.

standard based on similar considerations. See 49 Fed. Reg. 41250 (Oct. 22, 1984). That order was upheld by the D.C. Circuit in litigation brought by organizations seeking to require more stringent CAFE standards. See Center for Auto Safety v. NHTSA (CAS I), 793 F.2d 1322 (D.C. Cir. 1986). Beginning with MY 1992, NHTSA eliminated the separate CAFE standards for 2WD and 4WD vehicles, requiring only the combined standard. See 55 Fed. Reg. 12487 (Apr. 4, 1990).

Between 1996 and 2001, NHTSA was prohibited by statute from establishing different light truck CAFE standards. See 71 Fed. Reg. at 17571-17572 (ER 1378-1379) (citing legislative restrictions). During that period (MYs 1998-2004), NHTSA extended the frozen CAFE standard of 20.7 mpg for light trucks. Following the elimination of those legislative restrictions, NHTSA issued light truck CAFE standards for MYs 2005-2007. See 68 Fed. Reg. 16868 (Apr. 7, 2003). In that most recent CAFE regulation, the agency discussed the need for reform and announced a separate rulemaking that would consider reforms to the light truck CAFE regulation. Id. at 16869, 16871.

### B. The 2002 National Academy of Sciences Study

Congress requested that the National Academy of Sciences (NAS), with help from the Department of Transportation, study and evaluate the effectiveness and impact of CAFE standards. H.R. Rep. No. 106-940 (2000) (Conf. Rep.), reprinted in Cong. Rec. 21125, 21171 (Oct. 5, 2000). The NAS established the Committee on the Effectiveness and Impact of CAFE Standards, which prepared a report published in January 2002. National Research Council, Effectiveness and Impact of Corporate

Average Fuel Economy Standards (2002) (NAS Report) at 1 (ER 99). The NAS Report evaluated, critiqued, and recommended improvements to the CAFE program, including both passenger car and light truck CAFE.

The report concluded that, although the CAFE program clearly contributed to increased fuel economy, it was appropriate to consider further increases in CAFE standards. ER 101. The report identified and evaluated existing technologies that could significantly improve fuel economy in both passenger cars and light trucks, without reducing vehicle size, weight, utility, and performance. Ibid. NAS concluded that light trucks offered the best potential to reduce fuel consumption. ER 102. The report recognized that manufacturers' existing product plans, and the long lead times required to incorporate new technologies in upcoming models, as well as future economic, regulatory, and safety standards, and customer preferences, would have a bearing on the degree to which technologies could lead to increased fuel economy in the U.S. market. ER 102-103.

The NAS Report considered the economic trade-offs and other concerns that would arise as fuel-saving technologies were added to vehicles. In its "cost-efficient analysis," NAS identified packages of existing technologies that could be added in the succeeding 10 to 15 years, up to the point that further increases in fuel economy would not be reimbursed by fuel savings. ER 102.

Significantly, the NAS Report found that the existing structure of the CAFE program was not the most cost-efficient method for improving fuel economy. ER 102-103. Specifically, the report stated that raising CAFE standards under alternative

structures "could accomplish the same end at lower cost, provide more flexibility to manufacturers, or address inequities arising from the present" structure. Ibid. The NAS Report also concluded that the CAFE standards had in the past encouraged manufacturers to reduce the size and weight of vehicles, creating safety risks that contributed to a large number of traffic fatalities, and could do so again if CAFE standards increased too much or too quickly. ER 101.

The NAS Report suggested converting the CAFE program "to a system in which fuel targets depend on vehicle attributes." ER 103. The report recognized the significance of vehicle size and weight, and suggested making fuel economy targets dependent on vehicle weight, with higher fuel economy targets for lighter vehicles and lower targets for heavier vehicles. "Such a system would create incentives to reduce the variance in vehicle weights between large and small vehicles, thus providing for overall vehicle safety. It has the potential to increase fuel economy with fewer negative effects on both safety and consumer choice." Ibid. The report recognized that such a system would require different CAFE targets for each manufacturer, depending on the manufacturers' product (fleet) mix, the variety of different sized vehicles the manufacturers produce and sell. Id. at 87 (ER 185).

### C. The 2006 Regulation Under Review

As explained in more detail below, NHTSA adopted substantial changes to the CAFE regulatory scheme for light trucks, beginning in MY 2008. Reformed CAFE reduces or eliminates many of the incentives that NAS and others had identified as problematic in the CAFE regulations over the last three decades. For example,

Reformed CAFE sets a unique fuel economy target for each size of vehicle footprint, eliminating the possibility that a manufacturer could gain a CAFE advantage by changing the body design or size of a vehicle -- changes that could also have adverse safety consequences. Reformed CAFE also requires fuel economy improvements for all light trucks, and requires each manufacturer to comply with a fleet-specific fuel economy requirement, unlike the unreformed system, which gave a free ride to many manufacturers of smaller light trucks. Nevertheless, NHTSA remained limited by EPCA's requirement that the CAFE standard be the maximum feasible level that the agency determines the manufacturers can meet, and the requirement that the agency consider such limiting factors as economic practicability and technological feasibility. Reformed CAFE imposes the maximum feasible fuel economy requirements in light of those statutory constraints.

**1. Background**

NHTSA issued a Notice of Proposed Rulemaking (NPRM) in 2005. 70 Fed. Reg. 51414 (ER 29) (Aug. 30, 2005). As suggested in the NAS Report, the NPRM proposed a reformed structure for the light truck CAFE system. 70 Fed. Reg. at 51415 (ER 30). In the NPRM, NHTSA proposed standards under both the unreformed, traditional CAFE system and Reformed CAFE. The standards represented the maximum feasible fuel economy level for each system. Id. at 51416 (ER 31). NHTSA explained that Reformed CAFE would enlarge energy savings by accounting for size differences in the product mix and requiring virtually all light truck manufacturers to improve the overall fuel economy of their fleets. Id.

First, NHTSA proposed unreformed CAFE levels. Based on data submitted by manufacturers, NHTSA set a CAFE "baseline" for manufacturers with a significant share of the market, identifying the level of fuel economy each manufacturer was planning on achieving on its own. 70 Fed. Reg. at 51423 (ER 38). NHTSA then applied its engineering judgment and expertise about possible adjustments to product plans in a three-stage process, which it called the "stage analysis," applying additional technologies to the vehicle models of each such manufacturer to determine how those manufacturers could enhance overall fleet fuel economy. Id. at 51423, 51426 (ER 38, 41). In the first stage, NHTSA applied technologies that manufacturers stated were available for use by MY 2008 or earlier, but that the manufacturers had not adopted in their product plans. Stage II included transmission and engine improvements, with the timing of technological additions tied to planned model changes. In Stage III, NHTSA included projections of fuel economy improvements that could result from the application of diesel engines and hybrid power trains. Id. at 51426 (ER 41).

The fuel economy levels determined to be technologically feasible by the stage analysis were then analyzed by a computer model (named the Volpe model, after the DOT's Volpe National Transportation Systems Center in Cambridge, Massachusetts) to estimate benefits and costs. The Volpe model uses an algorithm that systematically applies additional technologies to manufacturers' baseline CAFE levels, in the order of effective cost, taking account of the marginal costs and benefits of each technology. See 70 Fed. Reg. at 51427 (ER 42).

Second, NHTSA introduced its proposed reforms to the light truck CAFE regulation. A central feature of Reformed CAFE was the focus on vehicle footprint (the area of wheelbase times axle width). NHTSA tentatively decided that vehicle footprint was the best attribute to serve as the basis of the Reformed CAFE structure because it would "best assure the consistency in vehicle design and structure between model years, is consistent with [NHTSA's] safety concerns, and may encourage the development and availability of light-weight materials whose use might advance fuel economy and preserve or maybe even enhance safety." Id. at 51430 (ER 45). The Reformed CAFE structure described in the NPRM proposed to measure the footprint of each light truck, divide the models of light trucks into six footprint categories, develop a target level of average fuel economy for each footprint category as expressed by a step function, and calculate a Reformed CAFE standard for each manufacturer based on the harmonic production-weighted average of the fuel economy targets for each category. 70 Fed. Reg. at 51429-51430 (ER 44-45).

NHTSA tentatively determined the relative fuel economy targets for the six footprint categories, considering the fleet of each of the seven largest manufacturers. First, NHTSA applied technologies to each manufacturer's baseline levels until the manufacturer reached a target. NHTSA used the Volpe model to determine aggregate costs and benefits for each footprint category, and stopped the adjustments at the point where marginal costs equaled marginal benefits. Thereafter, NHTSA repeated the effort for the industry as a whole. See 70 Fed. Reg. at 51433-51435 (ER 48-50).

### 2. Reformed CAFE

In the Final Rule, NHTSA modified Reformed CAFE from the system originally proposed. The Reformed CAFE structure is based on two basic elements:

> (1) a function that sets the target fuel economy levels for each value of vehicle footprint; and
>
> (2) a Reformed CAFE standard based on each manufacturer's [fleet mix, based on the calculation of a] production-weighted harmonic average of the fuel economy targets for footprint value.

71 Fed. Reg. at 17587 (ER 1394). The Reformed CAFE structure established in the final rule adopted the NPRM's approach of basing fuel economy targets on vehicle footprints (in square feet). However, it no longer relied on the six specific footprint categories. Instead, the final Reformed CAFE system "relies on a continuous mathematical function relating fuel economy targets to vehicle footprint." Ibid. Under the regulation as adopted, each vehicle footprint has its own CAFE target unique to that footprint size, and any change in vehicle design that alters the size of the footprint also alters the fuel economy target accordingly (higher fuel economy for smaller footprint vehicles and lower fuel economy for larger footprint vehicles).

The process NHTSA used to develop the continuous function Reformed CAFE structure is similar to the process that it used to develop the step function (with categories of vehicles) proposed in the NPRM. The agency again employed the Volpe model to add fuel-saving technologies to each of the seven largest manufacturer's fleets until the incremental cost of improving fuel economy equaled the incremental value of fuel savings and other benefits from doing so. NHTSA

plotted data points representing each vehicle's size, optimizing fuel economy on a graph, and fitting a continuous function through the data points, subject to constraints at the lower and upper ends of the footprint range. Finally, the level of the continuous function was incrementally adjusted, "raised or lowered until industry-wide net benefits are maximized," which the agency defined as "when the incremental change in industry-wide compliance costs from adjusting it further would be exactly offset by the resulting incremental change in benefits." 71 Fed. Reg. at 17596 (ER 1403).

Under the final Reformed CAFE structure, "each manufacturer is subject to identical fuel economy target[s] for light truck models with the same footprint value." 71 Fed. Reg. at 17607 (ER 1414). But each manufacturer has its own specific overall CAFE level, depending on the distribution of footprint values for the models making up its respective product lines.

**3. Transition Period**

In light of the extensive changes adopted in Reformed CAFE, and the anticipated expenses and uncertainty associated with compliance efforts, NHTSA created a three-year transition period for the new regulatory system. During that three-year period (MYs 2008-2010), manufacturers can choose to comply with unreformed or Reformed CAFE. The agency explained that it deemed the unreformed CAFE standards to be economically practicable. NHTSA considered the costs of both approaches to ensure the economic practicability of Reformed CAFE targets for the transition period. By equalizing the costs, NHTSA "ensure[d] that the

costs associated with the transition period do not result in economically severe compliance requirements." 71 Fed. Reg. at 17579 (ER 1386). In addition, NHTSA stated that the transition period would promote an orderly and effective transition to the Reformed CAFE system, because both the agency and manufacturers would gain experience during the three years leading to MY 2011, when all manufacturers must comply with Reformed CAFE. Id.

The agency established unreformed CAFE standards of 22.5 MPG for MY 2008, 23.1 mpg for MY 2009, and 23.5 mpg for MY 2010. NHTSA established these standards using the stage analysis (as explained in the NPRM), after incorporating new product plan data subsequently submitted by manufacturers.

**4. Covered Vehicles**

Under EPCA, the agency can regulate vehicles with a GVWR between 6,000 and 10,000 pounds if the agency determines (1) that the standards are feasible and (2) either that the vehicles are used for the same purpose as smaller vehicles, or that the regulation will result in significant energy conservation. 49 U.S.C. § 32901(a)(3). As we have explained, since MY 1980, the agency has regulated light trucks up to 8,500 lbs GVWR. See also 70 Fed. Reg. at 51418 (ER 33).

In the regulation under review, NHTSA decided to extend the light truck CAFE regulation to include medium duty passenger vehicles (MDPVs), as defined by the EPA, beginning in MY 2011. The agency found that standards for MDPVs are feasible and that MDPVs are used for substantially the same purpose as smaller light trucks. The agency observed that MDPVs (unlike other very large vehicles, such as

the largest long-bed pickup trucks) are subject to EPA testing, which provides baseline CAFE level information. 71 Fed. Reg. at 17649 (ER 1456). NHTSA determined that including MDPVs would result in a savings of 251 million gallons of fuel over the lifetime of those vehicles. See 71 Fed. Reg. at 17650 (ER 1457).

**5. Environmental Assessment (EA)**

NHTSA prepared and submitted both a draft and final environmental assessment (EA) in connection with the final light truck CAFE regulation. The Draft EA, ER 265, was made available for public comment. ER 1315. The Final EA, which incorporated public comments on the Draft EA, was dated March 29, 2006. ER 1311. Based on the Final EA, NHTSA made a Finding of No Significant Impact (FONSI) for the regulation, finding that the regulation would not significantly affect the environment. ER 1287.

The Final EA evaluated five alternatives that were consistent with the statutory requirements that the standards be economically practicable and technologically feasible. ER 1319-1326, 1334-1341. As to each of these alternatives, NHTSA evaluated environmental impacts such as energy consumption; greenhouse gas (GHG) emissions, as measured by reduced emissions of carbon dioxide; and emissions of "criteria" pollutants, such as carbon monoxide, nitrogen oxides, sulfur dioxide, and fine particulate matter. ER 1352-1359. Overall, NHTSA projected "that the range of impacts spanned by these alternatives would be relatively narrow." ER 1319. With regard to GHG emissions, the Final EA noted that "light trucks account for 28 percent of U.S. transportation sector GHG emissions, although they represent a much

smaller share -- about 8 percent -- of overall U.S. GHG emissions, since transportation is only one of several activities that generate emissions of greenhouse gases." Ibid. The Final EA determined the changes in carbon dioxide emissions that would result from the various alternatives by combining: (a) the estimated reduction in carbon dioxide from reduced fuel consumption; and, (b) the estimated reductions in "upstream" emissions from lower levels of fuel production and distribution. ER 1357. The Final EA also concluded that "[t]he various alternatives for MY 2008-11 light truck CAFE standards would * * * reduce U.S. greenhouse gas emissions by about 0.2 percent from the levels that would have been expected under the baseline alternative." ER 1358.

The Final EA also quantified the lifetime environmental impacts of MY 2005-2011 light trucks under six different regulatory alternatives: The baseline CAFE standard for light trucks that was in effect prior to 2003, the CAFE standards that NHTSA promulgated in 2003 (for MY 2005-2007 light trucks), the CAFE standards that would be in effect under unreformed CAFE, and three different formulations of Reformed CAFE, including the continuous function standard adopted in the regulation under review and two versions of the footprint-category approach outlined in the NPRM. ER 1334-1343. For each of those regulatory alternatives, the cumulative-impact analysis quantified the lifetime impacts of MY 2005-2011 light trucks on carbon dioxide emissions, fuel consumption, energy consumption, and emissions levels of criteria pollutants. ER 1359-1365, Tables 4-5, 4-6.

The cumulative impact analysis first quantified the lifetime environmental impacts of MY 2005-2011 light trucks that would occur if the 20.7 mpg CAFE standard (the standard in effect prior to 2003) had remained in effect for all MY 2005-2011 light trucks. ER 1324, 1359-60, 1361, Table 4-5. This "Without Previous Action" condition assumes that neither the 2003 rulemaking nor the current rulemaking took place, and calculates the lifetime environmental impacts of MY 2005-2011 light trucks on that basis. ER 1323-1324, 1360-1361.

Next, NHTSA quantified the lifetime environmental impact of MY 2005-2011 light trucks under the assumption that the 2003 Rule would apply to all MY 2005-2011 light trucks (the baseline condition). The 2003 Rule increased the CAFE standards for light trucks to 21.2 mpg in MY 2005, 21.7 mpg in MY 2006, and 22.2 mpg in MY 2007. ER 1360. The agency assumed that the 22.2 mpg standard for MY 2007 would also apply to MY 2008-2011 light trucks, to estimate the lifetime environmental effects of MY 2005-2011 light trucks. ER 1360-1361.

Finally, for each of the alternatives considered in the Final EA that impose requirements beyond those required by the 2003 Rule -- the action alternatives -- the Final EA calculated the lifetime environmental impacts of MY 2005-2011 light trucks, assuming that MY 2005-07 trucks were subject to the 2003 Rule and that MY 2008-2011 trucks were subject to the requirements of the specific action alternative. ER 1360-1362.

The cumulative impact analysis shows that carbon dioxide emissions will decline under both the CAFE standards that NHTSA promulgated in 2003 and the

action alternatives considered in the Final EA. Without the 2003 rule, MY 2005-2011 light trucks would produce 5,161 million metric tons of carbon dioxide emissions over the lifetime of those trucks. ER 1361, Table 4-5. The 2003 rule (the "baseline" condition) reduces that figure to 5,039 million metric tons. Ibid. Alternative B will reduce the total level of emissions to 4,979 million metric tons. Ibid. Overall, the 2003 Rule will reduce lifetime carbon dioxide emissions of those trucks by 122 million metric tons, and Alternative B will reduce lifetime emissions of the trucks by 182 million metric tons. ER 1362, Table 4-6; see also ER 1361-1362 (Tables 4-5 and 4-6 provide comparable figures to show the cumulative impact of Alternatives C-E). The analysis confirms that "each of the alternatives for the current action is projected to reduce lifetime fuel use, energy consumption, and greenhouse gas emissions by MY 2005-11 light trucks." ER 1362. NHTSA estimated that, together with the 2003 Rule, "the various alternatives for the current action will reduce lifetime carbon dioxide emissions from MY 2005-11 light trucks by 122 to 196 million metric tons, or by 2.5 percent to 3.8 percent from their level if neither action had been taken * * *." ER 1362. Taking into account the contribution of light trucks to total U.S. carbon dioxide emissions, "[t]he various alternatives for MY 2008-11 light truck CAFE standards are projected to result in cumulative reductions from the previous and current actions ranging from 0.2 to 0.3 percent of U.S. greenhouse gas emissions over the lifetimes of MY 2005-11 light trucks." Ibid.

Based on the analysis in the Final EA, NHTSA issued a FONSI, concluding that preparation of an EIS was not required. ER 1287.

## SUMMARY OF ARGUMENT

NHTSA adopted the light truck CAFE regulation after carefully considering the need for reform of the CAFE system, and the agency took care to hew the Reformed CAFE system to EPCA's statutory mandate. The result is a regulatory scheme that promises greater fuel economy improvements in the light truck fleet, while protecting the safety of drivers and passengers. Under Reformed CAFE, all light truck manufacturers will face increased fuel economy requirements, and manufacturers will not be able to game the CAFE system by shifting the body type, size, or weight of vehicles in the hope of obtaining a CAFE advantage.

NHTSA did not, however, jettison its consistent focus on practical, real-world concerns. EPCA requires that the agency consider such factors as economic practicability and technological feasibility in its determination of the maximum feasible fuel economy that manufacturers can achieve, and NHTSA was therefore prohibited from adopting a CAFE requirement that would be impractical.

Petitioners do not dispute the need for CAFE reform, and they acknowledge the improvements promised by NHTSA's new focus on vehicle footprint. Their arguments before this Court target only a few discrete elements of the light truck CAFE regulation. But petitioners appear to believe (incorrectly) that NHTSA should have elevated concerns about global warming above other considerations. Their arguments misunderstand EPCA, which is an energy conservation statute, not an environmental protection measure.

**1.** Congress directed the agency to balance the ultimate goal of increased fuel economy against the need to preserve economic stability and consumer choice, while protecting the safety of the driving public. EPCA does not authorize NHTSA to disregard those considerations in favor of a full-bore effort to combat the global concerns raised by the emission of carbon dioxide by vehicles as an anticipated by-product of internal combustion. Congress and the Executive Branch are undertaking considered action to address those concerns in the appropriate fora, but the CAFE system is not governed by the policy goal of reducing carbon dioxide emissions.

And petitioners wrongly assume that CAFE regulations are an appropriate means of altering the purchasing and driving decisions of the American public. Congress did not intend the CAFE system to confine the choice of vehicle models manufactured and offered for sale to the public, nor did Congress intend for CAFE regulations to constrain the uses to which American drivers put their vehicles. Under the CAFE regulation, vehicle manufacturers will be required to adopt fuel-saving technology in their vehicle designs. But the CAFE system is not a mechanism to command economic decisions precluding or limiting the sale of particular vehicles.

Petitioners' legal arguments miss the mark. Fundamentally, petitioners misunderstand the limited role of judicial review under the Administrative Procedure Act (APA), which directs courts to consider only whether an agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Petitioners improperly urge this Court to second-guess the policy judgment of the

expert agency concerning (for example) the appropriate balance of safety versus fuel economy or the likely behavior of the regulated industry.

Petitioners simply ignore the regime of Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984), which establishes a deferential two-step inquiry when considering an agency's regulatory implementation of its statutory mandate. This Court must defer to the agency's interpretation of EPCA in the absence of unambiguously expressed legislative intent to the contrary. NHTSA permissibly and reasonably interpreted EPCA in adopting Reformed CAFE, and petitioners make no effort to deal with the Chevron standard in their arguments to the contrary.

Thus, NHTSA reasonably interpreted EPCA's articulated concerns (including economic practicability, technological feasibility, and the need to conserve energy) to permit a consideration of costs and benefits in determining the maximum feasible CAFE level that manufacturers can achieve. And NHTSA carefully designed the parameters of Reformed CAFE to address the problems identified with the unreformed system while remaining true to EPCA's statutory directives. The agency rejected the idea of a secondary, backstop CAFE standard, which would have retained a problematic element of the unreformed system, perpetuating its adverse incentives. And NHTSA recognized the magnitude of the changes adopted in this regulation, and the need to allow for an orderly transition to the substantially new regime of Reformed CAFE.

NHTSA likewise properly exercised its statutory discretion to expand the scope of the CAFE regulation, adding MDPVs after a careful consideration of the purpose

of such vehicles and the likelihood that they could achieve improved fuel economy. The agency did not propose to consider the more sweeping changes that petitioners here urge, and NHTSA's reasons for differentiating MDPVs from very large pickup trucks do not undermine the agency's decision.

**2.** Petitioners also misunderstand the role of NEPA. They blame the CAFE regulation for all carbon dioxide emissions from light trucks. However, NEPA does not alter the agency's authority under EPCA, and does not relieve the substantive limitations imposed by EPCA. Thus, NEPA did not require or allow NHTSA to change its determination of the maximum feasible CAFE level that manufacturers can achieve. The Supreme Court recently held that NEPA does not require an agency to evaluate environmental consequences that it lacks the statutory authority to prevent. DOT v. Public Citizen, 541 U.S. 752, 758, 765 (2004). Consistent with Public Citizen, the agency prepared an EA analyzing the environmental impacts of the light truck CAFE regulation, not the impacts of all carbon dioxide emissions from light trucks. Although petitioners seek to attribute all global warming effects to the federal government, the EA explained that the CAFE regulation would reduce carbon dioxide emissions from light trucks, compared with the expected emissions under the prior regime or the alternatives before the agency.

Contrary to petitioners' suggestions, the EA carefully considered the effects of light truck carbon dioxide emissions in the context of climate change. And NHTSA compared its regulatory decision with alternatives that were within the agency's statutory authority, as well as with the status quo and prior regulatory standards. The

agency properly declined to consider in the EA alternatives that were precluded under EPCA.

Based on the agency's analysis in the EA, NHTSA reasonably found that the light truck CAFE regulation would not have a significant impact on the environment, and therefore concluded that no EIS was required. That determination was correct, and was consistent with prior regulatory determinations under the CAFE program, which the courts have upheld.

**3.** Petitioners also take issue with NHTSA's analysis of preemption principles in the preamble accompanying the light truck CAFE regulation, at the same time that they correctly recognize that the preemption issue is not properly presented in this Court. NHTSA's preemption analysis was correct, although it is not at issue here. NHTSA explained that carbon dioxide is a normal byproduct of internal combustion engines, and that carbon dioxide emissions and fuel economy are inextricably linked. Because of that link, state regulation of vehicle emissions of carbon dioxide is expressly preempted by EPCA, which prohibits states from adopting or enforcing regulations "related to fuel economy standards or average fuel economy standards," for vehicles subject to CAFE standards. 49 U.S.C. § 32919(a). NHTSA also explained that such state regulations would be preempted as well under principles of implied preemption, because the only way to limit carbon dioxide emissions is by applying the same pool of fuel-saving technology that NHTSA considered in the light truck CAFE regulation.

Petitioners acknowledge that NHTSA's preemption analysis is not properly at issue in this case, and they have also acknowledged that California's regulation of vehicle carbon dioxide emissions is preempted in any event by the Clean Air Act. Nevertheless, petitioners suggest that the Court might consider an argument that EPCA preemption could be overcome if EPA were to grant a waiver of Clean Air Act preemption. But EPA has not granted such a waiver, and petitioners therefore lack standing because they can show no injury from NHTSA's analysis of EPCA preemption; relatedly, petitioners' argument is unripe because the premise on which it rests -- EPA approval of a waiver under the Clean Air Act -- has not come to pass.

## STANDARD OF REVIEW

Judicial review of a fuel economy standard established under EPCA proceeds under the familiar, deferential standards established by the Administrative Procedure Act (APA). The Court's review "is limited to determining whether [the regulatory standard] is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Competitive Enterprise Institute v. NHTSA, 45 F.3d 481, 484 (D.C. Cir. 1995) (CEI III) (quoting 5 U.S.C. § 706(2)(A)). The agency's obligation is to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983) (MVMA) (internal quotation marks omitted). The reviewing court in turn must determine "whether the agency's final decision 'was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" CEI III, 45

F.3d at 484 (quoting MVMA, 463 U.S. at 43). "The scope of review under the [APA's] 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." MVMA, 463 U.S. at 43.

The deferential, narrow review of agency action under the APA's standards "is especially appropriate where, as here, the challenged decision implicates substantial agency expertise." Mt. Graham Red Squirrel v. Espy, 986 F.2d 1568, 1571 (9th Cir. 1993) (citing United States v. Alpine Land & Reservoir Co., 887 F.2d 207, 213 (9th Cir. 1989), cert. denied, 498 U.S. 817 (1990)); accord, Marsh v. Oregon Natural Res. Def. Council, 490 U.S. 360, 377 (1989); Inland Empire Pub. Lands Council v. Schultz, 992 F.2d 977, 981 (9th Cir. 1993). A court reviewing agency action under the APA's arbitrary and capricious standard should not reweigh the evidence before the agency. Hopi Tribe v. Navajo Tribe, 46 F.3d 908, 915 (9th Cir.), cert. denied, 560 U.S. 931 (1995). The reviewing court must "defer to the agency's interpretation of equivocal evidence, so long as it is reasonable." Central Arizona Water Conservation Dist. v. EPA, 990 F.2d 1531, 1540 (9th Cir.) (internal quotation marks omitted), cert. denied, 510 U.S. 828 (1993).

In reviewing the regulation, the Court must accord considerable deference to the agency's expertise in administering its own statutory scheme. If Congress has spoken directly to the "precise question at issue," the Court must give effect to its "unambiguously expressed intent." Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-843 (1984). If, however, the statute is silent or ambiguous with respect to the specific issue, or when Congress has expressly assigned a matter to the agency's

discretion, the Court should defer to the agency's interpretation, so long as that interpretation is reasonable. Id. at 843-44.

Because NEPA does not provide a private cause of action to enforce its provisions, petitioners' claims that NHTSA violated NEPA are reviewed under the standards of the APA. Native Ecosystems Council v. Forest Serv., 428 F.3d 1233, 1238 (9th Cir. 2005). The court may set aside the agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." See 5 U.S.C. § 706(2)(A); Neighbors of Cuddy Mountain v. Forest Serv., 137 F.3d 1372, 1376 (9th Cir. 1998). As explained above, the APA standard is highly deferential and judicial review is limited.

**ARGUMENT**

Petitioners have filed three briefs, addressing three general categories of legal arguments: EPCA and APA issues, NEPA issues, and preemption. In one brief, titled "Opening Brief Of Public Interest Petitioners On Energy Policy Conservation Act Issues" (EPCA Br.), petitioners challenge NHTSA's CAFE regulation under the standards of EPCA and the APA, and also refer to an argument concerning preemption. The second brief, titled "Opening Brief Of Public Interest Petitioners On National Environmental Policy Act Issue" (NEPA Br.), addresses the statutory regime established by NEPA, and challenges the adequacy of NHTSA's EA. The third brief, titled "Opening Brief Of The Petitioners In Consolidated Cases Nos. 06-72317 and 06-72641" (States Br.), likewise addresses NEPA issues, and also challenges NHTSA's analysis of preemption issues in the preamble of the light truck CAFE

regulation.[3] In this consolidated response brief, the government addresses each of those three categories of arguments.[4]

## I. NHTSA'S LIGHT TRUCK CAFE REGULATION COMPORTS WITH EPCA AND THE APA.

Petitioners raise a narrow set of challenges under EPCA and the APA to the details of NHTSA's light truck Reformed CAFE regulation. They do not challenge the unreformed CAFE regulation applicable to MYs 2008-2010. They do not dispute the fundamental approach of Reformed CAFE -- a continuous function imposing a specific CAFE target to each vehicle based on the vehicle footprint. And they do not dispute that making some vehicles lighter poses a safety risk. Despite their agreement with NHTSA on those broad principles, petitioners argue that some of the details of the Reformed CAFE program are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). As we explain below, petitioners' claims fall far short of that highly deferential standard.

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[3] Even if petitioners were to prevail on any of their challenges, this Court should not vacate the regulation, as doing so would mean that light truck manufacturers would be subject to no CAFE requirements at all. Petitioners apparently recognize that vacatur would not be appropriate, as they seek only remand. See EPCA Br. 58; NEPA Br. 56; States Br. 38, 65.

[4] The government generally does not dispute petitioners' standing to challenge the light truck CAFE regulation. However, as the following argument explains, petitioners lack standing to challenge NHTSA's preemption analysis. Petitioners have filed extensive declarations in this Court, including material outside the administrative record. Except for the limited purpose of considering whether petitioners can demonstrate standing, those extra-record materials must be excluded. See, e.g., Nuclear Info. & Res. Serv. v. NRC, 457 F.3d 941, 953 n.4 (9th Cir. 2006) (declining to consider declarations not presented to the agency).

### A. NHTSA Reasonably Considered The Costs And Benefits Of The CAFE Regulation.

Petitioners take issue with NHTSA's consideration of costs and benefits in the formulation of Reformed CAFE levels. See EPCA Br. 21-38. They assert that NHTSA should have interpreted EPCA's statutory standard differently, and that NHTSA's assessment of costs and benefits was flawed. Those arguments are wrong as a matter of law and misconstrue the record.

#### 1. EPCA permits NHTSA to weigh costs and benefits.

**a.** NHTSA determined that the Reformed CAFE formula represents the "maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year." 49 U.S.C. § 32902(a). In reaching that determination, NHTSA considered EPCA's statutory factors: "technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy." 49 U.S.C. § 32902(f). The agency explained that the Volpe model, which NHTSA used as a tool to aid its determination of the maximum feasible level for Reformed CAFE, incorporated "incremental cost-benefit analysis" as one part of the agency's comprehensive considerations, providing "a benchmark for assessing the economic practicability of the resulting standard." 71 Fed. Reg. at 17588-17589 (ER 1395-1396). Federal rulemaking generally should have "an overall goal of achieving the highest net benefits, which occurs at the point where the additional benefits from further increasing the standards (marginal benefits) just equal the increase in costs for

complying with a stricter standard (marginal costs)." Id. at 17592 (ER 1399) (citing OMB Circular A-4; Executive Order 12866). The agency's consideration of economic practicability did not rely exclusively on the marginal cost-benefit analysis in the Volpe model; NHTSA also considered "potential sales and employment impacts." Id. at 17590 (ER 1397) ("a cost-benefit analysis is not the sole factor in the agency's consideration of economic practicability"); see also id. at 17598 (ER 1405) ("the agency's consideration of economic practicability * * * also considered the financial condition of the industry in determining technology applications").

The Reformed CAFE standards were formulated using a computer program (the Volpe model) that added fuel-saving technologies to vehicles based on manufacturers' product plans. The Volpe model considered a broad range of fuel-saving technologies, including the technologies described in the NAS Report, as well as such advanced engine designs as clean diesel technology and hybrid systems. The Volpe model's "technology application algorithm" is designed "to systematically apply consistent cost and performance assumptions to the entire industry, as well as consistent assumptions regarding economic decision-making by manufacturers." 71 Fed. Reg. at 17585 (ER 1392). The algorithm applies technologies to a vehicle model successively until one of the following conditions is met: (a) compliance with the CAFE standard is achieved; (b) no further technologies are expected to be available in the given model year (in light of the programmed constraints); or (c) the manufacturer is expected to be willing to pay CAFE penalties (under 49 U.S.C. § 32912(b) and 49 C.F.R. § 578.6(h)). It included sophisticated considerations, such

as engineering constraints that assured that appropriate technologies would be added to each vehicle. The Volpe model also recognized that it would not be economically practicable for manufacturers to incorporate all fuel-saving technologies into every model in a given model year, and therefore recognized timelines for model changes and constraints on the rate at which manufacturers can realistically incorporate new technologies (phase-in caps). See 71 Fed. Reg. at 17625-17627, 17645-17646, (ER 1432-1434, 1452-1453).

At each step, the Volpe model's algorithm seeks the most cost-effective technology application. Thus, the model seeks and applies technologies that provide the most improvement in fuel economy for the least cost, and then proceeds to apply more costly technologies. NHTSA used the model to compute the aggregate costs and benefits of exceeding the existing, or "baseline" CAFE level by progressively larger increments. After the process was complete, fuel economy levels were identified at the point where the fuel savings benefit attributed to the last technology added just equaled its cost. At higher fuel economy levels, the costs of adding additional technology would exceed the benefits of the regulation. See, e.g., 71 Fed. Reg. at 17589 (ER 1396).

The Reformed CAFE rule is projected to produce significant energy savings. NHTSA estimated that it would save 7.8 billion gallons of fuel over the lifetime of the vehicles produced in MYs 2008-2011, compared to the expected baseline fuel economy levels planned by manufacturers. See 71 Fed. Reg at 17569 (ER 1376). Manufacturers would incur $6.7 billion in additional costs to achieve that higher fuel

economy, and the "resulting vehicle price increases * * * would be paid back in additional fuel savings" in an average of between 2.9 and 4.4 years. Ibid. (footnote omitted). Reformed CAFE also produces higher levels of fuel economy, for more manufacturers, than the prior, unreformed approach. See 71 Fed. Reg. at 17624 (ER 1431), Table 13.

Petitioners challenge NHTSA's implementation of the statutory mandate. See EPCA Br. 21-27. They assert that NHTSA should have disregarded the relationship of costs and benefits in determining the "maximum feasible average fuel economy level." 49 U.S.C. § 32902(a). But they fail to mention the remainder of that statutory provision, which specifies that NHTSA should determine the maximum feasible CAFE standard "that the Secretary decides the manufacturers can achieve in that model year," ibid., confirming both the statute's grant of discretionary authority and the importance of the agency's consideration of economic effects on the regulated industry. Petitioners' argument also fails to recognize EPCA's statutory requirement that NHTSA "shall consider," among other factors, economic practicability "[w]hen deciding maximum feasible average fuel economy under this section." 49 U.S.C. § 32902(f). Most importantly, petitioners ignore the governing principles of Chevron deference, which recognize that Congress left to the expert agency the authority to interpret the statutory standard. See Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-843 (1984); Center for Auto Safety v. NHTSA, 793 F.2d 1322, 1338 (D.C. Cir. 1986) (CAS I) (applying Chevron framework in review of CAFE regulation).

Petitioners focus on the phrase "maximum feasible" in isolation. But EPCA requires the agency to consider such matters as economic practicability and technological feasibility as it determines the maximum feasible level of fuel economy that manufacturers can achieve. The agency has construed EPCA's list of factors to include as well such considerations as safety and the need to reform the CAFE regulatory structure. And the courts have upheld that reading of the statutory language. See, e.g., Competitive Enterprise Institute v. NHTSA, 45 F.3d 481, 482-483 (D.C. Cir. 1995) (CEI III) ("NHTSA has previously considered safety as an aspect of technological or economic feasibility") (citing Competitive Enterprise Institute v. NHTSA, 956 F.2d 321, 322 (D.C. Cir. 1992) (CEI II)). The need to achieve reform is likewise justified as an aspect of the enumerated statutory factor requiring NHTSA to consider the need of the United States to conserve energy. The statutory language and structure do not support petitioners' interpretation, and Chevron precludes petitioners' argument.

Petitioners' approach ignores fundamental economic relationships between the benefits of a fuel economy regulation and its cost. Nothing in EPCA requires NHTSA to ignore the relationship between the cost of fuel-saving technologies and the benefits realized from their use. EPCA does not require the agency to set CAFE standards at the highest technically possible level that would result in positive net economic benefits. See 71 Fed. Reg. 17592 (ER 1399). In fact, if the agency were to have applied technology to the point where total cost equals total benefit, such a standard would have violated the language of EPCA because the Volpe model would

have run out of technologies to apply, and such a standard would not be "feasible," 49 U.S.C. § 32902(a), (f). See 71 Fed. Reg. at 17591 (ER 1398).

**b.** Judicial review of an agency rulemaking decision such as this one proceeds according to Chevron's familiar two-step inquiry. The question in such a case "is whether the text of the statute resolves the issue, or, if not, whether the [agency's] interpretation is permissible in light of the deference to be accorded the agency under the statutory scheme." Yellow Transp., Inc. v. Michigan, 537 U.S. 36, 45 (2002). Here, EPCA directed NHTSA to "prescribe by regulation average fuel economy standards for automobiles (except passenger automobiles)." 49 U.S.C. § 32902(a). In light of EPCA's specific direction that the agency promulgate a regulation, it is clear that NHTSA has acted pursuant to "delegated authority" and the agency action has the "force of law." United States v. Mead Corp., 533 U.S. 218, 226-227 (2001); see also Christensen v. Harris County, 529 U.S. 576, 587 (2000) ("Of course, the framework of deference set forth in Chevron does apply to an agency interpretation contained in a regulation.").

NHTSA interpreted EPCA's operative terms -- "the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year," 49 U.S.C. § 32902(a), and "economic practicability," 49 U.S.C. § 32902(f) -- to permit a consideration of costs and benefits, including the incremental cost-benefit analysis used in the Volpe model. The statute does not define those terms expressly, and Congress accordingly left broad discretion to

NHTSA to interpret the statutory language according to the agency's expert technical and policy judgment.

Because EPCA's broad statutory references are undefined, the statutory silence requires a reviewing court to "move to the second step" of Chevron, under which the court "must defer to the agency's interpretation if it is based on a permissible construction of the statute." California Dept. of Soc. Servs. v. Thompson, 321 F.3d 835, 847 (9th Cir. 2003) (internal quotation marks omitted). The deference due under Chevron's second step is virtually dispositive here: A court must give the agency's interpretation "controlling weight" as long as the agency's construction is reasonable and not "manifestly contrary to the statute." Chevron, 467 U.S. at 844-45.

The D.C. Circuit has previously recognized the leeway afforded NHTSA by EPCA's broad language: "Congress * * * specifically delegated the process of setting light truck fuel economy standards with broad guidelines concerning the factors that the agency must consider." CAS I, 793 F.2d at 1341. The court in that case rejected petitioners' effort to constrain NHTSA's considerations (specifically concerning the effect of consumer demand on CAFE standards), and held that Chevron compels deference to the agency's interpretation of its statutory mandate. See also, e.g., Public Citizen v. NHTSA, 848 F.2d 256, 265 (D.C. Cir. 1988) (upholding agency interpretation of economic practicability and energy conservation factors under Chevron step two; quoting CAS I, and describing that decision as "pathmarking precedent"). The D.C. Circuit's case law correctly recognizes that Congress delegated authority to NHTSA to consider the listed factors as appropriate and necessary, in the

expert view of the agency. See CAS I, 793 F.2d at 1341 (referring to NHTSA's decision as "the result of a balancing process specifically committed to the agency by Congress").

**c.** No court has ever adopted the strained view of EPCA's statutory language that petitioners urge here. Because petitioners fail to argue that NHTSA's interpretation would not survive Chevron step 2, they have waived any such argument. See, e.g., Independent Towers of Washington v. Washington, 350 F.3d 925, 929 (9th Cir. 2003) ("we will not consider any claims that were not actually argued in appellant's opening brief"). Thus, for petitioners to prevail, they would have to demonstrate that "Congress has directly spoken to the precise question at issue," Chevron, 467 U.S. at 842, and that EPCA unambiguously requires NHTSA to determine CAFE standards without reference to marginal cost-benefit analysis. Notably, petitioners offer neither argument nor authority to support such an assertion.

Petitioners argue that "[t]he plain meaning of 'maximum feasible average fuel economy'" precludes consideration of marginal costs and benefits. EPCA Br. 22. But there is no justification for isolating that statutory term from the factors that Congress directed the agency to consider. And the case law petitioners cite for that proposition falls far short of demonstrating the clarity required under Chevron step one. Indeed, their principal authority was decided before the Supreme Court's Chevron decision. See EPCA Br. 22-23 (citing American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 508-509 (1981)). And the more recent case law cited in petitioners' brief actually supports the government's position. See, e.g., Alaska Dep't of Envtl. Conservation

v. EPA, 540 U.S. 461, 484-495 (2004) (cited in EPCA Br. 23) (holding that "the Agency has rationally construed the Act's text and that EPA's construction warrants our respect and approbation").[5] Petitioners emphasize the Supreme Court's description of the terms "maximum" and "achievable" as "strong, normative terms," ibid., but they omit to mention the Court's holding, which concluded that the statute did not unambiguously answer the question presented, and that the agency's interpretation of those ambiguous terms was reasonable. Id. at 485-486. Similarly, EPCA's use of the bare terms "maximum feasible" does not establish a clear legislative meaning supporting petitioners' argument. Moreover, the dictionary definition of "feasible" includes "suitable" and "reasonable" as synonyms, confirming the need for the agency to exercise it discretion in determining the appropriate CAFE levels. Webster's Third New Int'l Dict. 831 (unabridged) (1993); see also, e.g., Random House Dict. of the English Language 714 (unabridged) (2d ed. 1987) ("suitable").

Likewise, petitioners' comparisons of EPCA to language in other statutes, EPCA Br. 23-24, might carry some significance if a court were asked to interpret the relevant language in the first instance. But a reviewing court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Chevron, 467 U.S. at 844; see also, e.g., Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 ("Chevron

[5] The Court in that case held that Chevron deference was inapplicable, as the agency's interpretation was embodied in internal guidance memoranda, not a formal rulemaking. See Alaska Dep't of Envtl. Conservation, 540 U.S. at 487-488.

requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation"); CHW West Bay v. Thompson, 246 F.3d 1218, 1223 (9th Cir. 2001) ("even if the agency's interpretation is not * * * the one the court would have chosen, it should nevertheless stand if it is reasonable"). For that reason, petitioners' linguistic comparisons are irrelevant.

Petitioners similarly seek to limit the scope of EPCA's requirement that NHTSA consider economic practicability. EPCA Br. 24-25. Here, too, petitioners point to case law and other statutes that have no bearing on the Chevron analysis. Most remarkably, however, they get the D.C. Circuit's decision in Public Citizen exactly backwards in this context. See EPCA Br. 24-25 ("courts * * * have ruled that the term allows weakening fuel economy standards below what is feasible only if a higher standard would threaten 'substantial economic hardship' for manufacturers with a 'substantial share' of the market") (citing Public Citizen, 848 F.2d at 264). Notably, petitioners add the "only if" language, which finds no support in the court's decision, refuting petitioners' narrow reading. See Public Citizen, 848 F.2d at 265 (noting that "Congress 'specifically delegated the process of setting ... fuel economy standards with broad guidelines concerning the factors that the agency must consider") (quoting CAS I, 793 F.2d at 1341). The D.C. Circuit in Public Citizen upheld NHTSA's interpretation of the statute to allow consideration of both consumer demand and the detrimental economic effect of a higher CAFE standard on the automotive industry as a whole; the court there did not hold that industry-wide

economic harm was the "only" justification for rejecting a higher standard. EPCA Br. 24.

Petitioners' argument is rendered all the more confusing because they say they are not "challenging NHTSA's decision to assess costs and benefits." EPCA Br. 26. Without explanation, they nevertheless assert that after conducting such an assessment, NHTSA must "set the fuel economy standard at the maximum level that is technologically feasible and economically practicable," id. at 26, suggesting that the assessment of costs and benefits is somehow divorced from the statutory standard. See also id. at 25 ("Petitioners are not challenging a NHTSA 'economic practicability' determination.") (suggesting that goal of "maximum feasible" CAFE level should be divorced from economic practicability considerations). But petitioners do not explain how such an approach would differ in practice from NHTSA's more natural interpretation of the statutory language.

As we have explained, NHTSA correctly concluded that a consideration of costs and benefits should be performed as an integral part of implementing EPCA's express provisions. Indeed, the plain language of EPCA likely would not admit of a different reading. The statute directs that the agency "shall consider" the listed factors "[w]hen deciding maximum feasible average fuel economy under this section," 49 U.S.C. § 32902(f), leaving no room for petitioners' implicit effort to separate the factors from the ultimate determination. Petitioners' argument would improperly rewrite the statutory language.

**d.** Even apart from the deference due NHTSA's interpretation under Chevron, the statutory language itself amply supports the agency's consideration of marginal costs and benefits as one element of the comprehensive inquiry into economic practicability, and in turn as part of the determination of "the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year," 49 U.S.C. § 32902(a). NHTSA explained that Congress identified "competing goals" in EPCA. 71 Fed. Reg. at 17667 (ER 1474). Similarly, the D.C. Circuit recognized that EPCA requires NHTSA to formulate a "reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." Public Citizen, 848 F.2d at 265; see also, e.g., Competitive Enterprise Institute v. NHTSA, 901 F.2d 107, 122 (D.C. Cir. 1990) (CEI I) ("NHTSA made a reasonable accommodation of competing factors").

In accord with the understanding that Congress gave NHTSA broad discretion to balance goals that are necessarily in tension, NHTSA correctly considered costs and benefits in fulfilling its statutory mandate. NHTSA explained that the "level of fuel economy, as determined under the Volpe analysis, is thus indicative of the fuel economy level that is economically practical for both individual manufacturers and the light truck industry as a whole, and provides a process for careful balancing of the 'competing factors of EPCA.'" 71 Fed. Reg. at 17590 (ER 1397) (quoting CEI I, 901 F.2d at 121). That interpretation of the statute's terms is eminently reasonable.

### 2. Uncertainty precluded assigning a monetary value to carbon dioxide emissions and to certain safety effects.

NHTSA concluded that the uncertainty surrounding some costs and benefits precluded assigning them concrete monetary values for purposes of the marginal cost-benefit analysis undertaken in conjunction with determining Reformed CAFE levels. See, e.g., 71 Fed. Reg. at 17589 (ER 1396) ("The agency did identify and consider a variety of benefits and costs that either could not be monetized or could not be quantified."). NHTSA explained that reducing emissions of carbon dioxide would be a benefit of Reformed CAFE's more stringent fuel economy requirements, but that benefit "can not be monetized" because "[t]here is no agreement in the literature on values or [a] range of values for monetizing such a benefit to the United States." Ibid. Similarly, NHTSA identified a non-quantifiable cost expected to result from the higher fuel economy requirements of Reformed CAFE: the "risk of adverse safety impacts from downweighting," or reducing the weight of a vehicle in order to improve its fuel economy, because "the agency is unable to predict to what extent manufacturers may rely on downweighting, and therefore cannot quantify the number of additional deaths and injuries that may occur as a result." Ibid. NHTSA considered those costs and benefits, but was unable to attribute any specific monetary value to them, and therefore did not include them in the calculations of marginal costs and benefits that underlie the Volpe model for adding technologies to a manufacturer's product line. NHTSA concluded that the inability to monetize those costs and benefits did not materially alter the stringency of the fuel economy standard

under Reformed CAFE. Ibid. ("the agency determined that there is no compelling evidence that these unmonetized benefits and costs would, taken together, alter its assessment of the level of the standard for MY 2011 that would maximize net benefits").

Petitioners argue that NHTSA's decision not to assign a monetary value to the benefit of reduced carbon dioxide emissions was arbitrary and capricious. EPCA Br. 27-34. They assert that, despite the wide range of possible values, NHTSA erred in failing to choose a single value for purposes of the marginal cost-benefit analysis under the Volpe model. Petitioners recognize the agency's "discretion" in analyzing the conflicting record evidence, but they assert that, "in view of the overwhelming scientific evidence in the record on the seriousness of global warming and the importance of motor vehicles as a source of CO2 emissions, it is clearly arbitrary for NHTSA to assign CO2 reductions no value at all." Id. at 28.

Petitioners' argument mischaracterizes both the agency's decision and the limited information available, and fails to acknowledge NHTSA's reasoning. The Supreme Court has emphasized that "[t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983). The Court must determine whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Ibid. (internal quotation marks omitted). Here, NHTSA "cogently explain[ed] why it has exercised

its discretion in a given manner," and based its decision "on a consideration of the relevant factors," carefully exercising its expert judgment. Ibid. In any event, EPCA does not compel NHTSA to set CAFE levels with reference to carbon dioxide emissions specifically, or environmental effects generally. The agency's decision was not arbitrary or capricious.

NHTSA explained that "[t]here is extremely wide variation in published estimates of damage costs from greenhouse gas emissions, costs for controlling or avoiding their emissions, and costs of sequestering emissions that do occur." SER 421. The record supports that conclusion. For example, the NAS Report explained that "estimating the marginal costs" of the effects of carbon dioxide releases "has proven highly controversial," and that "[a] wide range of estimates appears in the literature, from negative values to values well over $100 per metric ton" of carbon. ER 183.

Numerical estimates from comments seeking to attribute a specific value to carbon dioxide emissions varied from a range of $10 to $25 per ton of carbon (suggested by petitioner NRDC) to $50 per ton of carbon (from petitioner Environmental Defense and Union of Concerned Scientists). ER1026, 1089. Other suggestions, not substantiated by rigorous scientific analysis, resulted in values between $3 and $27 per ton of carbon. ER 806; see also ER 1026, 1089 (offering no analysis, suggesting only that a higher value was warranted in order to combat the problem of global warming).

The proposition that some costs and benefits are too uncertain to support a particular monetary value is hardly a controversial notion. This Court has upheld EPA's decision declining to adopt a proposed standard on the ground that the agency was "unable to reliably quantify" the benefits of the proposal. Citizens for Clean Air v. EPA, 959 F.2d 839, 850 (9th Cir. 1992). Even petitioner NRDC expressly recognized in its comments that some benefits of a more stringent fuel economy standard, such as the enhancement of national security and the reduction of carbon dioxide emissions, "may not even be fully identifiable, let alone quantifiable and monetizable." ER 800; see also 71 Fed. Reg. at 17592 (ER 1399).[6] Similarly, the agency observed that it could not monetize the "costs for remediating gasoline spills, reduction of which would be a benefit under Reformed CAFE." SER 421. Notably, petitioners do not dispute that decision. And prior light truck CAFE regulations (for MYs 2005-2007) likewise concluded that reduction of carbon dioxide was too uncertain a benefit to warrant assigning a monetary value for the reduction of carbon dioxide emissions. See 68 Fed. Reg. 16868, 16879 (Apr. 7, 2003) ("The value of avoiding greenhouse gas emissions is not quantifiable at this time."); ibid. (quoting petitioner Environmental Defense's recognition that "the magnitude of the global warming externality is admittedly difficult to estimate").

Petitioners incorrectly assert that NHTSA "assigned a value of zero dollars" (EPCA Br. 27; see also id. at 28, 31), that the agency "threw up its hands" (id. at 31),

[6] NRDC urged NHTSA not to rely on a marginal cost-benefit analysis, in part because of the inability to monetize all potential benefits.

and that NHTSA "wr[o]te off the central environmental benefits of stricter standards" (id. at 34). Not so. The agency properly omitted from its calculations variables that could not fairly be quantified. As we have explained, NHTSA considered the benefit of reduced carbon dioxide emissions, as it did in the prior light truck CAFE regulation (MYs 2005-2007), but concluded that the administrative record lacked sufficient data to arrive at any particular monetary value for that benefit. See 71 Fed. Reg. at 17589 (ER 1396).

As the agency correctly recognized, the limited and widely varying data in the administrative record preclude the assignment of any particular value to reduced carbon dioxide emissions. Petitioners here offer no valid reason to reach a different conclusion. They merely point to comments that offer a range of ultimate values for carbon dioxide emissions. See EPCA Br. 29 (citing ER 305, 1026, 1040).[7] But petitioners fail to address NHTSA's analysis, which emphasized not only the uncertainty concerning the question of the ultimate value to be assigned, but the wide variation in published estimates of the three major underlying costs of carbon dioxide emissions -- the cost of damages caused by such emissions, the costs of avoiding or controlling such emissions, and the costs of sequestering resulting emissions. See SER 421. Petitioners do not dispute the uncertainty surrounding those three

[7] The additional data petitioners cite, ER 1151-1152, cited in Pet. Br. 30 n.7, were submitted more than three months after the close of the comment period, and less than one month before the statutory deadline for the MY 2008 CAFE regulation. NHTSA filed the information in the docket, see 71 Fed. Reg. at 17638 (ER 1445) n.136, but did not have adequate time to assess the assertions.

underlying considerations. Nor do petitioners dispute that those considerations are relevant to the ultimate question.

Petitioners also mischaracterize the views of Dr. Michael Wang, who conducted a peer review of NHTSA's analysis. See EPCA Br. 32 (quoting ER 87). But NHTSA responded to Dr. Wang's concern, which was that the "wide range of dollar values per ton of [carbon dioxide] was not in itself sufficient justification for concluding that the cost could not be monetized." ER 87. As NHTSA explained, and as we observed above, the uncertainty NHTSA relied on was more fundamental, concerning the absence of data on the underlying sources of costs arising from carbon dioxide emissions . Petitioners likewise gain nothing from OMB Circular A-4, which states the unexceptional proposition that an agency "should monetize quantitative estimates whenever possible." EPCA Br. 31 (emphasis added) (quoting OMB Circular A-4, at 27 (Sept. 27, 2003)). Consistent with OMB's direction, NHTSA made an effort to monetize the value of reducing carbon dioxide emissions, but concluded it was not possible to do so here.

Finally, NHTSA explained that, even if it had been able to assign a monetary value to carbon dioxide emissions, the outcome likely would have been no different. See 71 Fed. Reg. at 17589 (ER 1396) ("there is no compelling evidence that these unmonetized benefits and costs would, taken together, alter [NHTSA's] assessment of the level of the [CAFE] standard for MY 2011 that would maximize net benefits"). Even petitioners' suggested values would attribute only a very small additional benefit for carbon dioxide reduction -- approximately 10-22 cents per gallon of gasoline.

See, e.g., 71 Fed. Reg. at 17638 (ER 1445) (Union of Concerned Scientists recommended value of $50 per ton of carbon would "correspond[] to approximately $0.15 per gallon of gasoline"); ER 183 (NAS Report, using same estimated value, "although this figure is significantly higher than typical estimates in the published literature"; also noting "range of cost estimates" resulting in benefits of 7-24 cents per gallon of gasoline). Because less-expensive (more cost-effective) technologies have already been added in the Volpe model, and therefore accounted for in Reformed CAFE levels, such a small additional benefit would not significantly change the application of fuel-saving technologies overall.

NHTSA explained in a related context (addressing an alternative approach to assessing costs and benefits) that seeking to impose higher levels of fuel economy would quickly run afoul of technological limitations. See 71 Fed. Reg. at 17591 (ER 1398) ("The Volpe model was unable to achieve a level of total cost equaling total benefit before running out of technologies to apply."). Thus, considerations of technological feasibility, as well as economic practicability, present real and substantial constraints on efforts to go beyond NHTSA's determination of the maximum feasible fuel economy levels under Reformed CAFE. Petitioners have failed to show that monetizing the costs of carbon dioxide emissions, even if possible, would meaningfully alter the end result.

NHTSA also explained that the unquantifiable safety costs attributable to vehicle weight reduction were also excluded from the marginal cost-benefit analysis, and that the two sets of benefits and costs, "taken together," would not alter the result.

Ibid. Although petitioners have challenged the threshold at which weight reduction becomes a safety problem, they do not dispute that it creates a safety hazard in some instances. See EPCA Br. 37-38 (arguing that vehicles with curb weight between 4000 pounds and 5000 pounds could be downweighted with limited effect on safety, but not disputing that downweighting vehicles below 4000 pounds creates safety risk). Nor do they dispute NHTSA's conclusion that it is impossible to quantify the costs of downweighting. NHTSA reasonably concluded that the existence of non-monetizable costs and benefits would, taken together, result in a negligible effect, if any, on the ultimate fuel economy level determined under the Volpe model.

**3. NHTSA carefully considered safety-related costs and benefits.**

**a.** In addition to its statutory responsibility to determine CAFE standards under EPCA, NHTSA is also the agency charged with overseeing the safety of light vehicles, including both passenger automobiles and light trucks. NHTSA promulgates and administers regulations (motor vehicle safety standards) under the National Traffic and Motor Vehicle Safety Act of 1966, as amended, 49 U.S.C. Chapter 301 (the Safety Act). NHTSA has extensive experience in evaluating safety concerns and identifying solutions designed to protect the lives of drivers and passengers on America's roadways.

The agency has consistently integrated safety considerations into its evaluation of the statutory factors set out in EPCA, and courts have upheld that practice. See CEI I, 901 F.2d at 120 n.11 ("NHTSA has always examined the safety consequences of the CAFE standards in its overall consideration of relevant factors since its earliest

rulemaking under the CAFE program") (citing 42 Fed. Reg. 33534, 33551 (June 30, 1977)). Indeed, even before EPCA's enactment, the Department of Transportation warned Congress of the potential for adverse safety effects associated with increased fuel economy requirements. See ibid. (citing 53 Fed. Reg. 39275, 39294 (1988), in turn citing 1974 DOT/EPA Report to Congress, which discussed "the possible trade-offs in the areas of improved fuel economy, lower emissions, and increased occupant safety," noting that "a sustained or increased shift to small cars, * * * would likely lead to an increase in the rate of highway deaths and serious injuries").

The history of CAFE regulation has borne out the agency's concern that more stringent fuel economy requirements can lead to lighter, less safe vehicles. The NAS Report recognized that much of the increase in fuel economy between 1975 and 1988 was due to reductions in the size and weight of vehicles, which led to increased safety risks. See ER 122 ("vehicle mass and size vary inversely not only with fuel economy, but also with risk of crash injuries"). While other trends improved vehicle safety overall, the NAS Report made clear that the safety improvements could have been even greater, but for CAFE requirements. See ER 124 (reviewing studies that "noted significant evidence that the improvement in motor vehicle safety * * * could have been even greater had vehicles not been downweighted and downsized"). The case law also reflects persistent safety concerns. See, e.g., CEI II, 956 F.2d at 326-327; CEI I, 901 F.2d at 120-122.

As NHTSA explained in the rulemaking here, CAFE regulations led vehicle manufacturers to reduce the size and weight of vehicles in the 1970s and 1980s,

which "contributed to many additional deaths and injuries." 70 Fed. Reg. at 51443 (ER 58). NHTSA predicted that, in the absence of reform to the CAFE regulatory process, "history is likely to repeat itself." Ibid. For that reason, NHTSA carefully considered the structure of Reformed CAFE, in an effort to reduce incentives for vehicle manufacturers to adversely affect safety as they improve fuel economy. 71 Fed. Reg. at 17595-17596 (ER 1402-1403).

In addition to the general correlation between vehicle weight and safety, NHTSA identified two specific safety considerations relevant to the design of Reformed CAFE -- rollover risk and crash compatibility. See 71 Fed. Reg. at 17573 (ER 1380). NHTSA particularly addressed the higher risk of rollover crashes among light trucks, especially SUVs and pickup trucks, which typically have a higher center of gravity than passenger cars. See 71 Fed. Reg. at 17595-17596 (ER 1402-1403); 70 Fed. Reg. at 51443 (ER 58). Reformed CAFE's focus on vehicle footprint minimizes the likelihood that CAFE compliance strategies will exacerbate rollover risk, because a manufacturer gains no CAFE advantage by decreasing track width (a component of footprint measurement), which could increase rollover risk while improving fuel economy, as a smaller footprint vehicle would have a higher CAFE target. See 71 Fed. Reg. at 17596, 17619-17621 (ER 1403, 1426-1428). The agency also identified a concern about the effect on safety of crashes involving vehicles of substantially different sizes, in which occupants of the smaller and lighter vehicle are more likely to suffer injury or death. See 71 Fed. Reg. at 17619-17620 (ER 1426-1428); 70 Fed. Reg. at 51421, 51443 (ER 36, 58). Weight reduction in some vehicles

may increase the risk of rollovers, while reducing the likelihood of death or injury in a crash involving vehicles with incompatible sizes. Reformed CAFE is based in part on the recognition that manufacturers may use weight reduction judiciously as a CAFE compliance strategy for larger vehicles, thereby minimizing safety risks. Ibid.

In the regulation under review, NHTSA contemplated the appropriate role for weight reduction in formulating Reformed CAFE. The agency relied on a study by Dr. Charles Kahane, analyzing the effects on safety of vehicle size and weight. Dr. Kahane's study looked at historical fatality rates in crashes involving MY 1991-1999 vehicles (passenger cars and light trucks), and concluded that "the net safety effect of removing 100 pounds from a light truck is zero for light trucks with a curb weight greater than 3,900 lbs." 71 Fed. Reg. at 17627 (ER 1434). However, NHTSA also recognized the "statistical uncertainty around [the 3,900 pound] figure," and accordingly imposed a confidence bound (a statistical constraint addressing the uncertainty in the underlying data) of approximately 1000 pounds, resulting in a threshold of 5000 pounds curb weight for considering weight reduction. Ibid.; see also SER 60-63, 275-276. Accordingly, the Volpe model considered weight reduction as a fuel-economy measure for vehicles over 5000 pounds.

**b.** Petitioners do not dispute much of the foregoing. They argue only that NHTSA should have used a 4,000-pound threshold instead of a 5,000-pound threshold for incorporating weight reduction in the Volpe analysis. But, as NHTSA explained, the studies of vehicle safety are necessarily imprecise, and the agency concluded that Reformed CAFE must compensate for the statistical uncertainty

underlying those assessments. Petitioners offer no compelling reason to overturn NHTSA's expert judgment concerning the effect of weight reduction on vehicle safety.

Petitioners challenge the validity of the Kahane study on the ground that it represented only a retrospective look at vehicle safety, focused on MY 1991-1999 vehicles. See EPCA Br. 35-37. But there is no objective way to assess the safety of vehicles that have not yet been built, and the record does not demonstrate any different safety effects of weight reduction among more recent vehicles. Indeed, petitioners offer no evidence showing that the safety of recent vehicles would be affected differently by reducing their weight. Instead, they argue that recent vehicles incorporate additional safety features, which would also reduce traffic fatalities.

For example, petitioners point to electronic stability control systems, which help to avoid rollover crashes. See EPCA Br. 36. But that is a non sequitur. The NAS Report expressly rejected a similar argument about vehicle safety, emphasizing that lives saved by other measures should not be traded off against the additional risk created by weight reduction. See ER 123 ("the appropriate question is not whether crash injury risk has continued to decline in the face of vehicle downsizing and downweighting, but rather whether motor vehicle travel in the downsized fleet is less safe than it would have been otherwise").

Petitioners also assert that "all of the scientific evidence points to a 4,000 pound (curb weight) or lower threshold." EPCA Br. 34. But they cite only to the Kahane study and to the NAS Report (which itself relies on an earlier study by Dr.

Kahane). See EPCA Br. 34-35 (citing ER 41-43, 170, 211). NHTSA addressed the conclusions and limitations of the Kahane study, as well as the other materials cited by commenters. See 71 Fed. Reg. at 17627-17628 (ER 1434-1435). The agency reasonably concluded that those studies are insufficiently precise. See 71 Fed. Reg. at 17628 (ER 1435) ("If the 3,900 lbs. estimate were perfectly accurate, we would be confident that weight reductions in vehicles down to 3,900 pounds would not result in net harm to safety. However, we agree with commenters that there is considerable uncertainty about the crossover weight and also the breakeven point."). That conclusion is supported by the administrative record. See, e.g., SER 83-84.

Petitioners fail to discuss NHTSA's central rationale for using a 5,000-pound threshold for weight reduction -- the statistical uncertainty in the Kahane study, which required confidence bounding. NHTSA explained the reasoning behind its judgment, and the administrative record supports that explanation. See SER 60-63, 275-276. Petitioners cannot overcome NHTSA's decision, especially in light of the APA's deferential standard of review, when they do not even mention that explanation, let alone attempt to explain how that explanation could be deemed unreasonable or unsupported.

The safety concerns at stake here are extremely serious, and warranted NHTSA's careful evaluation of the data. The NAS Report concluded that CAFE-related vehicle downweighting and downsizing in the 1970s and 1980s resulted in between 1300 and 2600 additional traffic fatalities in 1993. ER 125. NHTSA's

extensive experience with vehicle safety should not be second-guessed merely because petitioners would value fuel economy over safety.

### B. NHTSA Carefully Crafted Reformed CAFE To Improve Fuel Economy And Address Shortcomings In Unreformed CAFE.

Petitioners do not challenge NHTSA's fundamental approach in Reformed CAFE. See, e.g., EPCA Br. 41 ("Petitioners do not challenge the basic concept of formulating progressive fuel economy targets based on vehicle 'footprint.'"). Their limited challenge to two elements of the light truck Reformed CAFE regulation actually demonstrates a fundamental inconsistency in their arguments: While agreeing with the need for Reformed CAFE, petitioners would have NHTSA retain one of the most regressive elements of unreformed CAFE: a generally applicable nationwide minimum CAFE standard for light trucks (a backstop CAFE standard), irrespective of footprint and fleet mix. At the same time, petitioners urge that NHTSA should not have allowed a gradual transition to Reformed CAFE, and should instead have brought an abrupt end to the unreformed CAFE regulatory scheme, imposing the new system with no opportunity for manufacturers and the government to adjust to the operation of Reformed CAFE in the real world.

Petitioners' arguments are both mistaken. The agency's policy choices in designing the parameters of the Reformed CAFE regulation were permissible under EPCA, eminently reasonable, and supported by the administrative record.

#### 1. A "backstop" nationwide minimum CAFE standard would be inconsistent with Reformed CAFE.

Petitioners argue that NHTSA should have limited the effect of Reformed CAFE by subjecting every manufacturer to a generally applicable nationwide minimum CAFE standard as a backstop to the manufacturer-specific CAFE standard calculated under Reformed CAFE. See EPCA Br. 38-42. They argue that EPCA requires such a single, nationwide mileage number, and that the absence of a backstop will allow manufacturers to game the system by upsizing vehicles. Those arguments falter, both on the merits and because they fail to take account of the deference due the expert agency's judgment.

**a.** The key characteristic of unreformed CAFE was the use of a single CAFE standard, applicable to all manufacturers. As NAS and NHTSA recognized, that inflexible characteristic of unreformed CAFE created incentives to reduce vehicle size and weight, resulting in a relatively ineffectual system of regulation that led to additional safety risks. See 71 Fed. Reg. at 17574 (ER 1381); 70 Fed. Reg. at 51420-51422 (ER 35-37); ER 122-123, 127. Reformed CAFE, by contrast, imposes steadily increasing CAFE targets for every vehicle individually, based on its footprint. The approach of Reformed CAFE results in a manufacturer-specific CAFE requirement, derived from the fleet mix of vehicles each manufacturer produces. The result is a more effective regulatory scheme: higher overall fuel economy and more effective regulation of the fuel economy of smaller vehicles.

Some commenters urged the agency to impose a nationwide minimum CAFE standard, characteristic of unreformed CAFE, as a "backstop" to the Reformed CAFE system. Such a backstop would impose a higher CAFE standard than Reformed

CAFE if a manufacturer's fleet mix included a higher proportion of vehicles with a larger footprint (and therefore a lower fuel economy target). The backstop proposal reflects an effort to discourage manufacturers from producing larger light trucks. See, e.g., 71 Fed. Reg. at 17592, 17617-17618 (ER 1399, 1424-1425); ER 308, 807-809.

NHTSA rejected the backstop proposal, concluding that using CAFE standards to limit future changes to fleet mix would be contrary to EPCA. See 71 Fed. Reg. at 17592-17593, 17617 (ER 1399-1400, 1424). Congress intended to establish a regulatory system that would improve fuel economy without unduly limiting consumer choice and technological developments in vehicle production. Ibid. Moreover, a backstop would perpetuate the failings of unreformed CAFE, creating incentives for full-line manufacturers to downweight at the risk of safety, and contradicting a key purpose of adopting the footprint-based Reformed CAFE. Ibid.

**b.** Petitioners argue that EPCA compels the use of a backstop nationwide CAFE standard. See EPCA Br. 38-40. That argument cannot prevail in light of the statute's text, structure, legislative history, and implementation.

Petitioners once again ignore Chevron. But the question they raise -- whether NHTSA reasonably interpreted EPCA to authorize Reformed CAFE with no backstop -- is precisely the kind of question that this Court and others have held is governed by the two-step Chevron inquiry. See, e.g., New Edge Network, Inc. v. FCC, 461 F.3d 1105, 1110 (9th Cir. 2006); CAS I, 793 F.2d at 1338. Petitioners again cite to a pre-Chevron case. See EPCA Br. 38 (citing United States v. Larionoff, 431 U.S. 864 (1977)). And this Court's decision in Tuan Thai v. Ashcroft, 366 F.3d 790 (9th

Cir. 2004), cited in EPCA Br. 38-39, is inapposite. The Court there applied binding Supreme Court precedent interpreting the governing statute to avoid constitutional concerns. As the Supreme Court has made clear, the doctrine of constitutional avoidance may trump Chevron. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). But petitioners offer no reason to doubt the constitutionality of EPCA. And neither the Supreme Court nor any other court has held that EPCA requires a backstop. Indeed, as we explain below, the D.C. Circuit has previously held that EPCA permits NHTSA to consider fleet mix and consumer preference in setting CAFE standards. See, e.g., CAS I, 793 F.2d at 1339.

Petitioners read EPCA to require a single CAFE standard equally applicable to all manufacturers. See EPCA Br. 38. First, they argue that the statute's use of the term "maximum feasible level," 49 U.S.C. § 32902(a), with reference to "average fuel economy standards," ibid., and the term "a performance standard specifying a minimum level of fuel economy applicable to a manufacturer in a model year," id. § 32901(a)(6), require a single, universally applicable, predetermined mileage number. See EPCA Br. 39. But they fail to elaborate on this assertion, let alone provide any authority to support it. And the plain language of the statute refutes that argument.[8]

[8] Petitioners' argument also appears to be internally inconsistent, as their preferred approach -- Reformed CAFE plus an alternative backstop -- would not constitute a single "definite" or "fixed" standard. EPCA Br. 39.

The very statutory provisions petitioners quote demonstrate the error of their argument. EPCA refers in the plural to "average fuel economy standards," 49 U.S.C. § 32902(a), expressly contemplating more than a single CAFE standard. The statute also refers to "a performance standard specifying a minimum level of fuel economy applicable to a manufacturer in a model year," id. § 32901(a)(6) (emphasis added). That language demonstrates that Congress allowed for the possibility of manufacturer-specific standards, as in Reformed CAFE. Other provisions in EPCA confirm that Congress contemplated the possibility that NHTSA would adopt multiple, manufacturer-specific light truck CAFE standards, each establishing the maximum feasible CAFE level for a particular manufacturer's fleet mix. See, e.g., 49 U.S.C. § 32902(a) ("[T]he Secretary of Transportation shall prescribe by regulation average fuel economy standards for automobiles (except passenger automobiles) manufactured by a manufacturer in that model year. Each standard shall be the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year."). Certainly nothing in those provisions supports petitioners' position that "Congress has directly spoken," in petitioners' favor, "to the precise question at issue." Chevron, 467 U.S. at 842.

Nor does the structure of the statute aid petitioners. They try to equate EPCA's provisions for light truck and passenger car CAFE standards, see EPCA Br. 39-40. But the statutory language refutes that notion. Most obviously, EPCA refers to a single passenger car CAFE "standard," 49 U.S.C. § 32902(b), but light truck "standards," id. § 32902(a). The distinction has long been recognized. See, e.g., 70

Fed. Reg. at 51446 (ER 61) ("The statute requires that passenger car standards be the same for all manufacturers. There is no similar requirement for the [light] truck standards.") (quoting 1980 report). Petitioners' sole argument is that the statute refers to "minimum" CAFE standards. But that is consistent with a minimum standard applicable to a particular manufacturer, based on that manufacturer's fleet mix.

Petitioners argue that the legislative history indicates that "Congress did not want an exclusively retail sales mix CAFE standard with no backstop." EPCA Br. 40 (emphasis added; internal quotation marks omitted). But the report they cite says nothing about backstops. See S. Rep. No. 94-179 (1975). And the D.C. Circuit expressly rejected petitioners' argument concerning NHTSA's consideration of fleet mix in establishing CAFE standards. See CAS I, 793 F.2d at 1339 (concluding that the argument from legislative history "rests on the plainly unfounded assumption that the rationales for waiving penalties and the factors to be applied in setting standards are identical," and observing that, "while Congress rejected market forces as the sole means of improving energy conservation, that does not then mean that consumer demand is irrelevant to the determination of the mandatory standards"); id. at 1340 ("We conclude that the legislative history reveals no precise congressional intent with regard to this issue."). That court also held that "[c]onsideration of product mix effects was * * * reasonable." Id. at 1341.

The legislative history also demonstrates that Congress was concerned that CAFE standards should not unduly limit consumer choice. See H.R. Rep. No. 94-340, at 87 (1975), reprinted in 1975 U.S.C.C.A.N. 1762, 1849 ("any regulatory

program must be carefully drafted so as to require of the industry what is attainable without either imposing impossible burdens or unduly limiting consumer choice as to the capacity and performance of motor vehicles"), cited in Public Citizen, 848 F.2d at 264 ("a standard with harsh economic consequences for the auto industry would represent an unreasonable balancing of EPCA's policies"). NHTSA explained that a backstop would require manufacturers to limit production of larger vehicles, creating an artificial constraint on consumer choice that would be inconsistent with EPCA's balance. See 71 Fed. Reg. at 17593 (ER 1400). Indeed, those commenters proposing a backstop made clear they intended precisely such a result. See ibid.; see also ER 807-809.

Petitioners' backstop argument finds no support at step one of the Chevron analysis, as EPCA's language plainly admits of the interpretation NHTSA adopted. And petitioners do not dispute that NHTSA's interpretation is reasonable. Indeed, they concede that "the basic concept of formulating progressive fuel economy targets based on vehicle footprint" is not in dispute. EPCA Br. 41 (internal quotation marks omitted). Reformed CAFE calculates the maximum feasible fuel economy standard for each manufacturer, and avoids the perverse incentives that characterized the unreformed regulatory system. NHTSA carefully explained that imposing a backstop would be inconsistent with the fundamental approach of Reformed CAFE, would

exceed the maximum feasible level attainable by a manufacturer, and would raise safety problems. See 71 Fed. Reg. at 17592-17593 (ER 1399-1400).[9]

**c.** Petitioners also dispute NHTSA's conclusion that Reformed CAFE will not lead manufacturers to increase the size and weight of vehicles. See EPCA Br. 41-42. But the agency's predictive judgment concerning the likely behavior of manufacturers under unreformed CAFE was plainly reasonable, and was entitled to deference. See, e.g., Public Citizen, Inc. v. NHTSA, 374 F.3d 1251, 1260-61 (D.C. Cir. 2004) ("Predictions regarding the actions of regulated entities are precisely the type of policy judgments that courts routinely and quite correctly leave to administrative agencies.") (internal quotation marks and citation omitted); Southern Pacific Transp. Co. v. ICC, 871 F.2d 838, 842 (9th Cir. 1989) ("Such predictive judgments, when based upon credible evidence, are best left to the expertise of the administrative agency familiar with the industry.").

NHTSA explained that the structure of Reformed CAFE makes it highly unlikely that manufacturers will increase the size of their light truck models to gain a CAFE advantage. See 71 Fed. Reg. at 17617-17618 (ER 1424-1425). First, there is nothing to be gained by increasing the size of a light truck, especially under the continuous function approach adopted by NHTSA, as fuel economy is inversely related to vehicle size and weight, and any increase will likely result in poorer fuel economy. Second, manufacturers are constrained by consumer demand. Production

[9] Moreover, NHTSA has historically interpreted EPCA to allow multiple categories of light truck CAFE standards. See 49 C.F.R. § 533.5, Tables I-III.

of larger vehicles will not be economically sustainable in the absence of a demand for those vehicles (and, as the court held in CAS I, NHTSA's consideration of consumer demand is reasonable). Third, and relatedly, economic forces will impose additional constraints on manufacturers, as larger vehicles are more expensive to manufacture and to operate. Especially in light of rising fuel costs, overall demand for such vehicles is likely to decrease.

Petitioners argue that manufacturers in the past took advantage of incentives under unreformed CAFE to increase the size of their vehicles.. See EPCA Br. 41. But that historical trend prompted NHTSA to adopt Reformed CAFE, which the agency concluded would eliminate those undesirable incentives. Reformed CAFE "significantly minimizes the incentive to manufacture a vehicle as a light truck as opposed to a passenger car, solely for CAFE purposes." 71 Fed. Reg. at 17621 (ER 1428); see also, e.g., id. at 17568 (ER 1375); 70 Fed. Reg. at 51422 (ER 37). Petitioners also point to comments suggesting that the regulatory scheme proposed in the NPRM (using steps, or footprint categories, instead of a continuous function) could create new incentives to upsize. See EPCA Br. 41-42. But that argument is inapposite, as NHTSA responded to those comments by changing the proposed regulatory structure and adopting a continuous function approach instead, in part to eliminate the risk of those very incentives. See, e.g., 71 Fed. Reg. at 17596 (ER 1403) ("a continuous function will reduce the incentive created by a step function to upsize a vehicle whose footprint is near a category boundary"); id. at 17609 (ER 1416) (continuous function reduces incentives for manufacturers to upsize or

downsize vehicles for CAFE advantage); id. at 17615 (ER 1422) ("a continuous function reduces incentives to downsize or upsize a vehicle"). Similarly, product plans developed during the period of unreformed CAFE (see EPCA Br. 42) offer no insight into manufacturers' behavior under the new regulatory system. Petitioners' arguments fail to address NHTSA's explanation of the quite different incentive structure under Reformed CAFE.[10]

**2. The three-year transition period is supported by the statute, the record, and prior agency practice.**

In the regulation under review, NHTSA promulgated Reformed CAFE, but recognized that the new regulatory scheme would be "the first comprehensive reform of the light truck CAFE program since its inception." 71 Fed. Reg. at 17593 (ER 1400). To accommodate such a radical and thoroughgoing change, NHTSA decided to phase in the requirements of Reformed CAFE, providing three years (MYs 2008-2010) for manufacturers to adjust to the new regulatory system. For each model year during the three-year transition period, a manufacturer "may choose to comply with the Unreformed CAFE standard or the Reformed CAFE standard." Ibid. The choice, once made, is "irrevocable." Id. at 17639 (ER 1446). Beginning with MY 2011, light truck manufacturers must comply with Reformed CAFE exclusively.

Petitioners challenge the three-year transition period, arguing that EPCA precludes such a gradual shift to Reformed CAFE. See EPCA Br. 42-44. Once again,

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[10] Petitioners also point to news reports that post-date the regulation, were not part of the administrative record, and could not have been considered by NHTSA. See EPCA Br. 42 n.11.

petitioners disregard the governing Chevron framework. Their argument fails because they cannot demonstrate, under either step one or step two of Chevron, that NHTSA unreasonably interpreted the statute.

Petitioners argue that the transition period "fails to achieve maximum feasible average fuel economy." EPCA Br. 42 (citing 49 U.S.C. § 32902(a)). But they omit critical parts of the statute, which directs that the prescribed CAFE standard for light trucks "shall be the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year," 49 U.S.C. § 32902(a), recognizing the importance of manufacturers' ability to meet the regulatory standards. The statute also permits the agency to "prescribe separate standards for different classes of automobiles," ibid., refuting petitioners' suggestion that the statute contemplates only a single, uniform standard. Petitioners fail to demonstrate how the plain language of the statute can be read to preclude a transition period.

Petitioners contend, without argument or authority, that "only one [Reformed CAFE or unreformed CAFE], by definition, can be the maximum feasible." EPCA Br. 43.[11] Petitioners' argument rests on the unsupported assumption that the statute contemplates only a single CAFE standard for any model year. We have already demonstrated the flaws in that assumption when considering multiple manufacturers, in the context of the backstop argument (supra). The argument carries no more

[11] Notably, petitioners add the word "single" to their argument, though that word does not appear in the statute. EPCA Br. 43.

weight when applied to alternative methods of calculating the applicable CAFE standard.

Presumably, petitioners mean to suggest that the statute's reference to a maximum feasible standard precludes alternative formulations of the CAFE standard. If that were so, then either unreformed CAFE or Reformed CAFE would be unlawful -- only one (under petitioners's theory) could possibly establish the maximum feasible CAFE standard. But unreformed CAFE has been upheld repeatedly, and petitioners do not challenge NHTSA's determination of unreformed CAFE standards even in MYs 2008-2010. Nor do petitioners dispute the need for reform.

Petitioners' argument is notably limited. They contend only that NHTSA must make an abrupt move, in some unspecified model year, from the unreformed system to Reformed CAFE, although they do not say when such a change should take place or how the practical concerns identified by the agency should be accommodated. Here, NHTSA explained that "the need for an orderly transition" was a factor that should be considered in determining the applicable standard. 71 Fed. Reg. at 17594 (ER 1401). NHTSA explained that the need for an orderly transition was properly considered as part of three factors expressly listed in 49 U.S.C. § 32902(f): technological feasibility, economic practicability, and the need to conserve energy. See 71 Fed. Reg. at 17594, 17595, 17625 (ER 1401, 1402, 1432). The courts have recognized NHTSA's authority to construe the statutory factors in this way. See, e.g., CEI III,45 F.3d at 482-483 ("NHTSA has previously considered safety as an aspect of technological or economic feasibility") (citing CEI II, 956 F.2d at 322); CAS I, 793

F.2d at 1341 ("the factors of 'technological feasibility' and 'economic practicability' are each broad enough to encompass the concept" of consumer demand).

Prior regulatory history also demonstrates the error of petitioners' argument. In MYs 1982-1991, manufacturers had the option of complying with separate standards for 2WD and 4WD, or complying with a combined standard. During the 12 years between the adoption of that scheme, see 45 Fed. Reg. 20871 (Mar. 31, 1980), and its expiration in 1992, no one challenged or disputed the propriety of such an approach. NHTSA has also routinely adopted transition periods for new regulations under other statutes. For example, the Second Circuit upheld a three-year phase-in period for a new safety standard requiring tire pressure monitoring systems. See Public Citizen, Inc. v. Mineta, 340 F.3d 39, 61 (2d Cir. 2003).

### C. The Scope Of The Regulation Is Consistent With The Statutory Mandate And With The Record.

Petitioners raise two arguments concerning the scope of the light truck CAFE regulation, contending that NHTSA should have regulated some vehicles as passenger cars instead of light trucks, and that the agency should have included more very large vehicles within the light truck CAFE scheme. But those arguments improperly disregard the limitations imposed by Chevron and the APA standard of review. NHTSA's regulatory definitions governing the scope of light truck CAFE regulations reasonably comport with congressional intent.

**1.** Petitioners first take issue with the historical distinction between light trucks and passenger cars. See EPCA Br. 45-48. EPCA directs the Secretary to

"decide[] by regulation" what vehicles are "manufactured primarily for transporting not more than 10 individuals." 49 U.S.C. § 32901(a)(16). Moreover, EPCA's definition of "passenger automobile" excludes "an automobile capable of off-highway operation that the Secretary decides by regulation -- (A) has a significant feature (except 4-wheel drive) designed for off-highway operation; and (B) is a 4-wheel drive automobile or is rated at more than 6,000 pounds gross vehicle weight." Ibid. Thus, the statute leaves to the agency's discretion whether to extend CAFE regulation to include: (1) vehicles not primarily designed for passenger transportation, (2) vehicles with a feature designed for off-road use, and (3) vehicles over 6000 pounds GVWR.

Since 1977, NHTSA has consistently implemented the statutory distinction between passenger and non-passenger automobiles by defining a "light truck" as "an automobile other than a passenger automobile which is either designed for off-highway operation * * * or designed to perform at least one [listed, specialized function]." 49 C.F.R. § 523.5(a). The regulation lists five such functions, including the ability to "(1) Transport more than 10 persons; (2) Provide temporary living quarters; (3) Transport property on an open bed; (4) Provide greater cargo-carrying than passenger-carrying volume; or (5) Permit expanded use of the automobile for cargo-carrying purposes or other nonpassenger-carrying purposes." Ibid. That definition has been in place for three decades. See 42 Fed. Reg. 38362 (July 28, 1977).

Petitioners contend that the definition of light truck is outdated and should be narrowed to exclude some or all light trucks, based on their assertion that "the

majority of SUVs, vans and pickup trucks function solely or primarily as 'passenger vehicles.'" EPCA Br. 45-46. Petitioners argue (without analysis or authority) that the statutory term "passenger vehicles" should be read to mean any vehicle that functions as a means of transport for persons. But the statute does not include or even suggest such a definition, and NHTSA has reasonably adopted, and has long held, a different view, consistent with congressional intent.

Moreover, this issue was not within the scope of the NPRM. NHTSA expressly excluded such questions, stating that it was considering only the proposal to amend the flat-floor rule, and was "not otherwise changing those classification regulations at this time." 70 Fed Reg. at 51422 (ER 37). The agency had good reasons to limit the scope of this major rulemaking proceeding. "[W]e believe an orderly transition to Reformed CAFE could not be accomplished if we simultaneously change which vehicles are included in the light truck program * * *." Ibid. The lead-time limitations in the statute, requiring promulgation of the MY 2008 light truck CAFE standards approximately seven months after the NPRM, significantly constrained the scope of the agency's rulemaking. See 49 U.S.C. § 32902(a) (requiring regulation be prescribed "[a]t least 18 months before the beginning of each model year," i.e., by April 2006). And the promulgation of Reformed CAFE was a major undertaking, as reflected in the length of the Federal Register notices and the number of comments received. Undertaking a wholesale review of the agency's long-standing implementation of the statutory distinction between passenger cars and light trucks would have expanded the rulemaking beyond the agency's limited resources.

NHTSA also explained that "Reformed CAFE is likely to reduce the incentive to produce vehicles classified as light trucks instead of as passenger cars," a predictive judgment entitled to deference, which further diminishes the urgency of petitioners' concern. 70 Fed Reg. at 51422 (ER 37). The agency "may revisit the definitional issues as appropriate in the future." Ibid.[12]

Even if the question were properly presented, petitioners again fail to acknowledge the Chevron framework that governs this question of statutory interpretation.[13] They argue that "EPCA does not support" NHTSA's regulatory definition, but they fail to undertake the analysis that inquires whether Congress spoke directly to the question, and (if not) whether NHTSA has reasonably interpreted the statutory ambiguity. The reason for the omission is obvious: EPCA expressly delegates the authority to define the category of light trucks to the agency,

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[12] Petitioners can file a petition for rulemaking, asking NHTSA to reexamine the definition of light truck, and the agency's decision on such a petition would be subject to judicial review under the APA. See, e.g., General Motors Corp. v. NHTSA, 898 F.2d 165 (D.C. Cir. 1990); see also United States v. Dunifer, 219 F.3d 1004, 1008-1009 (9th Cir. 2004) (observing that denial of FCC petition for rulemaking "would be reviewable by a court of appeals"). The D.C. Circuit has held that such a mechanism, with deferential judicial review recognizing "the generous measure of discretion usually afforded an agency in its rulemaking process," is the appropriate vehicle to urge an agency to "revisit [an] original rule where subsequent events affected [the] continuing validity of [the] rule." American Ass'n of Paging Carriers v. FCC, 442 F.3d 751, 758 (D.C. Cir. 2006) (citing Geller v. FCC, 610 F.2d 973, 979 (D.C.Cir.1979)). Petitioners should not be permitted to "evade this carefully crafted process," Dunifer, 219 F.3d at 1009, by seeking to expand the scope of review here.

[13] The authority they cite, Brower v. Evans, 257 F.3d 1058, 1065 (9th Cir. 2001), cited in EPCA Br. 47, recognized the Chevron framework, and rested its decision on Chevron step one.

and NHTSA has done so consistently and in accordance with the purposes underlying the statutory distinction.

Petitioners mischaracterize the statutory definition of passenger automobiles in EPCA. See EPCA Br. 46. The statutory definition does not turn on whether a vehicle is "used to carry less than 10 passengers," ibid. (emphasis added), but on what NHTSA "decides by regulation" is the "primar[y]" purpose for which a vehicle is "manufactured," 49 U.S.C. § 32901(a)(16). The difference is crucial, in two respects. First, Congress specifically delegated to NHTSA the task of differentiating the two statutory categories, compelling Chevron deference to NHTSA's implementation of its statutory mandate. Second, NHTSA reasonably decided not to look to consumers' ultimate use of a vehicle, which may be difficult to predict, but to the purpose such a vehicle is intended to serve. For that reason, NHTSA's regulatory definition has consistently and properly focused not on consumer behavior but on the objective characteristics and primary functions of a vehicle. See, e.g., 41 Fed. Reg. 55368, 55369 (Dec. 20, 1976) (identifying "certain distinct design characteristics" and identifying "a convenient and objective way" to differentiate passenger from non-passenger automobiles).

Petitioners argue that the plain meaning of the term "passenger" compels a narrower definition. EPCA Br. 47. That argument would not survive step one of the Chevron framework, even on its own, as the unadorned term leaves many questions unanswered, which NHTSA has addressed by regulation (such as, for example, whether consumer use patterns or vehicle functionality should take precedence, and

how dual-use vehicles should be treated). But petitioners' argument is all the more remarkable in light of the statute's express delegation to NHTSA of the authority to define the scope of the term for regulatory purposes, which petitioners disregard. Likewise, petitioners (ibid.) misrepresent the legislative history, partially quoting a portion of a legislative report that noted that the statute "exclude[s] entirely vehicles not manufactured primarily for highway use." That exclusion is not at issue here, and the report goes on to emphasize that "[t]he classification of" vehicles other than passenger automobiles (light trucks) "would be done by the Secretary of Transportation in a rulemaking proceeding." H.R. Rep. No. 94-340, at 90 (1975), reprinted in 1975 U.S.C.C.A.N. 1762, 1852.

As we have explained, the legislative history makes clear that Congress did not intend CAFE regulation to limit consumers' choice of vehicles unduly. See H.R. Rep. No. 94-340, at 87, 1975 U.S.C.C.A.N. at 1852 ("any regulatory program must be carefully drafted so as to require of the industry what is attainable without either imposing impossible burdens or unduly limiting consumer choice as to capacity and performance of motor vehicles"). Petitioners' argument, focusing on the use of vehicles, irrespective of their design and functionality, would be inconsistent with that legislative intent, and NHTSA correctly has not adopted such a view.

Petitioners do not offer any argument addressed to Chevron step two, apparently conceding that NHTSA has reasonably interpreted the statute's delegation of authority. Rightly so, as the agency has recognized that the maximum feasible CAFE level is inversely proportional to a vehicle's size and weight. See, e.g., 71 Fed.

Reg. at 17568 (ER 1375) (noting that increasing size and weight of a vehicle reduces its fuel economy). Thus, it is not technologically feasible or economically practicable for manufacturers to design and build larger vehicles, such as light trucks, with the same fuel economy as passenger cars.

Ultimately, petitioners' semantic argument is of no practical consequence. Moving some larger vehicles from the category of light trucks to that of passenger cars would not overcome the practical limitations on the feasible fuel economy levels of those vehicles. In light of concerns about technological feasibility and economic practicability, NHTSA would likely be faced with a need to reduce the passenger car CAFE standard (under 49 U.S.C. § 32902(c)), which does not currently allow for the refinement of Reformed CAFE's footprint-based targets. NHTSA correctly found that the Reformed CAFE regulatory scheme is the best way to increase overall light truck fuel economy, and petitioners' argument would only frustrate that goal by limiting the scope of the Reformed CAFE regulation's focus on vehicle footprint.

Petitioners also misconstrue NHTSA's statements concerning the scope of the light truck CAFE regulation. They incorrectly insinuate that the agency has characterized light trucks as passenger vehicles, but they quote a statement in the National Energy Policy (NEP), which was not a NHTSA formulation and which did not purport to use EPCA's statutory terms of art or address the definition at issue here. See 68 Fed. Reg. 16868, 16897 (Apr. 7, 2003) (quoting NEP, at 2-4). NHTSA has consistently recognized the change in the overall light vehicle fleet (including both passenger cars and light trucks) over the past three decades. See 64 Fed. Reg. 26004,

26035 (May 13, 1999), cited in EPCA Br. 46; see also, e.g., 70 Fed. Reg. at 51422 (ER 37) ("The Unreformed approach to CAFE does not distinguish between the various market segments of light trucks, and therefore does not recognize that some vehicles designed for classification purposes as light trucks may achieve fuel economy similar to that of passenger cars."). Indeed, the effect of CAFE regulations on that shift was one of the factors leading NHTSA to adopt Reformed CAFE, which will reduce the incentive for vehicle manufacturers to seek to classify vehicles as light trucks in order to gain a CAFE advantage, because the CAFE targets for small light trucks are very close to the CAFE standards for passenger cars. See 71 Fed. Reg. 17621 (ER 1428) ("[T]he Reformed CAFE system will compare smaller light trucks to fuel economy levels more comparable to the passenger car standard."). And petitioners' observation that there exists a category of very large passenger vehicles (MDPVs, see also infra) adds nothing to the question of how to define the statutory categories, which recognizes that vehicles over 6,000 pounds may be deemed light trucks by the agency. See 49 U.S.C. § 32901(a)(16)(B).

**2.** The regulation under review expands the scope of the CAFE regulation, imposing Reformed CAFE requirements on MDPVs -- vehicles between 8,500 and 10,000 pounds that are primarily designed for transporting passengers -- beginning in MY 2011. See 71 Fed. Reg. 17648-17650 (ER 1455-1457). Petitioners argue that NHTSA did not go far enough, and that the agency should also have included very large pickup trucks. See EPCA Br. 48-55. But that argument misstates the

administrative record, and disregards the discretion Congress conferred on NHTSA, which NHTSA properly exercised here.

EPCA by its terms covers only vehicles under 6,000 pounds GVW, but the statute authorizes CAFE regulation of vehicles between 6,000 and 10,000 pounds "if the Secretary decides by regulation that -- (i) an average fuel economy standard * * * for the vehicle is feasible; and (ii) an average fuel economy standard * * * will result in significant energy conservation or the vehicle is substantially used for the same purposes as a vehicle [under 6,000 pounds]." 49 U.S.C. § 32901(a)(3). Pursuant to that delegated discretionary authority, NHTSA decided in 1978 that vehicles between 6,000 pounds and 8,500 pounds satisfied the statutory standard and would presumptively be subject to CAFE regulation. See 43 Fed. Reg. 11995 (Mar. 23, 1978); 49 C.F.R. § 523.3(b)(2). In the regulation under review, NHTSA further extended the coverage of Reformed CAFE to include MDPVs -- passenger vehicles weighing between 8,500 and 10,000 pounds -- concluding that manufacturers can improve fuel economy of MDPVs by applying technologies similar to those used in smaller light trucks, resulting in additional fuel savings. See 71 Fed. Reg. at 17650 (ER 1457).

There can be no dispute that EPCA expressly delegates to the agency the authority to promulgate regulations governing the scope of the CAFE regulatory scheme for vehicles weighing over 6,000 pounds. EPCA does not compel NHTSA to expand the scope of CAFE regulation to larger vehicles, but authorizes the agency, in its discretion, to do so based on certain findings. Petitioners do not dispute that the

agency reasonably interpreted the statute to add MDPVs. They argue that NHTSA could have also concluded that very large pickup trucks, like MDPVs, warrant inclusion in the CAFE program. See EPCA Br. 50-51. But the possibility that an agency could have reached a different outcome does not undermine the reasonableness of the agency's regulatory decision. Under the APA, courts should not second-guess an agency's choice among reasonable alternatives.

Petitioners also misconstrue NHTSA's reasoning, and invert the relevant question the agency sought to answer. As we have explained, the NPRM proposed to add MDPVs, and did not address whether very large pickup trucks should also be regulated under CAFE. The agency's analysis was accordingly directed at whether the record supports inclusion of MDPVs, not whether (as petitioners urge here) the record would also support addition of the largest pickup trucks. Thus, petitioners seize on factors that NHTSA identified as justifying inclusion of MDPVs, including differences between MDPVs and pickup trucks, and portray those factors as if they represented NHTSA's reasoning for excluding pickup trucks. But the agency is not obliged to justify exclusion of such very large vehicles, as the statute has already excluded them, subject to NHTSA's discretionary decision to include such vehicles. See 49 U.S.C. § 32901(a)(3).

NHTSA determined that MDPVs are particularly well-suited to CAFE regulation for two reasons: First, the agency concluded that CAFE regulation is feasible, in part because EPA has defined the category of MDPVs and subjected those vehicles to testing, providing data necessary for NHTSA to establish baseline fuel

economy levels. See 71 Fed. Reg. at 17649-17650 (ER 1456-1457). Second, NHTSA observed that MDPVs are designed and used primarily for passenger transportation. Ibid. Petitioners assert that the same conclusions could apply as well to pickup trucks, but the record supports NHTSA's distinction.

Petitioners claim that the absence of EPA testing requirements, and the related absence of data to formulate a baseline fuel economy level for very large pickup trucks, is not a substantial barrier to regulation. See EPCA Br. 51-54. But that is not the relevant question. Petitioners do not dispute that it is more feasible to regulate MDPVs, in light of EPA's testing requirements. That was NHTSA's conclusion, justifying the expansion of the CAFE regulation to include MDPVs, and it is amply supported by the record.

Petitioners also assert that "consumer use patterns for Class 2b pickups are substantially the same as those of the lighter weight pickups already regulated under EPCA." EPCA Br. 51. But the record does not support that claim, which in any event does not refute NHTSA's conclusion (agreeing with EPA) that the design of MDPVs reflects their intended use as passenger-carrying vehicles, and therefore justifies the extension of Reformed CAFE to cover MDPVs. See 71 Fed. Reg. 17650 (ER 1457) (quoting 65 Fed. Reg. 6698, 6849 (Feb. 10, 2000)). NHTSA and EPA recognized that the design and intended use of heavy pickup trucks with cargo beds over six feet long is obviously different from vehicles with more passenger, and less cargo, capacity. Ibid. Again, petitioners do not dispute this distinction from an objective, design-based perspective. Instead, they point to a single study, which they

say demonstrates consumer use patterns of very large pickup trucks. See ER 1030-1031. But the study they cite does not support that conclusion, as it failed to differentiate MDPVs (which includes short-bed pickup trucks) from long-bed pickups, and thus does not support their claim. In any event, petitioners do not dispute the reasonableness of NHTSA's reliance on objective design features to differentiate vehicles based on their intended purpose, not solely on historical usage choices by consumers.

## II. NHTSA COMPLIED WITH NEPA.

Petitioners also challenge NHTSA's compliance with NEPA. If the Court agrees that the regulation is consistent with EPCA and not arbitrary or capricious, then NHTSA's NEPA analysis should also be upheld. That is because the Final EA is premised on NHTSA's conclusion that the CAFE standards it promulgated represent "the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year," as required by 49 U.S.C. 32902(a), and that therefore the promulgation of more stringent standards would be inconsistent with EPCA's mandate. ER 1319, 1327, 1334, 1342-43, 1478-79.[14] By contrast, petitioners contend that EPCA either required or permitted NHTSA to establish substantially more stringent CAFE standards. As shown below, that dispute

[14] If the Court remands the regulation, NHTSA would have to promulgate a new regulation and make a new NEPA decision. Thus, if the Court agrees with petitioners that the regulation is arbitrary and capricious or contrary to EPCA, the Court may remand the regulation without reaching petitioners' NEPA arguments.

underlies not only petitioners' challenges to the regulation, but their NEPA arguments as well.

### A. The Final EA's Evaluation Of The Environmental Consequences Of The Regulation Was Not Arbitrary Or Capricious.

NHTSA adopted CAFE standards for MY 2008-2011 light trucks that will result in an incremental decrease in carbon dioxide emissions compared with the effect of previous regulations. Petitioners agree that there will be such a decrease. NHTSA concluded that the adoption of these new standards, which are an improvement over the pre-existing standards, would not significantly impact the human environment, so preparation of an EIS was not required. Contrary to petitioners' arguments, NHTSA was not required, in the context of adopting these new emission standards, to analyze broad-ranging impacts that carbon dioxide emissions have on the environment. NHTSA's judgment was reasonable and should be upheld by this Court.

#### 1. The EA adequately evaluated the decrease in carbon dioxide emissions brought about by the regulation in the context of global climate change.

Although NHTSA's regulation will cause a decrease in carbon dioxide emissions, and therefore will not negatively impact global climate change, the Final EA provides sufficient information concerning that issue given the role of an EA as a "concise public document" which serves to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact [FONSI]." 40 C.F.R. 1508.9(a)(1).

The Final EA reviewed current scientific knowledge concerning global climate change, as described in EPA's Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2004, Draft, February 23, 2006. ER 1346-48. The Final EA discussed the impacts of carbon dioxide, indicating that it can lead to climate change, which in turn can lead to potential human health effects and increase the concentration of ground-level ozone. ER 1346. It also acknowledged that carbon dioxide concentrations have risen "principally because of fossil fuel combustion, which accounted for almost 98 percent of total U.S. CO2 emissions in 1998." ER 1347-48.

Moreover, NHTSA evaluated the effects of carbon dioxide in the context of climate change in the Final EA's consideration of alternatives, including potential health risks, and specifically noted that the regulation was "expected to lessen the GHG impacts." ER 1348 & n.41. The Final EA also specifically considered the potential health effects from greenhouse gas emissions. ER 1346, Table 3-2.[15] Additionally, the Final EA evaluated, in reasonable detail, the potential effects of carbon dioxide and criteria air pollutants (including CO, lead, NO2, ozone, PM, and SO2) on air quality. ER 1345-47, 1354-57. It further discussed the impact of the regulation upon water resources, biological resources, land use and development, and hazardous waste generation. ER 1348-51, 1358-59. The Final EA's analysis is reasonably detailed and sufficient to meet the agency's burden adequately to inform decisionmakers, particularly in light of the regulation's minor and beneficial

[15] "Carbon dioxide emissions account for more than 95% of total greenhouse gas emissions resulting from the operation of motor vehicles." ER 1332 n. 27.

environmental impacts. See Utah Shared Alliance v. Carpenter, 463 F.3d 1125, 1136 n.4 (10th Cir. 2006) (and cases cited therein); Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1120 (9th Cir. 2002); City of Los Angeles v. NHTSA, 912 F.2d 478 (D.C. Cir. 1990), overruled on other grounds, Florida Audubon Soc. v. Bentsen, 94 F.3d 658 (D.C. Cir. 1996).

In the regulation, NHTSA responded to comments concerning greenhouse gas emissions and global warming. ER 1478-80. For example, petitioner CBD argued that the agency did not properly analyze the cumulative impacts of the regulation related to greenhouse gas emissions and global warming. In response, NHTSA explained that the final EA provided a discussion of greenhouse gas emissions in the U.S. transportation sector, as well as in the U.S. generally, based on available data. ER 1479 (citing ER 1347, 1357). NHTSA also noted that commenters had expressed concern about the potential impact of increased greenhouse gas emissions and global warming on animal species and their habitats. The agency stated in response:

> We first note that the Endangered Species Act does not require review in every instance that could have an impact on a particular endangered or threatened species, however remote. 16 U.S.C. 1531 et seq. Rather, review is triggered in instances where it is likely that such an impact will occur. See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 703 (1995). As noted in the final EA, the agency projected that the final rule would produce, compared to U.S. emissions of CO2, a small decrease in emissions of CO2, the primary component of greenhouse gas emissions, under the selected alternative (see EA p. 32). Accordingly, the agency determined that the action we are adopting today will not have a significant impact on the environment.

ER 1480.

NHTSA's treatment of the global climate change issue in the Final EA was consistent with applicable law. An EA must "include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. § 1508.9(b) (emphasis added). See also Native Ecosystems Council v. U.S. Forest Service, 428 F.3d 1233, 1239 (9th Cir. 2005) (summarizing EA requirements, and affirming Forest Service decision to not prepare an EIS). "An EA need not conform to all the requirements of an EIS." S. Or. Citizens Against Toxic Sprays, Inc. v. Clark, 720 F.2d 1475, 1480 (9th Cir. 1983) (citing Foundation for North American Wild Sheep v. United States Department of Agriculture, 681 F.2d 1172, 1178 n. 29 (9th Cir. 1982)). The Council on Environmental Quality (CEQ) regulations provide different requirements for an EA than for an EIS. Compare 40 C.F.R. Part 1502 (EIS requirements) with 40 C.F.R. § 1508.9(a)(1) (EA requirements). In Foundation for North American Wild Sheep v. United States Department of Agriculture, 681 F.2d 1172 (9th Cir. 1982), this Court made clear:

> We do not suggest that the EA must conform to all the requirements of an EIS. We merely assess whether the EA, offered by the Service as the prime statement of reasons for its decision not to prepare an EIS, is sufficient to establish the reasonableness of that decision.

Id. at 1178 n. 29. See also Australians for Animals v. Evans, 301 F.Supp.2d 1114, 1121 (N.D. Cal. 2004) (in an EA, "long descriptions or detailed data are unnecessary").[16]

**2. The legally relevant impact under NEPA is the decrease in carbon dioxide emissions from MY 2008-11 light trucks brought about by NHTSA's regulation.**

The regulation will reduce carbon dioxide emissions from MY 2008-11 light trucks below the level that would occur under the no-action alternative (Alternative A -- continuing the pre-existing CAFE standards ). ER 1357-58. Petitioners concede that much. NEPA Br. 23, 34. But they argue that in future years the number of light trucks on the road and the average number of miles traveled by each vehicle (VMT) are projected to increase, that these changes will increase carbon dioxide emissions from MY 2008-11 light trucks, and that the regulation's higher fuel economy standards will offset only some of the anticipated increase in carbon dioxide

[16] The cases cited by petitioners (States Br. 22) do not support the proposition that an EA which leads to a FONSI is subject to the same requirements as an EIS. In Price Road Neighborhood Ass'n, Inc. v. U.S. Department of Transportation, 113 F.3d 1505 (9th Cir. 1997), the Court merely noted that the CEQ regulations do not address when an EA must be supplemented. The Court then relied on the CEQ regulation regarding when an EIS should be supplemented if there are changes to the project, 40 C.F.R. § 1502.9(c)(1)(i), and applied it to the EA at issue. In Save Our Ecosystem v. Clark, 747 F.2d 1240 (9th Cir. 1984), the EA was used on an annual basis to modify an existing programmatic EIS. The court held that in those particular circumstances the EA was the "functional equivalent of an EIS," and therefore subject to the 45 day notice-and-comment period for an EIS. Id. at 1247. Both rulings concern specific regulatory requirements not relevant here. The controlling rule here is that "[t]he EA is to be a "concise public document' that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS].'" Public Citizen, 541 U.S. at 757 (quoting 40 C.F.R. 1508.9(a)).

emissions from MY 2008-11 light trucks. NEPA Br. 23, 34.[17] On this basis, petitioners claim that the regulation "will result in a net annual increase in greenhouse gas emissions from light trucks." Id. at 23. According to petitioners, the Final EA should have analyzed the impact of the projected net-increase in carbon dioxide emissions from MY 2008-11 light trucks, rather than the decrease in carbon dioxide emissions resulting from NHTSA's regulations. Id. at 23-24, 27-36; States Br. 33-37. This argument distorts the NEPA analysis by attempting to portray NHTSA's regulations as the legally relevant cause of all carbon dioxide emissions by light trucks.

**a. NHTSA considered the expectation that the number of light trucks on the road is expected to increase.**

To predict emissions from and energy use by MY2008-11 light trucks, NHTSA considered both VMT and the number of light trucks in use. ER 1330-33. "Environmental impacts from adopting higher CAFE standards for light trucks were estimated separately for each model year over its expected life span in the U.S. vehicle fleet (approximately 36 years)." ER 1330. To determine the emission levels and energy use by light trucks of a particular model year in future calendar years, the agency multiplied "age-specific estimates of annual miles driven per vehicle by the number of vehicle[s] expected to remain in service at each age." ER 1331.

[17] The factors that tend to impact VMT include "population growth, economic growth, urban sprawl, low fuel prices, and increasing popularity of sport utility vehicles and other light-duty trucks that tend to have lower fuel efficiency." ER 1517. Those factors are outside NHTSA's regulatory jurisdiction.

NHTSA's estimates of reductions in carbon dioxide emissions from the regulation do account for future increases in light truck sales, as well as for increases in the durability and longevity of light trucks (these three factors together determine growth in "the number of light trucks on the road"). SER 364, 367-368.[18] However, the assumption of petitioners that the average number of miles light trucks are driven annually (VMT) will increase is based on a misinterpretation of the record.[19]

**b. Even though the number of light trucks on the road is expected to increase, NHTSA correctly determined that the regulation will reduce carbon dioxide emissions from MY 2008-11 light trucks.**

NHTSA correctly concluded that the legally relevant impact for determining the agency's obligations under NEPA was the decrease in carbon dioxide emissions brought about by the new CAFE standards, not projected increases in emissions caused by increased numbers of light trucks on the road.

"Under NEPA, an agency is required to provide an EIS only if it will be undertaking a "major Federal actio[n],' which "significantly affect[s] the quality of the human environment.'" Department of Transportation v. Public Citizen, 541 U.S. 752, 763 (2004) (quoting 42 U.S.C. § 4332(2)(C)). "Under applicable CEQ

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[18] That explains why, for MY 2008-10 light trucks, estimated lifetime carbon dioxide emissions generally tend to increase for each model year. ER 1355, Table 4-3. However, for each model year, estimated lifetime carbon dioxide emissions are less under the action alternatives than under the baseline, reflecting the decrease in carbon dioxide emissions brought about by more stringent CAFE standards. Ibid.

[19] Petitioners misapprehend data reported by EPA. NEPA Br. 34; States Br. 34 (both citing ER 1517). In fact, the EPA report describes historical growth in the number of miles driven each year by all "highway vehicles" in use, not the average number of miles a "light truck" is driven annually. ER 1517.

regulations, "[m]ajor Federal action' is defined to "includ[e] actions with effects that may be major and which are potentially subject to Federal control and responsibility.'" Ibid. (quoting 40 C.F.R. § 1508.18 (2003)). NHTSA does not control how many light trucks are on the road. The decisions of American consumers to purchase and use more light trucks are plainly not "Federal actions." Petitioners believe that NHTSA should have imposed even more stringent CAFE standards further to offset the impact upon carbon dioxide emissions of projected increases in the number of light trucks. However, the agency concluded that, because of EPCA's requirements that CAFE standards be technologically feasible and economically practicable, CAFE standards more stringent than those contained in the regulation were beyond its mandate under EPCA. ER 1478-79. Accordingly, NHTSA correctly examined the impact of its regulations upon carbon dioxide emissions and other factors in light of the expected increase in the number of light trucks on the road, but the agency correctly did not treat its regulation as the cause of the predicted increase in carbon dioxide emissions resulting from the larger number of light trucks in use.

The analysis in the Final EA is fully supported by the Supreme Court's decision in Department of Transportation v. Public Citizen, 541 U.S. 752 (2004), in which the Court held that NEPA did not require the Federal Motor Carrier Safety Administration (FMCSA) to prepare an EIS assessing the environmental effects of allowing Mexican trucks onto United States roads once the President lifted a moratorium on those trucks. This Court, in the ruling the Supreme Court reversed, had held that the FMCSA was required to consider the cumulative impact not only

of the safety regulations it had promulgated, but of the President's decision to lift the moratorium because the decision was to take effect once the safety regulations were issued and was therefore foreseeable. 541 U.S. at 762-63.

The Supreme Court reversed. It explained that "NEPA requires a reasonably close causal relationship between the environmental effect" and the pertinent agency conduct before an EIS must be prepared. Id. at 767 (internal quotation marks omitted). The Court found that the necessary causal link was absent because

> FMCSA has only limited discretion regarding motor vehicle carrier registration: It must grant registration to all domestic or foreign motor carriers that are willing and able to comply with the applicable * * * requirements. FMCSA has no statutory authority to impose or enforce emissions controls or to establish environmental requirements unrelated to motor carrier safety.

Id. at 758-759 (citation and internal quotation marks omitted). Although FMCSA could theoretically have attempted to regulate emissions from Mexican trucks indirectly, as by making safety regulations more stringent or by increasing enforcement, it was not clear "that FMCSA could, consistent with its limited statutory mandates, reasonably impose on Mexican carriers standards beyond those already required in its proposed regulations." Id. at 765. In those circumstances, the Court reasoned, "the legally relevant cause of the entry of the Mexican trucks is not FMCSA's action, but instead the actions of the President in lifting the moratorium and those of Congress in granting the President this authority while simultaneously limiting FMCSA's discretion." Id. at 769. Thus, the Court concluded that, "where an agency has no ability to prevent a certain effect due to its limited statutory

authority over the relevant actions, the agency cannot be considered a legally relevant "cause' of the effect." Id. at 770. "Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its EA when determining whether its action is a "major Federal action.'" Ibid.

The Court further explained that inherent in NEPA and its implementing regulations is a rule of reason, "which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." Id. at 767. An EIS serves two functions: it makes detailed information available to the agency concerning the environmental consequences of its proposed action, and it also makes the information available "to the larger audience that may also play a role in both the decisionmaking process and the implementation of the decision." Id. at 768 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989)). Neither of those purposes would be served, the Court held, by requiring FMCSA to prepare an EIS concerning the cross-border operations of Mexican motor carriers, both because the agency "has no authority to categorically prevent the cross-border operations," and because FMCSA would not be able to act on any additional information the "larger audience" might provide. Id. at 768-69.

Both of the Court's rationales apply with equal force in this case. The regulation will decrease carbon dioxide emissions from MY 2008-11 light trucks compared to the emissions permitted under the pre-existing CAFE standards, as the Final EA shows and petitioners concede. NHTSA evaluated the environmental

consequences of that decrease in the Final EA. The effect of the limitations imposed by Congress in EPCA means that the new CAFE standards will not entirely offset the projected effect of increases in the number of light trucks. However, the cause of that shortfall is Congress's decision in EPCA to require that CAFE standards be technologically feasible and economically practicable. See Public Citizen, 541 U.S. at 769. Because NEPA applies only to federal agencies, 42 U.S.C. 4332(2)(C), and excludes Congress, the Judiciary, or the President, 40 C.F.R. 1508.12, NHTSA cannot be ordered to prepare an EIS to address the environmental consequences of policy choices made by Congress. See Ground Zero Center for Non-Violent Action v. U.S. Dept. of Navy, 383 F.3d 1082, 1088 (9th Cir. 2004).

Furthermore, requiring NHTSA to analyze the environmental consequences of projected increases in carbon dioxide emissions from light trucks would be inconsistent with NEPA's rule of reason because, as in Public Citizen, it is not clear that NHTSA could "consistent with its limited statutory mandates" impose more stringent CAFE standards. Id. at 765. See also Goos v. I.C.C., 911 F.2d 1283, 1295-1296 (8th Cir.1990) (collecting cases); Sierra Club v. Hodel, 848 F.2d 1068, 1089 (10th Cir.1988) ("The EIS process is supposed to inform the decision-maker. This presupposes he has judgment to exercise."); Milo Community Hosp. v. Weinberger, 525 F.2d 144, 147 (1st Cir.1975) (agency not required to consider environmental factors when doing so "could not have changed the Secretary's decision."). NHTSA properly limited the scope of the Final EA to the environmental consequences of the decrease in carbon dioxide emissions that will result from the regulation.

The Final EA compared carbon dioxide emissions from MY 2008-11 vehicles under the regulation with the emissions that would occur under the no action alternative -- maintenance of the regulatory status quo. Petitioners characterizes this comparison as a "charade," NEPA Br. 28, but it is precisely the comparison that CEQ and the courts have directed agencies to make. "In requiring consideration of a no-action alternative, the [CEQ] intended that agencies compare the potential impacts of the proposed major federal action to the known impacts of maintaining the status quo." Custer County Action Assoc. v. Garvey, 256 F.3d 1024, 1040 (10th Cir. 2001) (citing Association of Public Agency Customers v. Bonneville Power Administration, 126 F.3d 1158, 1188 (9th Cir. 1997), and 46 Fed. Reg. 18,026, 18,027 (1981)).

NHTSA did so by comparing the carbon dioxide emissions from MY 2008-11 light trucks that would occur if the old CAFE standards remained in effect (the no-action alternative, or the "baseline") and the carbon dioxide emissions from those trucks under the regulation. ER 1354-58. This comparison shows, as petitioners concede, that the regulation will bring about a reduction in carbon dioxide emissions.[20]

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[20] The Final EA recognized that the regulation will indirectly affect VMT in one way: "improving fuel economy also reduces the fuel cost of driving and thus leads to additional use of light trucks, a response referred to as the fuel economy "rebound effect.'" ER 1319-20. The increased use of light trucks in turn leads to increased emissions. Id. at 1320. This is known as the "rebound effect," and it would occur to some extent under any more stringent CAFE standard. The regulation's tighter CAFE standards "are expected to result in a slight increase in annual miles driven per vehicle from the levels of annual vehicle use if the baseline standard remained in effect." ER 1331. However, the total effect of the new CAFE standards on carbon dioxide emissions, taking the rebound effect into account, is still a net-reduction compared to the no-action alternative. ER 1357. In other words, the direct

Petitioners contend that NHTSA failed to address the contribution of carbon dioxide emissions from light trucks to climate disruption and to analyze the impacts of such disruption on the human environment, including biodiversity, public safety, and human health. NEPA Br. 39. However, under Dept. of Transportation v. Public Citizen, 541 U.S. at 770, the agency was not required to consider in its EA effects that it lacks the ability to prevent. Just as the FMCSA was not required to consider the effects arising from the entry of Mexican trucks into the United because it could not prevent their entry, ibid., so NHTSA was not required to evaluate in its EA the effects of carbon dioxide emissions it lacks the statutory authority to prohibit. ER 1347-48. Instead, the agency reasonably evaluated the decrease in carbon dioxide emissions caused by its regulation in the context of global climate change, as described previously.

Petitioners argue that the limits on NHTSA's authority to impose more stringent standards stem from the way the agency has chosen to implement that statute, including the decision to use an analytical cost-benefit model, rather than from any inherent limit on the agency's statutory authority. NEPA Br. 6-7. Petitioners appear to view EPCA as giving the agency unbounded authority to decide that environmental benefits outweigh concerns about economic practicability and technological feasibility. Ibid. NHTSA does not interpret the statute that way, nor have the courts.

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effect of the new standards in reducing carbon dioxide emissions is greater than the effect on emissions of the slight increase in annual miles driven per vehicle. The Final EA therefore correctly concluded that the regulation will cause a net-decrease in carbon dioxide emissions.

> EPCA does not permit the agency to establish fuel economy standards at any chosen level, but instead requires NHTSA to balance these factors when setting an appropriate standard. For example, a fuel economy standard "with harsh economic consequences for the auto industry * * * would represent an unreasonable balancing of EPCA's policies." Center for Auto Safety v. NHTSA, 793 F.2d 1322, 1340 (D.C. Cir. 1986).

ER 1479. This is the agency's longstanding interpretation of the statute, which is entitled to deference under Chevron.[21] It is also fully consistent with congressional intent. As the House Report on EPCA explained:

> [T]he Committee recognizes that the automobile industry has a central role in our national economy and that any regulatory program must be carefully drafted so as to require of the industry what is attainable without either imposing impossible burdens on it or unduly limiting consumer choice as to capacity and performance of motor vehicles.

H.R. Rep. No. 94-340, at 87 (1975), reprinted in 1975 U.S.C.C.A.N. 1762, at 1849. The goal of EPCA, therefore, is not to achieve the maximum level of fuel economy regardless of the economic consequences. NHTSA has historically considered whether a potential CAFE standard is economically practicable in terms of whether the standard is one ""within the financial capability of the industry, but not so stringent as to threaten substantial economic hardship for the industry." Public Citizen v. NHTSA, 848 F.2d 256, 264 (D.C. Cir. 1988).

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[21] See, e.g., 68 Fed. Reg. 16868, 16872-73, 16881-93 (Apr. 7, 2003); 59 Fed. Reg. 16312, 16313-15, 16320-21 (Apr. 6, 1994); 53 Fed. Reg. 11074, 11079-87 (Apr. 5, 1988); 45 Fed. Reg. 20871, 20873-75 (Mar. 31, 1980).

NHTSA concluded that EPCA's requirements that CAFE standards be both economically practicable and technologically feasible precluded the agency from imposing more stringent requirements than those contained in the regulation. ER 1319. This determination was not based solely on the cost-benefit analysis. On the issue of economic practicability, the agency also considered "potential sales and employment impacts," ER 1395, and "the financial condition of the industry," ER 1405. NHTSA also considered the recommendations of commenters which advocated that the agency mandate higher levels of fuel economy, but NHTSA determined that existing technologies could not support the fuel economy levels suggested by those commenters. See ER 1373, 1398, 1431, 1433, 1452.

Therefore, having determined the maximum feasible standards, NHTSA could not impose more stringent CAFE standards than those included in the regulation. As Department of Transportation v. Public Citizen makes clear, an agency's duty to consider environmental impacts under NEPA is necessarily bounded by the limits of its regulatory authority under the statute it administers, as those limits are reasonably interpreted by the agency. 541 U.S. at 766 (noting that under FMCSA's "entirely reasonable reading" of its statute, it was required to certify any motor carrier that met certain requirements, and the agency therefore could not entirely exclude Mexican motor carriers from operating within the United States). Similarly, in determining that the Bureau of Land Management lacked sufficient discretionary authority to make its action subject to the Endangered Species Act, this Court held that, to the extent the agency's statute and regulations are ambiguous concerning the extent of

discretion, "we defer to the agency's interpretation of the laws it administers." Sierra Club v. Babbitt, 65 F.3d 1502, 1509 (9th Cir. 1995) (citing Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 701-707 (1995)). See also Northwest Coalition for Alternatives to Pesticides v. Lyng, 844 F.2d 588, 591 (9th Cir. 1988). NHTSA's reasonable interpretation of the extent of its regulatory discretion under EPCA also merits deference in determining the extent of its obligations under NEPA.

There is thus no basis for petitioners' claim that NHTSA should have treated the regulations as the legally relevant cause of projected increases in carbon dioxide emissions from light trucks.

**3. The environmental consequences of the regulation were adequately analyzed in the Final EA.**

**a. NHTSA did not improperly minimize the effect of carbon dioxide emissions from light trucks.**

Petitioners claim that NHTSA erred by "minimizing the significance of potential environmental impacts by comparing emissions changes to a larger national emission level," and that the Ninth Circuit has "rejected" this approach. States Br. 25 (citing Public Citizen v. Dept. of Transp., 316 F.3d 1002 (9th Cir. 2003), rev'd on other grounds, 541 U.S. 752 (2004)). Petitioners are wrong.

The regulation imposes CAFE standards on light trucks nationwide, and the U.S. transportation sector as a whole is generally a substantial emitter of carbon dioxide. ER 1348. The Final EA therefore determined the impact of the regulation on carbon dioxide emissions from light trucks by comparing the reductions in

nationwide emissions brought about by the regulation to total national emissions levels of carbon dioxide. ER 1357-58. NHTSA concluded that the action alternatives would reduce total U.S. greenhouse gas emissions by about 0.2 percent compared to the previous CAFE standards. Id. at 1358. There is no record support for the theory that the impact of the regulation on carbon dioxide emissions should have been estimated on a more local level. Indeed, the opposite is true. NHTSA's analysis in the Final EA relied on, among other sources, the February 23, 2006, draft version of EPA's Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2004. ER 1492-1521. This report was, at the time, the latest compilation of U.S. emissions available to NHTSA for its analysis. ER 1348 n. 42, 1358 n. 50. This EPA report, which is prepared in accordance with Intergovernmental Panel on Climate Change guidelines, quantifies carbon dioxide emissions by major generating and consuming sectors on a national basis. ER 1492-1521.

The agency's approach is further supported by City of Los Angeles v. NHTSA, 912 F.2d at 478. In the regulations challenged in that case, the effect on carbon dioxide emissions was also analyzed at the national level, and none of the opinions in that case criticized the agency's approach. Ibid.

Petitioners' reliance on this Court's ruling in Public Citizen is misplaced. That case did not concern carbon dioxide emissions, but rather criteria pollutants. Petitioners in that case contended that the Mexican trucks operating in the United States would, contrary to the findings in the EA, increase emissions of criteria pollutants and air pollution in border states, thereby harming border state populations.

The Court was critical of the Department's approach of comparing estimated emissions from the Mexican trucks nationally, and thereby characterizing the estimated increases as "very small relative to national emission levels," 316 F.3d at 1023. Instead of that "national" approach, this Court stated that the Department's EA should have conducted an analysis "regarding whether these increases may be localized in certain areas near the Mexican border." Ibid. [22]

Here, by contrast, the regulation will not increase carbon dioxide emissions at all, much less do so in any particular geographic area. The concern with possible dilution of locally significant impacts that motivated this Court in Public Citizen is therefore not present here.

**b. The Final EA adequately considered cumulative impacts.**

According to petitioners, the regulation will increase carbon dioxide emissions from light trucks, and the Final EA should have analyzed the cumulative impact of those increases upon global climate change. NEPA Br. 31-36; States Br. 36-37. This theory turns reality on its head, treating regulations that reduce carbon dioxide emissions as the cause of those emissions and any resulting environmental consequences.

The CEQ defines "cumulative impacts" as the impact on the environment that results "from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency * * * or person

[22] Of course, the Court's understanding that these changes would be caused by FMCSA's rule was the basis of the Supreme Court's subsequent reversal. See discussion supra.

undertakes such other actions." 40 C.F.R. § 1508.7. NHTSA's regulation decreases carbon dioxide emissions from MY 2008-11 light trucks, for the reasons previously explained. Thus, the cumulative impact analysis in the Final EA correctly examined the incremental impact of the regulation in reducing carbon dioxide emissions. The cumulative impacts analysis includes both the incremental impact of NHTSA's 2003 Rule, which increased the CAFE standards for MY 2005-2007 light trucks, and the incremental impact of all action alternatives considered in the Final EA (Alternatives B-E), which increase the CAFE standards for MY 2008-2011 light trucks. The Final EA contains a reasonably thorough discussion of the cumulative impacts of those regulations, and disclosed the sources of the underlying data supporting the cumulative effect analysis. ER 1319-26, 1354-1365. The Final EA's discussion demonstrates that NHTSA analyzed the cumulative impacts of the regulations upon criteria pollutants and carbon dioxide. Ibid. The Final EA explained that, because of the substantial time that elapsed between the agency's last CAFE action that was unaffected by congressional restrictions and the 2003 light truck rulemaking, and the significant changes in vehicle fleet composition and other parameters affecting the CAFE program that occurred during that period, the most practicable approach to evaluating cumulative impacts was to focus on impacts of activities that have occurred since the lifting of the congressional restrictions. ER 1323, 1359. NHTSA's cumulative impact analysis is reasonably detailed and consistent with the requirements for an EA, which require "some quantified or detailed information." Native Ecosystems Council, 428 F.3d at 1244.

The cumulative impacts analysis in the Final EA is also consistent with the Council of Environmental Quality's Guidance on the Considerations of Past Action in Cumulative Effects Analysis (June 24, 2005) at 3 (available at www.nepa.gov/nepa/regs/Guidance_on_CE.pdf). CEQ provided guidance to federal agencies regarding the extent to which the environmental consequences of past actions must be analyzed when determining the cumulative impacts of a proposed action. The guidance explains that "[a]gencies are not required to list or analyze the effects of individual past actions, unless such information is necessary to describe the cumulative effects of all past actions combined." It was consistent with this guidance for NHTSA to include in the cumulative impact analysis the effect of the 2003 Rule, the most recent and relevant of NHTSA's previous CAFE rulemakings, but not to analyze separately the impact of every past regulatory action regarding light trucks since the effect of the 2003 Rule includes "the cumulative effects of all past actions combined."

The cumulative impact analysis also takes into account changes in carbon dioxide emissions resulting from factors beyond the agency's regulatory authority, such as increases in the number of light trucks on the road. Thus, the Final EA provides a comprehensive evaluation of how carbon dioxide emissions from the regulated light trucks will change over time, both because of the decreases in emissions that will result from NHTSA's regulations, and because of the increases that will result from factors beyond the agency's regulatory authority. The cumulative

impact of Alternatives B-E is a decrease in carbon dioxide emissions from light trucks. ER 1362.

Nevertheless, petitioners insist that the cumulative impact analysis should have treated NHTSA's CAFE standards as the cause of increased carbon dioxide emissions from light trucks, rather than the cause of decreases in those emissions. NEPA Br. 31-34. This theory of causation ignores Public Citizen's holding that a regulatory agency can be deemed the legally relevant cause of only those environmental consequences that it has the authority to prevent. "Consideration of the CEQ's "cumulative impact' regulation does not change [the causation] analysis." Public Citizen, 541 U.S. at 769. "[C]umulative impacts include only the indirect and direct effects caused by a project." C.A.R.E. NOW, Inc. v. F.A.A., 844 F.2d 1569, 1573 (11th Cir. 1988) (emphasis added). See also Seattle Community Council Federation v. FAA, 961 F.2d 829, 835-36 (9th Cir. 1992); Allison v. Dept. of Transp., 908 F.2d 1024, 1031 (D.C. Cir. 1990). As the Supreme Court explained in Public Citizen,

> The "cumulative impact" regulation required FMCSA to consider the "incremental impact" of the safety rules themselves, in the context of the President's lifting of the moratorium and other relevant circumstances. But this is exactly what FMCSA did in its EA. FMCSA appropriately and reasonably examined the incremental impact of its safety rules assuming President's modification of the moratorium (and, hence, assuming the increase in cross-border operations of Mexican motor carriers). The "cumulative impact" regulation does not require FMCSA to treat the lifting of the moratorium, or consequences from the lifting of the moratorium, as an effect of its promulgation of its * * * Rules.

541 U.S. at 769-70 (emphasis added).

Similarly, in this case the cumulative impact regulation did not require NHTSA to treat its regulations as the cause of carbon dioxide emissions from light trucks, nor does it require the agency to treat the consequences of those emissions as an effect of the regulation. Petititioners' demand for an all-encompassing cumulative impact analysis of carbon dioxide emissions from light trucks assumes without foundation that all such emissions and the consequences of those emissions were caused by NHTSA's CAFE standards. In an apparent effort to support this groundless theory, petitioners assert that past CAFE standards were "inadequate," suggesting that this makes NHTSA partly responsible for past and present carbon dioxide emissions from light trucks. CBD Br. 33; see also States Br. 36-37. In fact, previous CAFE standards, like those challenged in this case, were set at the maximum level that was technologically feasible and economically practicable, as EPCA requires. See note 21, supra. Past CAFE standards are not subject to challenge in this litigation. 49 U.S.C. § 32909(b). Allegations regarding past CAFE standards therefore add nothing to petitioners' argument.

In short, the regulation is not the cause of carbon dioxide emissions from light trucks, but rather will bring about a decrease in those emissions, and NHTSA properly conducted the cumulative impact analysis on that basis.

**c. Petitioners' "tipping" arguments fail.**

Petitioners argue that "greenhouse gas emissions allowed by the Challenged Rule, when added to the past and projected future emissions, could very well tip the

earth's precarious balance into global meltdown." NEPA Br. 5-6; States Br. 27. These arguments fail.

First, the argument has been waived. Petitioners' comments on the Draft EA did not raise the "tipping point" argument. And it is axiomatic that issues not raised during the comment period are not properly before the Court on judicial review under NEPA. Public Citizen, 541 U.S. at 764-765 (citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978)).

Moreover, the only evidence cited by petitioners to support the "tipping" theory is the Declaration of James Hansen. States Br. 27. Mr. Hansen's declaration, as well as the other declarations that address the merits of this matter, were not a part of the rulemaking record, but rather were submitted to the Court during this litigation. The date of Mr. Hansen's declaration is May 5, 2006 - well after the regulation and FONSI were signed. Petitioners cannot now rely upon Mr. Hansen's declaration or other materials not before the agency during the rulemaking. See Greenpeace Action v. Franklin, 14 F.3d 1324, 1333-34 (9th Cir. 1992). This court "review[s] the reasonableness of [the] agency action on the basis of the record before the agency at the time of the decision." Nevada Land Action Association v. U.S. Forest Service, 8 F.3d 713, 718 (9th Cir. 1993) (citing Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 983 (9th Cir.1985)). "The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 331 (1976) (quoting Camp v. Pitts, 411 U.S. 138, 142 (1973)). The

reviewing court is to examine the agency record under the APA's arbitrary and capricious test, not conduct de novo review of a new record of competing affidavits. Florida Power and Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985); Citizens to Preserve Overton Park v. Volpe, 401 US. 402, 415, 419-20 (1971). The rule limiting judicial review to the record at the time the agency made its decision applies with equal force to NEPA cases. See Vermont Yankee, 435 U.S. at 553-555.

In any event, the "tipping argument" is without merit because it depends upon the erroneous assumption that the regulation (either by itself or in combination with previous CAFE standards) will cause an increase in carbon dioxide emissions from light trucks. That theory is without merit for the reasons previously explained.

**B. The Final EA Included A Reasonable Range Of Alternatives.**

Petitioners argue that the range of alternatives considered by NHTSA was not broad enough and must take into account "all possible approaches" to a particular project, even if the alternative requires legislative action. NEPA Br. 42-49; States Br. 29-33. This broad approach cannot withstand the Supreme Court's recent decision in Public Citizen, in which the Court held that the Federal Motor Carrier Safety Administration need not consider impacts from actions it had no authority to implement. 541 U.S. at 769. The range of alternatives considered by an agency need only be reasonable in light of the purpose of the proposed action. The agency need not consider alternatives that are outside its power to implement. See Sierra Club v. Babbitt, 65 F.3d 1502, 1513 (9th Cir. 1995); see also Citizens Against Rails-To-Trails v. Surface Transportation Board, 267 F.3d 1144, 1151 (D.C. Cir. 2001). The agency

complied with NEPA by analyzing the environmental consequences of both the alternative selected in the regulation and other alternatives that fell within the range of its statutory authority under EPCA. However, an analysis of the environmental benefits of alternatives that are not economically practicable or technologically feasible would serve no purpose because NHTSA could not implement such an alternative consistently with EPCA.

"The alternatives considered in [the Final EA] reflect the limitations imposed by EPCA on the agency's discretion to set light truck CAFE standards." ER 1327. The alternatives examined in the Final EA were the product of a comprehensive model that factored many variables to help NHTSA determine the fuel economy level that would enable the agency to satisfy its statutory obligations to develop the maximum feasible fuel economy level in light of the four statutory factors the agency must address, including technological feasibility and economic practicability. ER 1321, 1332, 1348, 1358, 1363, 1368. Each of the alternatives that met the agency's criteria was evaluated in detail in the Final EA. ER 1334-43, 1352-62.

The Final EA explained that "more stringent standards would be inconsistent with the agency's statutory mandate to establish standards that are both technologically feasible and economically practicable. The NEPA's requirements do not take priority over an agency's statutes. Here, the NEPA's requirements must be applied in light of the constraints placed on the agency by EPCA." ER 1319. See also ER 1478-79. NHTSA "narrowed the alternatives it would examine in detail based on the goal of

achieving the maximum feasible fuel economy level while recognizing the limitations presented by EPCA." ER 1334.

Petitioners have not identified any specific alternative that they claim the agency should have considered, much less one that would meet all the statutory criteria. Cf. City of Angoon v. Hodel, 803 F.2d 1016, 1022 (9th Cir. 1986) (upholding decision not to analyze a suggested alternative where plaintiff had not "offered a specific, detailed counterproposal" during the NEPA process). Instead, their complaint is that technological feasibility and economic practicability constraints unduly narrow the range of alternatives the agency could consider and eliminate from consideration alternatives that might have provided greater carbon dioxide reductions. NEPA Br. 42-49; States Br. 29-33. This is at bottom an argument that, in order to satisfy NEPA, the agency was required either to ignore or to reinterpret statutory limitations in order to permit consideration of a wider range of alternatives.

This argument contradicts controlling NEPA law. In Sierra Club v. Babbitt, this Court reasoned that there would be "no benefit from NEPA compliance" where the agency lacked "the power to implement alternatives" to the project at issue. 65 F.3d at 1512-1513. While the agency could modify the project, it concluded that its authority to do so was limited to three conditions that were unrelated to environmental protection. Id. at 1508, 1512. Thus, the Court found that the agency was unable

"meaningfully to influence" the project and, hence, NEPA was inapplicable. Id. at 1513.[23]

According to petitioners, it was improper for NHTSA to use "non-environmental criteria," including technological feasibility and economic practicability, to narrow the range of potential alternatives. NEPA Br. 45-46. But these "non-environmental criteria" are factors Congress directed the agency to apply, and the criteria selected by Congress necessarily define the range of alternatives the agency may consider.[24] It is wholly appropriate for an agency to rely upon statutory objectives as a guide for the purpose and need of a project. See Westlands Water Dist. v. U.S. Dep't of Interior, 376 F.3d 853, 866 (9th Cir. 2004) ("Where an action is taken pursuant to a specific statute, the statutory objectives of the project serve as a guide by which to determine the reasonableness of objectives outlined in an EIS."). See also City of New York v. U.S. Dep't of Transp., 715 F.2d 732, 743 (2d Cir.1983) (statutory objectives provide a "sensible compromise" between unduly narrow objectives and "hopelessly broad societal objectives"); City of Alexandria v. Slater, 198 F.3d 862,

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[23] See also Citizens Against Rails-To-Trails, 267 F.3d at 1151; Sac & Fox Nation of Missouri v. Norton, 240 F.3d 1250, 1262 (10th Cir. 2001); American Airlines, Inc. v. Department of Transportation, 202 F.3d 788, 803 (5th Cir. 2000); Sugarloaf Citizens Ass'n v. FERC, 959 F.2d 508, 513 (4th Cir. 1992).

[24] Even had Congress not directed NHTSA to consider economic practicability and technological feasibility, it would have been entirely proper for NHTSA to do so. "Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant." Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18027 (Mar. 23, 1981) (emphasis added).

867-68 (D.C. Cir. 1999) (upholding agency's analysis of highway expansion project where purpose and need statement was focused upon factors required by the applicable, substantive statute).

Parties cannot fault an agency for not considering an alternative that would "override and redefine" the stated purpose of the project. See Crutchfield v. County of Hanover, 325 F.3d 211, 221-223 (4th Cir. 2003).[25] NEPA does not require discussion of an alternative that is not reasonably related to a project's purposes. Native Ecosystems Council, 428 F.3d at 1245-1247; City of Richfield v. FAA, 152 F.3d 905, 907 (8th Cir. 1998); Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195-196 (D.C. Cir. 1991); Northern Alaska Environmental Center v. Kempthorne, 457 F.3d 969, 978 (9th Cir. 2006) (agency need not discuss alternatives that are infeasible, ineffective, or inconsistent with the objectives of the project).[26] Rather, "[t]he goals of an action delimit the universe of the action's reasonable alternatives." Busey, 938 F.2d at 195. In City of Alexandria v. Slater, 198 F.3d 862 (D.C. Cir. 1999), the court explained:

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[25] Petitioners cite Alaska Wilderness Recreation and Tourism Association v. Morrison, 67 F.3d 723 (9th Cir. 1995) for the proposition that in determining a reasonable range of alternatives, "NEPA requires that agencies "take into proper account all possible approaches to a particular subject.'" NEPA Br. 44. The quoted language is incomplete. The Court made clear, consistent with other precedent detailed in the text above, that "an agency must look at every reasonable alternative, with the range dictated by the nature and scope of the proposed action, and sufficient to permit a reasoned choice." 67 F.3d at 729 (emphasis added).

[26] In Native Ecosystems, the Court also held that "an agency's obligation to consider alternatives under an EA is a lesser one than under an EIS." 428 F.3d at 1246.

> NEPA's injunction that agencies consider the environmental impacts of "all reasonable alternatives" does not substantively constrain an agency's choice of objectives; to the contrary, it is those very objectives that provide the point of reference for a determination whether an alternative is "reasonable" in the first place. By suggesting that the Administration violated NEPA because it did not sufficiently prioritize environmental goals, the district court subtly-and impermissibly-transformed a procedural statute into a substantive one.

Id. at 867. Petitioners' argument that NHTSA should have conducted the NEPA analysis before defining the purpose of its regulation ignores this basic principle of NEPA law.

Thus, NHTSA appropriately limited its NEPA review to alternatives that satisfy the goals of promulgating economically practicable and technologically feasible CAFE standards.

### C. NHTSA'S Decision To Issue A FONSI Was Not Arbitrary Or Capricious.

NHTSA's regulation will decrease carbon dioxide emissions compared to the prior CAFE standards for light trucks. Moreover, the regulation establishes the maximum feasible average fuel economy level that the Secretary determined the manufacturers can achieve in that model year, as required by 49 U.S.C. 32902(a). Further environmental analysis could not therefore have resulted in more stringent standards. Had NHTSA prepared an EIS to analyze in greater detail the impact of the 0.2 percent decrease in carbon dioxide emissions, this would only have delayed application of the new CAFE standards that every party recognizes as an improvement, since new standards must be promulgated "[a]t least 18 months before

the beginning of each model year." Ibid. It was therefore entirely consistent with NEPA's rule of reason for NHTSA to prepare an EA.

Petitioners argue that NHTSA simply concluded that the approximately 0.2 percent reduction in United States carbon dioxide emissions will have an insignificant environmental impact, "with no discussion or analysis." States Br. 25-26.[27] However, NHTSA's conclusion that a 0.2 percent decrease in carbon dioxide emissions will not have a significant impact upon the environment is self-evidently reasonable and consistent with relevant case law. In City of Los Angeles v. NHTSA, 912 F.2d at 478, a majority of the court rejected challenges by various petitioners to CAFE standards of 26.0 mpg for MYs 87-88 passenger vehicles and 26.5 mpg for MY 89 passenger vehicles. Notably, those standards were less than the 27.5 mpg standard Congress specified would apply to passenger vehicles unless the agency chose to establish lower standards. Id. at 482. NHTSA estimated that the regulation would increase carbon dioxide emissions by about one percent compared to the level that would occur if the standard were 27.5 mpg. Nevertheless, the court upheld NHTSA's decision to prepare an EA rather than an EIS. Judge Douglas Ginsburg found that NRDC lacked standing because there was neither an allegation nor evidence that the one percent increase would have a significant impact upon global climate change. Id. at 484. Then-Judge, now Justice, Ruth Bader Ginsburg, "mindful of the deferential "abuse of

[27] The language quoted by petitioners actually appears in the regulation, not in the Final EA. ER 1480.

discretion' standard governing judicial review of NHTSA's decision," concluded that the agency's decision not to prepare an EIS was reasonable. Id. at 504.

Petitioners contend that the Court should rely instead on Judge Wald's dissent in that case. States Br. 28. But Judge Wald's view was that NHTSA should have provided a better explanation why a one percent increase in carbon dioxide emissions did not require preparation of an EIS. She did not suggest she would reach the same conclusion when, as here, the new standards will actually decrease carbon dioxide emissions by 0.2 percent. Id. at 500-01. Thus, City of Los Angeles fully supports the agency's FONSI in this case.[28]

The agency's FONSI is also supported by Public Citizen v. NHTSA, 848 F.2d 256 (D.C. Cir. 1988). In that case, consumer and environmental organizations, municipalities, and states challenged a final rule issued by NHTSA setting CAFE standards for 1986 model year passenger automobiles. After concluding that the rule would not have a "significant" impact on the environment within the meaning of NEPA, NHTSA converted a draft EIS into a Final EA and FONSI. The D.C. Circuit held that NHTSA's decision that the CAFE standard did not significantly affect the environment so as to require an EIS was not arbitrary or capricious, particularly

[28] Petitioners imply that the fact that the new CAFE standards will decrease carbon dioxide emissions, and therefore benefit the environment, is irrelevant under NEPA. States Br. 24. On the contrary, courts have recognized that the environmental benefits of an activity are a relevant factor under NEPA. See Utah Shared Alliance v. Carpenter, 463 F.3d at 1136 n.4 (and cases cited therein); Kootenai Tribe of Idaho v. Veneman, 313 F.3d at 1120.

because the environmental impact from the change was estimated to be not significant and within Clean Air Act limits. Id. at 267-68.

The Court noted that nearly all major federal actions will have "some adverse effect on the human environment." Id. at 266 (emphasis in original). By using the word "significantly," "Congress was apparently willing to depend primarily upon the agency's good faith determination as to what conduct would be sufficiently serious from an ecological standpoint to require use of the full-scale procedure [of preparing an EIS]." Ibid. (citation and quotation omitted). The Court also cited River Road Alliance, Inc. v. U.S. Army Corps of Engineers, 764 F.2d 445, 452 (7th Cir. 1985), for the proposition that, while "significant" impact has "no determinate meaning," the statute requires the agency to make a rational prediction whether the time and expense of preparing a full EIS will be commensurate with the likely benefits of an evaluation more searching than the one made in preparing an EA. The Supreme Court's emphasis upon NEPA's rule of reason further supports the conclusion that an EIS should not be required when it could not alter the agency's decisionmaking process. Public Citizen, 541 U.S. at 767. When, as here, the new standards will slightly decrease carbon dioxide emissions and have already been set at the maximum levels permissible under EPCA, NHTSA acted reasonably in concluding that preparation of an EIS was not justified.

Moreover, the contribution of the 0.2 percent decrease in carbon dioxide emissions brought about by the regulation to reducing any environmental impact in

the United States is too speculative to warrant analysis under NEPA. As this Court explained:

> The Council on Environmental Quality NEPA implementing regulations provide that federal agencies must examine the "reasonably foreseeable" environmental effects of their proposed actions when conducting environmental review. 40 C.F.R. § 1502.16, 1508.8(b). We have "rejected the notion that every conceivable environmental impact must be discussed in an EIS." No GWEN Alliance of Lane County, Inc. v. Aldridge, 855 F.2d 1380, 1385 (9th Cir.1988). We have instead held that "[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences is all that is required by an EIS." Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir.1974). "An EIS need not discuss remote and highly speculative consequences." Id. at 1283; see also Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1026-27 (9th Cir.1980).

Ground Zero Center for Non-Violent Action, 383 F.3d at 1089 -1090.

As relevant here, an impact is considered too remote when the nature and extent of the impact depends on events and actions outside the control of the agency. For example, although NEPA sometimes requires a review of whether an airport construction project will induce growth, such a review is not required when that growth would be dependent on other, unrelated factors, such as the state of the economy, the existing runway capacity, and technological advances to aircraft. See National Parks and Conservation Ass'n. v. Dep't of Transp., 222 F.3d 677, 680-81 (9th Cir. 2000); see also Assure Competitive Transportation v. United States, 635 F.2d 1301 (7th Cir. 1980). In addition, courts are particularly reluctant to require NEPA analysis of a potential impact when it is so indefinite that a meaningful NEPA analysis is not truly possible. For example, in Sierra Club v. Marsh, 769 F.2d 868, 878 (1st Cir. 1985), the First Circuit stated that the key question was, "Can one describe [the

impacts] "now' with sufficient specificity to make their consideration useful?" Ibid. See also Dubois v. United States Dep't of Agriculture, 102 F.3d 1273, 1286 (1st Cir. 1996) (noting that impacts are too indefinite to be included in an EIS if they cannot be described at the time the EIS is drafted with sufficient specificity to make consideration useful to a reasonable decision maker).

When these considerations are applied to this case, they lead to the conclusion that the global warming changes of concern to the petitioners are far too remote from NHTSA's regulatory action to require NEPA analysis. Global climate change is the product of the actions of individuals, businesses, and governments all over the world. The impact of the decrease in carbon dioxide emissions from light trucks on global climate change is entirely speculative, and the impact on localized climate within the United States is unknowable given the state of the science. The uncertainties regarding global climate change and the slight impact of the regulation on carbon dioxide emissions combine to make further NEPA analysis too speculative in this instance.

Petitioners' reliance on the intensity factors listed in the CEQ regulations does not alter the result.[29] Like all of petitioners' arguments, the discussion of the intensity

[29] These are simply factors to be considered in determining whether an impact to the physical environment is significant enough to warrant preparation of an EIS. 40 C.F.R. § 1508.27(b). Moreover, most of the listed factors begin with the words "[t]he degree to which * * * ." Therefore, even if a proposed action triggers a number of listed factors, if it does so only to a modest degree it would still not result in a finding of "significance." See, e.g., 40 C.F.R. § 1508.27(b)(2), (4), (5), (6), (8) and (9). The weighing and balancing of the factors set forth in 40 C.F.R. 1508.27(b) is the responsibility of the agency. The role of the Court is to ensure that the agency "did not act arbitrarily or capriciously with reference to these five factors." Presidio

factors is based on the false premise that NHTSA's regulation is the cause of all carbon dioxide emissions from light trucks that it does not prohibit. NEPA Br. 52-55. For example, petitioners erroneously contend that the regulation threatens "public health and safety" because of its "greenhouse gas implications." Id. at 52. Petitioners also allege that the regulation will harm threatened and endangered species by allegedly releasing "almost 2.8 billion * * * metric tons of CO2 to the atmosphere." Id. at 55. These arguments have no basis in the record because the new CAFE standards will bring about a 0.2 percent decrease in carbon dioxide emissions from light trucks. Cumulative impacts also do not support petitioners' argument. Id. at 54. The various alternatives for MY 2008-11 light truck CAFE standards were projected to result in cumulative reductions "ranging from 0.2 to 0.3 percent of U.S. greenhouse gas emissions over the lifetimes of MY 2005-11 light trucks." ER 1362. Thus, the record does not support the claim that the new CAFE standards will have a cumulatively significant impact.

Another intensity factor is "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4). Petitioners claim that a controversy existed here because many commenters wanted the agency to impose more stringent regulations. NEPA Br. 53. This is much like the unsuccessful public controversy argument in Wetlands Action Network v. U.S. Army Corps of Engineers, 222 F.3d 1105 (9th Cir. 2000), in which

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Golf Club v. National Park Service, 155 F.3d 1153, 1162 (9th Cir. 1998).

this Court held that objections to the development of a freshwater wetland system did not render the Corps' permitting decision controversial for NEPA purposes "because they do not pertain to the "'size, nature, or effect' of the development of the freshwater system," but to a request that a different project be built. Id. at 1122 (emphasis added). Similarly, petitioners' controversy does not concern the "size, nature, or effect" of the new CAFE standards, but rather the desire of some commenters for different regulations that they have not described in any detail. Indeed, while about 45,000 comments were submitted on the NPRM, only two concerned the sufficiency of the Draft EA. ER 1330. As this suggests, the dispute in this case really concerns the agency's authority under EPCA, not the environmental effect of NHTSA's regulation.

Petitioners also claim that "the Challenged Rule almost certainly will "establish a precedent for future actions with significant effects.'" NEPA Br. 53 (quoting 40 C.F.R. § 1508.27(b)(6)). However, NHTSA remains free to impose more stringent CAFE standards in future rulemakings if that can be done consistently with EPCA.

For all these reasons, the agency's FONSI was not arbitrary or capricious.

### D. If The Court Concludes That The Final EA Was Arbitrary And Capricious, The Appropriate Remedy Is A Remand To The Agency.

Even if this Court concludes that the Final EA is arbitrary and capricious, the petitioners' demand that NHTSA be ordered to prepare an EIS should be rejected. The appropriate remedy under the APA is a remand to the agency. [30]

[30] A NEPA challenge must be brought pursuant to the APA. See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882-83 (1990).

The APA allows a court to "hold unlawful and set aside" agency action that it finds arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2); Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 376 (1989). The Act does not authorize a court to "substitute its judgment for that of the agency." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). It is a basic principle of administrative law that a court sits only to review an agency's determination, not to make the decision. SEC v. Chenery Corp., 318 U.S. 80, 88 (1943). "[T]he function of the reviewing court ends when an error of law is laid bare." Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17, 20 (1952). Thus, the Supreme Court has long held that when a reviewing court finds that an administrative agency has erred, the appropriate remedy is to remand the matter back to the agency for "further consideration." Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 549 (1978) (quoting Camp v. Pitts, 411 U.S. 138, 143 (1973) and citing SEC v. Chenery Corp., 318 U.S. at 80); see also Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

Several circuits, including this Court, have reached the same conclusion in NEPA cases, expressly holding that, when a reviewing court finds that an agency failed to comply with NEPA, the court should remand the matter for the agency to consider whether an EIS is warranted. E.g., Metcalf v. Daley, 214 F.3d 1135, 1146 (9th Cir. 2000) (concluding that "in consideration of [the court's] limited role in this process, * * * it is appropriate only to require a new EA" rather than to direct the agency to prepare an EIS); Jones v. Gordon, 792 F.2d 821, 829 (9th Cir. 1986) ("We

emphasize, however, that we disagree with the district court's conclusion that the Service must prepare [an EIS] * * *. Rather, the Service must consider the requirements of NEPA and regulations thereunder, and must provide a reasoned explanation of whatever course it elects to pursue."). See also O'Reilly v. U.S. Army Corps of Engineers, __ F.3d __, 2007 WL 173936 (5th Cir. 2007); Nat'l Audobon Soc'y v. Hoffman, 132 F.3d 7, 18 (2d Cir. 1997); Found. on Economic Trends v. Heckler, 756 F.2d 143, 154 (D.C. Cir. 1985).

This reasoning applies with full force in this case as well. If the Court concludes that NHTSA failed to adequately evaluate some environmental consequence, or failed to sufficiently explain some conclusion it reached, the appropriate action is to remand the matter to the agency for further evaluation or explanation.[31] The agency can then determine, after further examination, whether an EIS is required.

## III. PETITIONERS' CHALLENGE TO NHTSA'S PREEMPTION ANALYSIS IS BOTH NON-JUSTICIABLE AND WRONG AS A MATTER OF LAW.

NHTSA explained in the Federal Register that federal law preempts state laws regulating emissions of carbon dioxide from motor vehicles covered by federal fuel economy standards. See 71 Fed. Reg. at 17654-17670 (ER 1461-1477). That analysis is both proper and correct, but it is not before this Court at this time. Petitioners agree

[31] In her dissent in City of Los Angeles v. NHTSA, Judge Wald would have remanded the EA to the agency for a better explanation, not ordered the preparation of an EIS. 912 F.2d at 503. Petitioners urge this Court to follow Judge Wald's dissent, States Br. 28, but they ignore that aspect of her opinion in arguing that the Court should order an EIS.

that this Court should not review the merits of NHTSA's determination regarding preemption, although they also inexplicably argue that California's state emission standards would be incorporated into federal law, and somehow become immune from EPCA preemption, if and when EPA were to grant a waiver of Clean Air Act preemption. See States Br. 51-65; EPCA Br. 55-57. But that claim is not ripe for decision, as EPA has not granted California's waiver application.[32]

### A. NHTSA Analyzed The Preemptive Effect Of Its CAFE Regulation.

There is a direct relationship between fuel economy and motor vehicle carbon dioxide emissions. Carbon dioxide is the "ultimate end product of burning gasoline," and "there is but one pool of technologies for reducing tailpipe [carbon dioxide] emissions and increasing fuel economy." 71 Fed. Reg. at 17654 (ER 1461). As a result of that direct relationship, a state regulation limiting motor vehicle emissions of carbon dioxide is "related to fuel economy standards," 49 U.S.C. § 32919(a), and is thus expressly preempted by EPCA.[33] EPCA also impliedly preempts such a state law due to the conflict with the exclusive federal regulatory scheme.

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[32]The California Air Resources Board has requested that EPA grant a waiver of Clean Air Act preemption, pursuant to 42 U.S.C. § 7543(b)(1), for the California greenhouse gas regulations. See States Br. 44-45. That waiver request remains pending before EPA, which recently informed California that the agency "intends to proceed with the waiver request after the Supreme Court has issued its decision in Massachusetts v. EPA [No. 05-1120]." Letter from William L. Wehrum, Acting Assistant Administrator, EPA, to Catherine Witherspoon (Feb. 21, 2007), available at http://www.regulations.gov (document keyword: EPA-HQ-OAR-2006-0173-0002) (last visited Feb. 22, 2007).

[33] Carbon dioxide represents over 90 percent of greenhouse gas emissions from motor vehicles. See 71 Fed. Reg. at 17665 (ER 1472), Table 23.

NHTSA analyzed the scientific link between carbon dioxide emissions and vehicle fuel economy. See 71 Fed. Reg. at 17659-17667 (ER 1466-1474). Carbon dioxide is the inevitable byproduct of combustion, the process that powers light trucks. See id. at 17659 (ER 1466) ("In perfect combustion, the oxygen in the air combines with all of the carbon in the fuel to form carbon dioxide and all of the hydrogen in the fuel to form water.") (chemical symbols omitted). The agency explained that the science underlying combustion allows a simple calculation of carbon dioxide emissions: "as a matter of basic chemistry, the burning of a gallon of gasoline produces about 20 pounds of [carbon dioxide]." The conclusion is ineluctable: "[Carbon dioxide] emissions are always and directly linked to fuel consumption because [carbon dioxide] is the ultimate end product of burning gasoline." Ibid.[34]

NHTSA explained that fuel economy is measured by a formula developed by EPA, which "calculates fuel economy based on carbonaceous emissions from the vehicle." 71 Fed. Reg. at 17660 (ER 1467); see 49 U.S.C. § 32904(c). By algebraic operations, NHTSA explained that the amount of carbon dioxide emissions is "the controlling independent variable" in the calculation of fuel economy. Id. at 17661 (ER 1468). Thus, "compliance with federal fuel economy standards is based primarily on [carbon dioxide] emission rates of covered vehicles." Ibid. Indeed, California's

[34] Although combustion in a motor vehicle engine is imperfect, and thus also results in the emission of other substances, including carbon monoxide and hydrocarbons, those other emissions have declined in their significance as the Clean Air Act has required manufacturers to reduce such emissions, with the result "that fuel economy has become virtually synonymous with [carbon dioxide] emission rates." Id. at 17659-17660.

greenhouse gas regulation primarily regulates carbon dioxide emissions, and does so by requiring improvements to fuel economy. See 71 Fed. Reg. at 17665 (ER 1472); SER 114-125. California's method of calculating greenhouse gas emissions is essentially equivalent to fuel economy measurements: "Just as in the case of compliance with federal fuel economy standards, compliance with [California's] regulation is largely a function of tailpipe [carbon dioxide] emissions." Id. at 17666 (ER 1473). It would not be feasible, and California has not attempted, to regulate carbon dioxide tailpipe emissions other than by improving fuel economy.

Reductions in carbon dioxide emissions would require vehicle manufacturers to draw from the same pool of technological solutions available for improving fuel economy. See 71 Fed. Reg. at 17661-17667 (ER 1468-1474). NHTSA reprinted two tables from the NAS Report, identifying the categories of technological innovations applicable to each category of light trucks. Id. at 17662-17663 (ER 1469-1470). NHTSA compared those tables to one from California's state carbon dioxide emission regulations, demonstrating that "nearly all of the technologies relied upon by [California] are technologies that NHTSA largely relies on in formulating the federal average fuel economy standards." Id. at 17664 (ER 1471).

From a legal perspective, NHTSA explained the statutory background and pointed to EPCA's express preemption provision, in which Congress made clear that "a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards." 49 U.S.C. § 32919(a). The agency also identified the constitutional basis for preemption, quoting Lorillard Tobacco Co. v.

Reilly, 533 U.S. 525, 540 (2001), in which the Supreme Court explained that federal law may preempt state standards expressly or by implication. See 71 Fed. Reg. at 17656 (ER 1463). NHTSA noted that the Clean Air Act separately preempts state standards "relating to the control of emissions from new motor vehicles or new motor vehicle engines," but authorizes EPA to waive that preemption for emission standards adopted by California that meet certain requirements. 42 U.S.C. § 7543(a)-(b).

NHTSA explained that a state regulation of carbon dioxide emissions therefore is a "regulation related to fuel economy standards," which is expressly preempted by EPCA because "the only technologically feasible, practicable way for vehicle manufacturers to reduce [carbon dioxide] emissions is to improve fuel economy." 71 Fed. Reg. at 17656 (ER 1463). The agency looked to Supreme Court jurisprudence illuminating the breadth of the statutory term "related to," and reviewed the legislative history and the structure of the statutory scheme as a whole. NHTSA concluded that state regulation of carbon dioxide emissions would be a "fuel economy standard in almost all but name and stated purpose"; such a regulation "would have virtually the same effects as a fuel economy standard" and would "directly target[]" vehicle manufacturers, compelling them to adopt fuel-saving technologies just as a fuel economy standard would. Id. at 17657-17658 (ER 1464-1465).[35]

NHTSA also concluded that principles of implied preemption compelled the same conclusion because state regulation of carbon dioxide emissions "would frustrate

[35] NHTSA observed that a state could not avoid preemption merely by identifying a separate purpose. See 71 Fed. Reg. at 17658 (ER 1465) (citing Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 105 (1992)).

the objectives of Congress in establishing the CAFE program and conflict with the efforts of NHTSA to implement the program in a manner consistent with the commands of EPCA." 71 Fed. Reg. at 17667 (ER 1474). Because EPCA requires the federal government to establish the maximum feasible CAFE standards, and because Congress directed the agency to consider specific criteria and to avoid serious adverse economic effects while maintaining consumer choice, the agency concluded that a state regulation imposing more stringent requirements than NHTSA's fuel economy standards "would upset the efforts of NHTSA to balance and achieve Congress's competing goals" and "would negate the agency's analysis and decisionmaking." Id. at 17667 (ER 1474). Because "regulating fuel economy and regulating [carbon dioxide] emissions are inextricably linked, given current and foreseeable automotive technology," manufacturers must necessarily look to the same technological solutions to meet both regulatory requirements. Id. at 17668 (ER 1475). Congress committed to NHTSA the task of determining how much new (and expensive) technological and design changes should be required of vehicle manufacturers in accommodating the conflicting policy goals of conserving energy while avoiding serious adverse economic consequences and preserving consumer choice, and NHTSA's judgment in balancing those considerations would be frustrated by a more stringent state requirement. See ibid.

NHTSA also rejected the views of commenters (including some petitioners here) who disputed the agency's preemption analysis, suggesting that state regulation of greenhouse gas emissions would not be preempted under EPCA if the state were

granted a waiver of Clean Air Act preemption by EPA. As in petitioners' opening briefs, the commenters that advanced this objection to preemption pointed to EPCA's list of factors that NHTSA must consider in establishing a CAFE standard, including "other motor vehicle standards of the Government." 49 U.S.C. § 32902(f). NHTSA explained that the list of factors in EPCA is neither an exemption from preemption nor a saving clause for otherwise preempted state regulations. NHTSA interpreted EPCA's list of factors in light of the express preemption provisions of both EPCA and the Clean Air Act, as well as the purposes to be served by exclusive federal regulation of fuel economy standards. See 71 Fed. Reg. at 17669-17670 (ER 1476-1477).[36]

**B. Petitioners' Argument Is Non-Justiciable.**

This litigation presents only the validity of NHTSA's light truck CAFE regulation; notably, California's greenhouse gas regulations are not before this Court, and their validity is not at issue here. Petitioners appear to recognize that NHTSA's thorough preemption analysis "is not subject to judicial review" in this Court. States Br. 4 n.3; see also EPCA Br. 19 (questioning whether preemption analysis "is even reviewable in this proceeding"). Despite that acknowledgment, petitioners challenge NHTSA's preemption analysis based on an event that has not occurred. Petitioners contend that state emissions regulations are immune from federal preemption under EPCA "if they are approved by EPA under the Clean Air Act." States Br. 40

[36] NHTSA expressly did consider other motor vehicle standards, including California emissions standards, in formulating the light truck CAFE regulation. See 71 Fed. Reg. at 17642-17643 (ER 1449-1450). As the agency explained, those standards do not directly affect fuel economy, and thus they are quite different from state regulation of carbon dioxide emissions.

(emphasis added). But California's regulations have not received an EPA waiver of Clean Air Act preemption, even if such a waiver could conceivably be germane to preemption under EPCA. The state's waiver application remains pending, and EPA has indicated that it intends to proceed with the waiver request after the Supreme Court issues its decision in Massachusetts v. EPA, a case that presents related issues. At this point, petitioners' claim is not justiciable.

Article III of the Constitution limits the jurisdiction of the federal courts to live cases or controversies, and prohibits advisory opinions. See, e.g., Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937) (Constitution prohibits courts from issuing "an opinion advising what the law would be upon a hypothetical state of facts"). Both standing and ripeness doctrines derive from the constitutional "case or controversy" requirement, and both doctrines require a legally cognizable injury, a requirement that petitioners cannot satisfy here. See, e.g., Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (Constitution's "irreducible minimum" for standing requires that a plaintiff or petitioner "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision") (citation and internal quotation marks omitted); Abbott Laboratories v. Gardner, 387 U.S. 136, 152 (1967) (ripeness requires that the claimed legal injury be "direct and immediate" rather than speculative). The "basic rationale" for the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from

entangling themselves in abstract disagreements" over policy with other branches of the federal government. Abbott, 387 U.S. at 148. The Supreme Court has reiterated that "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." Texas v. United States, 523 U.S. 296, 300 (1998) (internal quotation marks omitted). This Court, reviewing the jurisprudence of the Supreme Court and lower courts, recently emphasized the need for "factual context," and observed that "the Supreme Court and circuit courts have repeatedly declined premature review." Earth Island Inst. v. Ruthenbeck, 459 F.3d 954, 962 (9th Cir. 2006).

This Court has recognized that, "in many cases, ripeness coincides squarely with standing's injury in fact prong." Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc), cert. denied, 531 U.S. 1143 (2001); see also ibid. ("ripeness can be characterized as standing on a timeline"). Thus, the justiciability of a dispute may depend in part on the imminence and likelihood of a legally cognizable injury, as well as on its traceability and redressability. Here, petitioners cannot satisfy the constitutional requirement of injury because the state regulations are preempted not only by EPCA but also by the Clean Air Act. Indeed, California itself has acknowledged that its regulations remain preempted by the Clean Air Act, unless and until EPA grants a waiver under the Clean Air Act. See Central Valley Chrysler-Jeep v. Witherspoon, 2007 WL 135688, *1, *5 (E.D. Cal. Jan. 16, 2007). A decision by this Court on the issue raised by petitioners -- whether EPCA preemption could be affected by an EPA waiver of preemption under the Clean Air

Act -- would not redress the Clean Air Act's separate preemptive effect. Moreover, petitioners' argument is hypothetical, as EPA has not granted a waiver of the Clean Air Act's preemption. Indeed, petitioners lack standing as well to challenge the EPCA preemption of state greenhouse gas regulations because they suffer no injury in the absence of a waiver by EPA of Clean Air Act preemption. Petitioners' claimed injury is thus "th[e] result [of] the independent action of some third party not before the court." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)); see also, e.g., Lee v. Oregon, 107 F.3d 1382, 1389 (9th Cir.), cert. denied, 522 U.S. 927 (1997).

Petitioners' sole preemption argument is entirely hypothetical and speculative. But, "[e]ven if there were greater certainty" regarding EPA's disposition of California's pending waiver application, petitioners' claim would not be ripe for review. See Texas, 523 U.S. at 300. Prudential considerations under the ripeness doctrine require a court "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Id. at 301 (quoting Abbott, 387 U.S. at 149). Here, judicial decision of petitioners' hypothetical claim would be imprudent, both because it may well be unnecessary (as California's waiver application may be denied by EPA) and because other judicial vehicles exist that are better suited. See, e.g., Cronin v. FAA, 73 F.3d 1126, 1131 (D.C. Cir. 1996) (fitness prong of ripeness inquiry "militate[s] in favor of postponing review if, for example, the court finds that resolution of the dispute is likely to prove unnecessary or that the court's deliberations

might benefit from letting the question arise in some more concrete form") (internal quotation marks omitted).

As petitioners explain, States Br. 40, vehicle manufacturers and dealers have brought suit in federal district court to challenge the validity of California's greenhouse gas emissions regulations, and that court has before it arguments concerning federal preemption, as well as other issues related to the validity of the California regulations. See Central Valley Chrysler-Jeep v. Witherspoon, 456 F. Supp. 2d 1160, 1168-1170 (E.D. Cal. 2006) (concluding that plaintiffs stated claim for relief on preemption claim). Petitioners correctly recognize that the merits of the preemption questions are before the district court in Central Valley. See, e.g., States Br. 40. That court has held, and California has conceded, that the state regulations are currently preempted by the Clean Air Act, and that there is no occasion to decide the merits of other objections to the state regulations (such as EPCA preemption) at this time. See Central Valley, 2007 WL 135688.

Thus, EPCA preemption will be properly presented, if at all, only if EPA determines that it is appropriate to grant a waiver of the Clean Air Act's conceded preemptive effect on California's regulations. By contrast, EPCA preemption does not affect petitioners' challenge to the NHTSA regulations at issue before this Court. The question of the preemptive effect of federal law on state greenhouse gas regulations is entirely theoretical in the context of this case. This Court does not have before it California's (or any other state's) regulations. Petitioners offer no compelling reason for this Court to reach out and decide an issue that is not properly presented here, and

over which this Court lacks jurisdiction. The parties will suffer no hardship from allowing preemption issues to be decided in due course, when they are properly presented.

In a similar context, the D.C. Circuit has recognized "that a preamble may under some circumstances be reviewable," but has held that, where "a more complete understanding of [the] ramifications [of an agency's statement] must await a concrete application," even a purely legal challenge "is not ripe for review." Kennecott Utah Copper Corp. v. Department of the Interior, 88 F.3d 1191, 1222 (D.C. Cir. 1996); see also, e.g., Clean Air Implementation Project v. EPA, 150 F.3d 1200, 1208 (D.C. Cir. 1998), cert. denied, 527 U.S. 1021 (1999); Florida Power & Light Co. v. EPA, 145 F.3d 1414, 1420 (D.C. Cir. 1998). As in Kennecott, 88 F.3d at 1223, the prospect that the legal questions may be properly presented in future litigation counsels in favor of deferring the isue to a more appropriate proceeding. This Court should await the opportunity to consider the applicability of NHTSA's preemption analysis in the context of a concrete legal dispute, such as the Central Valley case.

The court in Kennecott also recognized that "the issues of reviewability and ripeness [may] converge" in some cases concerning language in a preamble. 88 F.3d at 1223. NHTSA's explanation of the preemptive effect of EPCA and the CAFE standard does not here affect the status of the state regulations, which are not before this Court. As we have explained, the validity of those state regulations will be litigated in the Central Valley case, where the court will properly consider the effect of NHTSA's preemption analysis. As in Kennecott, "[p]etitioners have not

demonstrated that the * * * preamble has a direct and immediate rather than a distant and speculative impact upon them." Ibid. (citing Abbott, 387 U.S. at 152-153). NHTSA's explanation of the preemptive effect of EPCA and the CAFE standard does not by itself alter the validity of the state regulations. A state's regulation of greenhouse gas emissions is preempted not by NHTSA's statement, but by the Constitution (via the Supremacy Clause), and by Congress's decision in EPCA expressly to preempt state regulations relating to fuel economy standards, as well as because such a state regulation would be fundamentally inconsistent with the federal regulatory scheme.

### C. Petitioners' Argument Would Fail On The Merits.

Even if it were ripe for review, petitioners' argument could not prevail. Petitioners urge this Court to ignore preemption principles concerning the effect of EPCA and the federal regulatory scheme established by that statute, solely on the ground that a separate federal statute, the Clean Air Act, which itself preempts state regulation of vehicle emissions (including greenhouse gas emissions), contemplates a waiver of that statute's express preemptive effect. That argument does not follow.

Fundamentally, petitioners' argument falters on its first and only step. Petitioners contend that state standards, once approved by EPA for a waiver under the Clean Air Act, become federal law for purposes of conflict preemption. See, e.g., States Br. 58 ("Thus, the California GHG emissions standards, once approved by EPA, are incorporated into EPCA" and "are not preempted * * * as state fuel economy standards under [§] 32919(a)."). But there is no support in law or logic for such a

surprising notion. The Clean Air Act makes clear that waiver of preemption under that statute operates only to relieve "application of this section," the preemption provision of the Clean Air Act. 42 U.S.C. § 7543(b)(1) (emphasis added). Petitioners cannot prevail here by suggesting that a waiver effects any broader transformation of state standards, as the Clean Air Act expressly limits the effect of the waiver to that statutory scheme. See 42 U.S.C. § 7543(b)(3) ("compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this subchapter") (emphasis added). Thus, even if EPA were to grant a Clean Air Act waiver to a state standard, that standard would remain subject to the separate preemptive effect of EPCA.

Nor is it significant, for preemption purposes, that NHTSA has considered applicable state emissions standards, as well as federal emissions standards promulgated by EPA, in the course of determining CAFE standards. See States Br. 57-58.[37] Petitioners suggest that NHTSA's consideration transformed those state requirements into federal law for purposes of preemption analysis. That is not correct. NHTSA's prior consideration of emission standards that may indirectly affect fuel economy does not compel the agency to ignore the inconsistency of a state regulation that would directly conflict with federal law.

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[37] Petitioners gain nothing by pointing to a long-expired provision of EPCA, which authorized modification of fuel economy standards applicable to a particular manufacturer for MYs 1978-1980. See States Br. 56-57 & n.11 (citing Pub. L. No. 94-163, § 301, 89 Stat. 905 (previously codified as 15 U.S.C. § 2002(d)(3)(D))). That provision expressly limited the definitions (including the definition of emission standards cited by petitioners) by introducing them with the clause, "[f]or purposes of this subsection." Id., 89 Stat. 904 ((previously codified as 15 U.S.C. § 2002(d)(3)).

The district court in Central Valley recently considered and rejected the very argument advanced by petitioners here. See 456 F. Supp. 2d at 1173 ("Section 209(b) [of the Clean Air Act, 42 U.S.C. § 7543(b)] does not provide that the regulations, once EPA grants a waiver, become federal law and are thereby rendered immune from preemption by other federal statutes."). That court reviewed the statutory provisions at issue, and explained that neither EPCA nor the Clean Air Act confers the kind of immunity from preemption urged by petitioners here. See id. at 1172 ("Nothing in the statutory language or the legislative history of the Clean Air Act, the EPCA, or any other statute before the court indicates Congress's intent that an EPA waiver would allow California regulation to disrupt the CAFE program."). That court also held that, absent an EPA waiver, California's greenhouse gas regulations are expressly preempted by the Clean Air Act, precluding any need at this stage for consideration of whether those state standards are also preempted by EPCA. 456 F. Supp 2d at 1174-1175.; see also Central Valley, 2007 WL 135688.

There is accordingly no basis for this Court to address petitioners' unripe claim concerning the effect on EPCA preemption of an EPA waiver under the Clean Air Act. Nor is there any occasion here to address the merits of the preemption analysis. All parties agree that the underlying merits question -- whether California's greenhouse gas emissions regulation is preempted by EPCA and by NHTSA's promulgation of a light-truck CAFE standard -- is not before this Court.

We nevertheless emphasize that NHTSA's analysis was correct as a matter of science and law, although those questions are not presented here. Petitioners do not

dispute the fundamental premise of NHTSA's preemption analysis -- that carbon dioxide emissions and fuel economy are essentially equivalent measures. Indeed, petitioners' own arguments rest on that very same premise, acknowledging the relationship between carbon dioxide emissions and fuel economy. For example, petitioners seek a higher CAFE standard because "[s]tronger [CAFE] standards would reduce more [carbon dioxide]." EPCA Br. 29; see also, e.g., NEPA Br. 24 ("increase[d] fuel economy standards * * * significantly reduce greenhouse gas emission from light trucks"); States Br. 34 ("increasing the fuel economy of the trucks will result in decreased gas consumption and GHG emissions from those vehicles"). As NHTSA correctly emphasized, 71 Fed. Reg. at 17666, 17670 (ER 1473, 1477), the only technologically feasible method of reducing carbon dioxide emissions (and the method expressly contemplated by California's regulatory scheme) is by improving fuel economy.

The scientific conclusion -- that carbon dioxide emission is a function of, and thus directly related to, fuel economy -- is indisputable. The fundamental chemical process of combustion is well understood, and no one disagrees that carbon dioxide is a natural byproduct of using gasoline to power a vehicle. As a legal matter, NHTSA's conclusion that federal law preempts state regulation of carbon dioxide emissions is likewise beyond cavil. Because both the measurement and the improvement of fuel economy and carbon dioxide emissions are inextricably linked, there can be no dispute that they are "related," and therefore that state regulation of carbon dioxide emissions from covered vehicles is preempted by EPCA's express

provision, 49 U.S.C. § 32919(a). Moreover, because Congress directed NHTSA to balance conflicting policy goals, any state requirement that embodies a different balancing would inevitably conflict with federal law.

It was entirely proper for NHTSA to undertake a formal consideration of preemption in the context of its rulemaking here. As the expert agency charged by Congress with establishing a preemptive regulation, NHTSA correctly considered the effect of its regulatory action on state laws and regulations. Such considerations of federalism in rulemaking proceedings generally are required by law. See, e.g., Executive Order 13132, Federalism, 64 Fed. Reg. 43255 (Aug. 4, 1999); Executive Order 12988, Civil Justice Reform, § 3(b)(2)(A), 61 Fed. Reg. 4729, 4731-4732 (Feb. 5, 1996) ("each agency * * * shall make every reasonable effort to ensure: * * * that the regulation, as appropriate -- specifies in clear language the preemptive effect, if any, to be given to the regulation"). Moreover, the Supreme Court has expressly urged federal agencies to articulate their expert views on questions of preemption, recognizing that an "agency is uniquely qualified to determine whether a particular form of state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Medtronic, Inc. v. Lohr, 518 U.S. 470, 496 (1996) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941); see also id. at 506 (Breyer, J., concurring) (agency has "special understanding of * * * whether (or the extent to which) state requirements may interfere with federal objectives"). Here, as in Geier v. American Honda Motor Co., 529 U.S. 861, 883 (2000), "Congress has delegated to DOT authority to implement the statute; the subject matter is technical;

and the relevant history and background are complex and extensive." In those circumstances, the Court left no doubt that "[t]he agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements." Ibid. (quoting Medtronic).

## CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

Respectfully submitted,

ROSALIND A. KNAPP
*Acting General Counsel*
PAUL M. GEIER
*Assistant General Counsel*
PETER J. PLOCKI
*Attorney*

ANTHONY M. COOKE
*Chief Counsel*
LLOYD S. GUERCI
*Assistant Chief Counsel*
KATHERINE C. GEHRINGER
TIMOTHY H. GOODMAN
DAVID W. CASE
*Attorneys, National Highway Traffic Safety Administration*

*Department of Transportation*
*Washington, D.C. 20590*

PETER D. KEISLER
*Assistant Attorney General*
MATTHEW J. McKEOWN
*Acting Assistant Attorney General*

RONALD M. SPRITZER
*Attorney, Environment and Natural Resources Division*

DOUGLAS N. LETTER
(202) 514-3602
H. THOMAS BYRON III
(202) 616-5367
*Attorneys, Appellate Staff*
*Civil Division, Main Room 7260*
*U.S. Department of Justice*
*950 Pennsylvania Avenue, N.W.*
*Washington, D.C. 20530-0001*

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## CERTIFICATE OF SERVICE

I hereby certify that I have, this 23d day of February, 2007, served two copies of the foregoing Brief For The Respondents, by sending them by First Class Mail, postage prepaid. The Brief will also be filed by First Class Mail, postage prepaid.

Susan S. Fiering, Esq.
Office of the California
Attorney General
1515 Clay St.
Oakland, CA 94612
510-622-2142

Sean H. Donahue, Esq.
2000 L Street, N.W.
Suite 808,
Washington, D.C. 20036
202-466-2234

Deborah A. Sivas, Esq.
Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, California 94305
650-723-0325

David D. Doniger, Esq.
Natural Resources Defense Council
1200 New York Avenue, N.W.
Washington, D.C. 20005
202-289-2403

Patrick Gallagher, Esq.
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105
415-977-5709

Ronald Giteck, Esq.
Office of the Minnesota
Attorney General
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101
651-284-4066

RONALD M. SPRITZER
Attorney