IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| PEOPLE OF THE STATE OF CALIFORNIA, ex rel. BILL LOCKYER, ATTORNEY GENERAL; STATE OF CONNECTICUT; STATE OF MAINE; COMMONWEALTH OF MASSACHUSETTS; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT; DISTRICT OF COLUMBIA; CITY OF NEW YORK,<br><br>Petitioners,<br><br>**v.**<br><br>NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, an agency within the UNITED STATES DEPARTMENT OF TRANSPORTATION,<br><br>Respondent. | Case Nos. 06-72317 and 06-72641<br><br>Consolidated with Case Nos.: 06-71891; 06-72694; 06-73807; 06-73826 |

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| STATE OF MINNESOTA,<br><br>Petitioner,<br><br>**v.**<br><br>NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, et al.,<br><br>Respondent. |

**OPENING BRIEF OF THE PETITIONERS IN CONSOLIDATED CASES NOS. 06-72317 AND 06-72641**

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## JURISDICTIONAL STATEMENT

This Court has jurisdiction, pursuant to Rule 15 of the Federal Rules of Appellate Procedure and section 32909 of the Energy Policy and Conservation Act, 49 U.S.C. § 32909, to review the final rule of the National Highway Traffic Safety Administration entitled "Average Fuel Economy Standards for Light Trucks, Model Years 2008-2011," which sets the corporate average fuel economy ("CAFE") standard for light trucks (hereafter "CAFE Rule"). The CAFE Rule has been published at 71 Fed. Reg. 17,566 (April 6, 2006). [ER 1373][1/]

Petitioners challenge two aspects of the CAFE Rule. First, Petitioners challenge the failure of the National Highway Traffic Safety Administration ("NHTSA") to prepare an Environmental Impact Statement pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*. Second, Petitioners challenge NHTSA's opinion, set forth in the preamble to the CAFE Rule, stating that California's standards regulating greenhouse gas emissions from motor vehicles are preempted by section 32919(a) of the Energy Conservation and Policy Act ("EPCA").

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1. References to "ER –" are to Petitioners' Excerpts of Record, filed in 7 volumes concurrently with this brief.

Petitioners filed the petitions for review on May 2 and May 17, 2006, within 59 days after April 6, 2006, *see* 49 U.S.C. § 32909(b), when both actions were announced in the Federal Register.

Petitioners have standing in this action because NHTSA's failure to comply with NEPA in approving the CAFE Rule will adversely affect Petitioners' proprietary, sovereign and quasi-sovereign interests. In the context of NEPA, "the creation of a risk that serious environmental impacts will be overlooked" is sufficient to establish standing, as long as the injury is alleged by a plaintiff who may be expected to suffer the environmental consequences of the decision. *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975). As set forth in the documents in the record and in the declarations submitted with this Brief,[2/] it cannot reasonably be disputed that greenhouse gas ("GHG") emissions caused by human activity, including emissions from motor vehicles, have significantly increased global warming over the past fifty to a hundred years. Petitioners – eleven states and two other governmental entities, each with specific interests in its natural and other resources – have been and will continue to be injured in a variety of ways by the effects of climate change caused by

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2. All declarations, except the Lloyd Declaration, are attached as exhibits to the Declaration of Susan S. Fiering in Support of Opening Brief, filed herewith.

GHG emissions. *See* discussion *infra* in Impacts of Global Warming to States and Municipalities.

Petitioners' injuries include not only harm to their proprietary interests, but also interference with their sovereign interests in being unable to enforce the provisions of their laws designed to curb GHG emissions. *See People of the State of California v. Federal Communications Commission*, 75 F.3d 1350, 1361 (9th Cir. 1996); *Alaska v. U.S. Department of Transportation*, 868 F.2d 441, 443-44 (D.C. Cir. 1989). Each of these injuries is redressable by a decision of this Court remanding the matter to NHTSA to prepare an environmental impact statement ("EIS") pursuant to NEPA prior to issuing a revised CAFE standard for Model Year 2011 and by a ruling that motor vehicle GHG emissions standards issued by California and approved by the U.S. Environmental Protection Agency ("EPA") pursuant to section 209(b) of the Clean Air Act, are not preempted by EPCA.

## ISSUES PRESENTED FOR REVIEW

1. A. Was it arbitrary and capricious, in violation of NEPA, for NHTSA to refuse to prepare an EIS to address the impact of the CAFE Rule on global warming, when the CAFE Rule affects the level of GHG emissions from light trucks, when NHTSA has never addressed global warming in any manner

and has never determined the impact of motor vehicle GHG emissions on global warming, and when it is absolutely vital that GHG emissions be lowered to a level that will slow global warming in order to avert environmental disaster?

B. Was it arbitrary and capricious, in violation of NEPA, for NHTSA to rely on a brief and nearly incomprehensible Environmental Assessment that did not address reasonable alternatives to the CAFE Rule and did not properly assess impacts or cumulative impacts of the Rule?

2. Does EPCA preempt motor vehicle GHG emissions standards issued by California pursuant to the Clean Air Act, when such standards are expressly incorporated into EPCA and must be considered by NHTSA in setting fuel economy standards?[3/]

## STATEMENT OF THE CASE

For the first time since the inception of EPCA in the 1970s, NHTSA has proposed an overhaul in how it sets the CAFE standard for light trucks (which include minivans and SUVs). In proposing the new system for setting mileage

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3. Petitioners press this issue, fully aware that the Court may conclude that NHTSA's preemption discussion is not subject to judicial review. Petitioners, however, are compelled to attack NHTSA's preemption discussion here because they have, to date, no assurance that NHTSA (or other parties) will not take the position that the preamble *does* have legal effect; that it is, in fact, an integral part of the regulations, and that it was required to be challenged, if at all, in this proceeding.

and the new standards for model years 2008-11, NHTSA failed in all respects to consider the most significant environmental consequences of its proposed overhaul– the effect of motor vehicle GHG emissions on global warming.

Over the past several decades, it has become clear that motor vehicle GHG emissions are contributing to an impending environmental disaster. As the National Academy of Sciences reported to Congress in 2002, "Evidence . . . continues to accumulate that global climate change must be taken seriously. U.S. cars and trucks are responsible for a *nonnegligible fraction* of the world's annual emissions of carbon dioxide, the most important greenhouse gas." (emphasis added). [ER 105]

On April 6, 2006, NHTSA issued its CAFE Rule, establishing new mileage requirements for light trucks for model years 2008-2011. The CAFE Rule effects only a modest increase in required fleet-wide average mileage to 23.5 mpg for model year 2010. [ER 1375]

In promulgating the CAFE Rule, NHTSA made a number of significant errors, each of which, standing alone, is fatal under NEPA. The Agency failed, in all respects, to consider the environmental consequences of its proposed overhaul of light truck standards, including most importantly, the impact of carbon dioxide (CO2) emissions on global warming. In addition, NHTSA

reached out improperly and incorrectly to argue that EPCA preempts motor vehicle emission standards set by the State of California.

Petitioners filed two separate petitions for review, which were consolidated with petitions filed by four non-government organizations. Petitioners in these two actions are the States of California, Connecticut, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Commonwealth of Massachusetts, District of Columbia, and City of New York (Petition No. 06-72317) and the State of Minnesota (Petition No. 06-72641)

While the Petitioners' Opening Brief focuses on two of the errors committed by NHTSA in promulgating its final rule – the failure to prepare an EIS under NEPA, and the erroneous and improper conclusion that EPCA preempts requirements authorized under the Clean Air Act – Petitioners do not limit their challenge to these issues alone, and support the arguments filed by the Sierra Club, Natural Resources Defense Council, Environmental Defense, and Center for Biological Diversity.

Petitioners' Opening Brief discusses two distinct issues, with different statutory provisions and facts relevant to each. Underlying both issues however, are the scientific facts related to global warming. Petitioners have therefore set out a discussion of the facts of global warming below, and then, for ease of

reference, have divided this Brief into two separate sections, one addressing NHTSA's duty to prepare an Environmental Impact Statement under NEPA to address GHGs and global warming, and the second addressing NHTSA's improper and erroneous opinion concerning preemption of California GHG emissions standards.

## THE CLIMATE CHANGE PROBLEM

The United Nations Framework Convention on Climate Change ("UNFCCC") defines climate change as "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods." There is an international scientific consensus that greenhouse gas emissions, particularly CO2 emissions, are causing and will continue to cause climate change. [*See* sources cited in ER 339-41]

Impacts from climate change that have occurred, are occurring, and will occur, include: temperature increases, increased frequency of heat waves, loss of Arctic and Antarctic ice, melting of glaciers and related glacial lake outburst flows, loss of snowpack in California and elsewhere, changes in precipitation patterns, increased hurricane intensity, sea level rise and coastal flooding, harm to ecosystems including loss of plant and animal species, public health harms such

as increased heat-related illness and smog, harm to habitats, and the potential for substantial social upheaval resulting from significant environmental changes. [*See* ER 339-41]

Furthermore, Petitioners' concerns with global warming are immediate and urgent. Leading scientists have concluded that emissions of CO2 and other heat-trapping gases have warmed the oceans and led to an energy imbalance that is causing, and will continue to cause, significant warming, increasing the urgency of reducing $CO_2$ emissions. Scientists have identified "positive feedback mechanisms" that may cause global warming to proceed at an exponential, rather than linear rate. At some point the increase in temperature will reach a "tipping point," creating unstoppable, large-scale, disastrous impacts for all the inhabitants of the planet. [ER 330, 378-85, 443-44, 572-74]; Hansen Decl. ¶¶ 34-39, 43, 49, 52-61, 79-83.

Thus, Petitioners, indeed all inhabitants of this planet, are facing two possible scenarios. The first, is a "business as usual" scenario in which human inputs continue to push global temperature to higher ranges until the tipping point is reached and cataclysmic results ensue, including dramatic climatic disruptions and extermination of a substantial fraction of the animal and plant species on the planet. The "alternative scenario," is one in which human inputs

on global warming are constrained and the effects of global warming are reduced. Under this scenario, there is a possibility of adaptation and mitigation that will avoid a catastrophic disruption of life on earth. *See* [ER579] Hansen Decl. ¶¶ 28-39, 56-81.

The temperature difference between the two scenarios is a difference between warming of 2 to 3 degrees centigrade ("business-as usual scenario") and warming in the range of 1 degree centigrade ("alternative scenario") above year 2000 temperatures. This temperature difference may depend on relatively small differences in human-made GHG inputs. Thus, while we cannot stop the effects of global warming that are already underway, we are capable of avoiding outright cataclysm, and there are major benefits to be achieved in limiting climate change. [ER 443-44] Hansen Decl. ¶¶ 34-39, 66, 79-82.

## IMPACTS OF GLOBAL WARMING TO STATES AND MUNICIPALITIES

The impacts of global warming are more than abstract and distant threats. As the declarations submitted by Petitioners demonstrate,[4/] global warming affects air quality, increasing ozone and the severity of smog episodes (Kalkstein

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4. The impacts detailed in the declarations are specific to California and New York City, but similar concerns are shared by all of the Government Petitioners.

Decl. ¶¶ 3, 4, 11-14, 22-31; Kleeman Decl. ¶¶ 5, 6, 9-13; Lloyd Decl. at ¶¶ 24-27); it harms coastal areas by causing sea levels to rise (Flick Decl. ¶¶ 8-49; Hanemann Decl. ¶¶ 53, 62); it damages urban infrastructure, including stormwater drainage, sewers, and transportation systems through sea level rise and increased intensity of rainfall leading to flooding (Lloyd Decl. ¶¶ 9-15); it reduces state and municipal water resources by decreasing mountain snowpacks, and by changing runoff patterns (Hanemann Decl. ¶¶ 6-34; Stewart-Frey Decl. ¶¶ 5-33; Maurer Decl. ¶ 12-22, Lloyd Decl. ¶¶ 22), by causing sea level rise that breaches levees and causes salt water intrusion into fresh water areas (Williams Decl. ¶¶ 5-20), and by increasing the turbidity and pathogen levels of the water due to extreme weather events (Lloyd Decl. ¶¶ 16-21).

In light of their concern with global warming and their obligation to protect public health and the environment, Petitioners have taken a number of steps to reduce GHG emissions. Thus, California has promulgated regulations to control GHG emissions from automotive vehicles, including light trucks. Cal. Health & Saf. Code § 43018.5 and Cal. Code Regs., Tit. 13, § 1961.1. These regulations, which have been adopted by ten other states[5/] are currently under

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5. Connecticut, Maine, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. Conn. Agencies Regs. § 22a-174-36b (2006); 06-096-127 Me. Code R. § 127

attack by automakers and other parties in three separate court actions. New York City ("NYC") has established a Climate Change Task Force to coordinate NYC's climate change adaptation and mitigation efforts, and has undertaken a study to assess impacts on its wastewater infrastructure from global warming, and a modeling project to apply climate model scenario data to water operations to determine future risks associated with climate change. NYC is also taking steps to reduce GHG emissions by requiring diesel powered vehicles to use ultra-low sulfur diesel fuels, requiring City vehicles to achieve the highest possible emission standard available for the vehicle category, replacing the City's public fleet with alternative fuel vehicles, installing solar panels throughout the city, and converting traffic lights to energy-efficient light-emitting diodes. Lloyd Decl. at ¶¶ 3, 14, 21, 29, 30, 33.

In short, the problem of global warming is no longer a matter of just academic interest. It is an issue of immediate concern to Petitioners that demands a fundamental change in the way in which we view the world and its

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(2006); 310 Mass. Code Regs. 7.40 (2006); N.J. Admin. Code § 7:27-29 (2006); N.Y. Comp. Codes R. & Regs. tit. 6, § 218-8 (2006); Or. Admin. R. 340-257-0100 (2006); 25 Pa. Code §§ 126.411-412 (2006); R.I. Low Emission Vehicle Program, Air Pollution Control Reg. No. 37 (2006); Vt. Air Pollution Control Regs., Subch. XI and App. F (2006); Wash. Admin. Code 173-423-010 (2006).

resources.

## Issue 1. NHTSA ACTED ARBITRARILY AND CAPRICIOUSLY IN REFUSING TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

### I. The Energy Policy and Conservation Act

In the aftermath of the energy crisis that resulted from the 1973 to 1974 Arab oil embargo, Congress enacted the Energy Policy and Conservation Act. Title V of the Act, "Improving Fuel Efficiency," codified at 49 U.S.C. §§ 32902 *et seq*., requires the Secretary of Transportation to set Corporate Average Fuel Economy standards for light trucks for each model year based on the "maximum feasible average fuel economy level" that the manufacturers can achieve in each model year. In setting the fuel economy level, the Secretary must consider four criteria: "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). There is nothing in the statute to suggest that any one criterion controls; all must be considered in determining the maximum feasible average.

The original fuel economy standards for light trucks were set in 1977 for model year ("MY") 1979. From 1996 through 2001, restrictions in the

Department of Transportation Appropriations Act prevented NHTSA from setting any new CAFE standards for the time period beginning with MY 1998. The Agency did not act to set standards again until April 2003 when it set CAFE standards for MYs 2005-2007 at 22.2 miles per gallon ("mpg"). Final Environmental Assessment ("EA") [ER 1329]; 71 Fed.Reg. 17573 [ER 1380]. Through MY 2007, the standards were fleet-wide averages, meaning that each manufacturer's fleet had to meet the average fuel economy level overall. [ER 1381]

## II. NHTSA's Environmental Assessment Under NEPA

NEPA requires all federal agencies to analyze the environmental impacts of proposed major actions in order to promote better environmental decision-making, 42 U.S.C. § 4332(2)(c). "NEPA promotes its sweeping commitment to 'prevent or eliminate damage to the environment and biosphere' by focusing Government and public attention on the environmental effects of proposed agency action." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989) (quoting 42 U.S.C. § 4321).

To promote environmentally sensitive governmental decision-making, NEPA requires that agencies prepare an environmental impact statement ("EIS") for all "major Federal actions significantly affecting the . . . human

environment," 42 U.S.C. § 4332(2)(c). NEPA requires an EIS even where the significant impacts on the environment are arguably beneficial. *See* 40 C.F.R. § 1508.27(b)(1); *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429, 1437 (10th Cir. 1996); *Environment Defense Fund v. Marsh*, 651 F.2d 983, 993 (5th Cir. 1981).

Where the impacts of a project are unclear, rather than preparing a full EIS, an agency may first prepare a more limited document, the EA, to determine whether the proposed action may have a significant environmental effect. *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001). An EA must include a brief discussion of the environmental impacts of the proposed action and alternatives, and provide sufficient evidence and analysis for determining whether to prepare an EIS or a Finding of No Significant Impact. *Save the Yaak Committee v. Block*, 840 F.2d 714, 717 (9th Cir. 1988). The importance of the EA as well as the EIS "lies not merely in the aid it may give to the agency's own decisionmaking process, but also in the notice it gives the public of both the environmental issues the agency is aware of and those it has missed." *Illinois Commerce Comm'n v. I.C.C.*, 848 F.2d 1246, 1260 (D.C. Cir. 1988).

NHTSA acknowledged that the new CAFE light truck standards are covered by NEPA. It prepared a short and highly confusing EA in which it compared four different alternatives to a "baseline" to determine what it called the environmental impacts of each alternative. Alternative A, the "baseline," was the existing MY 2007 standard of 22.2 mpg extended through 2011. Alternative B was the preferred and ultimately selected alternative (discussed *infra*). Alternatives C-E presented minor variations on the above and are described in the EA at pages 8-15. [ER 1334-41]

NHTSA refused to review any standards that would result in more stringent fuel economy requirements, simply asserting that more stringent requirements would be inconsistent with its mandate to set mileage at the "maximum average feasible" level. [ER 1343] Thus, for example, NHTSA refused to consider alternatives proposed by Environmental Defense that demonstrated that mileage could be set as high as 26 mpg for MY 2011. [ER 1021-22]

In a discussion of impacts notable for its brevity and opacity, NHTSA first compared the lifetime impacts of the trucks manufactured in MY 2008-11 (in terms of energy use, emission of GHGs) under Alternatives B-E with the impacts that would occur if the 2007 light truck mileage of 22.2 mpg was extended

through 2011 (Alternative A or baseline). NHTSA concluded that Alternatives B-E would reduce lifetime CO2 emissions by 52 to 73 million metric tons ("MMT") from what they would have been had the earlier standard remained in place, or 1.8 to 2.6 percent of the expected level under the baseline. NHTSA then noted that the U.S. transportation sector accounted for 31 percent of total U.S. CO2 emissions in 2004 and the light truck fleet accounted for 28 percent of the transportation sector emissions. Thus, under the Agency's analysis, Alternatives B-E would reduce U.S. GHG emissions by about 0.16 to 0.23 percent from the levels that would have been expected from the baseline. [ER 1357-58]

In an even more confusing discussion of what it termed cumulative impacts, NHTSA compared the lifetime impacts of Alternatives B-E for the trucks manufactured during MYs 2005-11, with the impacts that would have occurred if the standard of 20.7 mpg, that existed prior to 2005, was extended until 2011. According to NHTSA, Alternatives B-E would reduce lifetime emissions of CO2 by 122 to 196 MMTs, or by 2.4 to 3.8 percent from the levels that would have resulted if the 20.7 mpg fuel economy standard had remained in effect. This reduction amounted to 0.21 to 0.33 percent of U.S. GHG emissions over the lifetime of the MY 2005-11 trucks from the levels that would have been

expected. [ER 1362-63]

NHTSA noted that, while "the projected reductions in CO2 emissions would represent sizeable fractions of lifetime CO2 emissions by MY 2008-11 light trucks, they would be much smaller when expressed as a percent of total CO2 emissions by motor vehicles, transportation sector emissions, or total U.S. CO2 emissions from all sources." [ER 1366] On this basis, NHTSA concluded that the CAFE standard "will not have a significant effect on the quality of the human environment." [ER 1287, 1478]

## III. The CAFE Rule

On April 6, 2006, NHTSA published its final CAFE Rule for MYs 2008-11. The Rule established a transition period from 2008 to 2010, during which manufacturers may choose to comply with either of two different CAFE systems -- the "Unreformed," which uses a fleet-wide average mileage standard, or the "Reformed," which establishes standards based on vehicle "footprints." In MY 2011 all manufacturers must comply with the Reformed system. [ER 1375]

The Unreformed system sets fleet-wide average mileage requirements as follows:

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| MY 2008 | 22.5 mpg |
| MY 2009 | 23.1 mpg |

MY 2010 23.5 mpg

[ER 1373] In the Reformed system, required mileage is based on the vehicles' "footprint," defined as the wheelbase times track width. Vehicles with smaller footprints must meet higher mileage targets; larger vehicles are required to meet much lower targets. [ER 1373] Significantly, the Reformed, or footprint-based, system relies nearly entirely on a market-based approach. If a manufacturer sells more large footprint cars (such as large SUVs), then the average mileage of the manufacturer's light truck fleet will be higher. Since there is no fleet-wide average mileage requirement, there is no incentive for manufacturers to design and sell smaller vehicles to offset the fuel economy level of the larger vehicles. Thus, a manufacturer could, in theory, manufacture only larger SUVs or minivans that met the lower mileage requirements for those larger footprints, which could lead to more energy use and higher GHG emissions. Despite this possibility, NHTSA refused to consider proposals by both Environmental Defense and the Natural Resources Defense Counsel that NHTSA impose a "backstop" mechanism "that would ensure that the novel Reformed CAFE proposal does not allow a significant negative reduction in fleetwide fuel economy due to substantial unanticipated changes in fleet size mix." NHTSA concluded that such a mechanism would be contrary to the "intent of EPCA"

because it would "limit a manufacturer's ability to respond to shifts in the market." [ER 1342]

## SUMMARY OF ARGUMENT

NHTSA's brief and nearly incomprehensible environmental review is inadequate on multiple grounds. The reality of global warming is by now virtually indisputable, and the contribution to global warming of GHG emissions from transportation (31% of U.S. total GHG emissions in 2004 [ER 1357]) is well documented. The National Academy of Science's statement to Congress, speaking directly on the issue of CAFE standards, bears repeating, "[G]lobal climate change must be taken seriously. U.S. cars and trucks are responsible for a nonnegligible fraction of the world's annual emissions of carbon dioxide, the most important greenhouse gas." [ER 105] Notwithstanding these circumstances, in the entire history of the CAFE rulemaking, NHTSA has never prepared an EIS to address the issue of global warming, and simply dismissed any change in GHG emissions from the new CAFE rule as insignificant.

Further, in preparing its EA, NHTSA limited the range of alternatives it considered, thus guaranteeing that any impacts would differ only narrowly from each other and from what it defined as the baseline. It compared only the difference in projected energy use and emissions for cars manufactured in MYs

2008-11 under the new CAFE standard, with what they would have been under the old standard, thus presenting the impact as a hypothetical decrease in emissions. This analysis ignored the trend for vehicle miles traveled ("VMT") to increase each year, and hid the real world consequence of the CAFE standard as measured by the actual change in energy consumption and greenhouse gas emissions from one year to the next, based on a change in VMT. NHTSA further neglected to discuss any of the cumulative impacts of the CAFE standard, including the impacts of past rulemakings on GHG emissions and the combined effects of GHG emissions from the transportation sector overall.

For the reasons set forth above and discussed in detail below, the Petitioners request that this Court remand this matter to NHTSA to prepare a full EIS that will address the environmental impacts of the CAFE Rule, in particular, the effects of greenhouse gas emissions from light trucks on global warming, prior to issuing a revised CAFE standard for model years 2011 and forward.

## ARGUMENT

### I. The Standard for Environmental Review Under NEPA

NEPA and the case law of this Circuit establish "a relatively low threshold for preparation of an EIS." *Natural Resources Defense Council v. Duvall*, 777 F. Supp. 1533, 1537 (E.D. Cal. 1991). To prevail, Petitioners need not establish

that the CAFE rule *will* have a significant impact on the environment. Rather, if the Petitioners raise a *substantial question* whether the proposed project *may* have a significant effect upon the environment, the agency must prepare an EIS. *Nat'l Parks & Conservation Ass'n*, 241 F.3d at 730; *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998).

An agency's decision to proceed on a major federal action without benefit of an EIS is governed by the "arbitrary and capricious" standard. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002). This standard requires this Court to ensure that NHTSA has taken a "hard look" at the environmental consequences and that the agency's decisions are "founded on a reasoned evaluation of the relevant factors. . . ." *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992) (citations omitted); *see also Anderson v. Evans*, 371 F.3d 475, 486 (9th Cir. 2004)*; Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998).

Further, a decision not to prepare an EIS will be considered unreasonable if the agency fails to "supply a convincing statement of reasons why potential effects are insignificant." *The Steamboaters v. Federal Energy Regulatory Commission*, 759 F.2d 1382, 1393 (9th Cir. 1985)*; See also Public Citizen v. Dept. of Transportation*, 316 F.3d 1002, 1027 (9th Cir. 2003), *rev'd on other*

*grounds*, 541 U.S. 752 (2004) (holding that the Department of Transportation failed to provide a convincing statement of reasons to support its decision).

Although the standards for evaluating an EIS do not expressly apply to EAs, the courts often look to the EIS regulations as guidance for reviewing EAs, and an EA which leads to a Finding of No Significant Impact is subject to the same requirements as an EIS. *See Price Road Neighborhood Ass'n, Inc. v. U.S. Dep't of Transportation*, 113 F.3d 1505, 1509 (9th Cir. 1997) (using EIS requirements to determine whether an EA should have been supplemented); *Save our Ecosystems v. Clark*, 747 F.2d 1240, 1247 (9th Cir. 1984) (noting that label of the document is unimportant; court must examine the purpose which the document serves).

## II. Because There is a *Substantial Question* that the CAFE Rule *May* Have a Significant Impact on GHG Emissions and Global Warming, NHTSA Must Prepare a Full EIS

Petitioners make two arguments: First, even NHTSA's own flawed analysis of impacts in the Environmental Assessment demonstrated a substantial question that the impacts of the CAFE Rule may have a significant impact on global warming. NHTSA's refusal to prepare a full EIS was therefore arbitrary and capricious. Second, the EA itself was opaque, inadequate, and misleading, because it did not consider reasonable alternatives, omitted the true impacts of

the rulemaking, and did not address cumulative impacts. NHTSA's reliance on the EA was arbitrary, capricious, and contrary to NEPA. These arguments are set forth separately below.

### A. NHTSA Arbitrarily and Capriciously and Without Any Analysis Dismissed Changes in GHG Emissions as Insignificant

In its EA, NHTSA acknowledged the existence of global warming, noting that since the Industrial Revolution atmospheric CO2 has risen because of fossil fuel combustion, and "[i]ncreasing concentrations of greenhouse gases are likely to accelerate the rate of climate change." NHTSA further noted that the transportation sector "is a significant source of greenhouse gas [GHG] emissions" [ER 1348], accounting for approximately 31 percent of total U.S. CO2 emissions in 2004. The light truck fleet accounted for 28% of the transportation sector CO2 emissions and about 8 percent of overall GHG emissions. [ER 1357-58]

NHTSA measured the impact of the CAFE rule by calculating the decrease in the rate of growth of energy consumption and emissions for light trucks manufactured in MYs 2008-11 under the new CAFE standard with what they would have been had the old standard been left in place. Under this

analysis, which itself was flawed and incomplete, as discussed below, NHTSA concluded that the CAFE Rule would reduce GHG emissions from what they would otherwise have been by:

- 52 to 72 million metric tons ("MMT") of CO2 over the lifetime of the trucks manufactured for MYs 2008-2011, a reduction of 1.8 to 2.6% of light truck emissions, as measured from the baseline mileage of 22.2 mpg set in 2007;
- 122 to 196 MMTs of CO2 over the lifetime of the trucks manufactured for MYs 2005-11, a reduction of 2.4 to 3.8% of light truck emissions, as measured from the baseline mileage of 20.7 mpg set prior to 2005;

and that the above reductions amounted to 0.16 to 0.33 percent of total U.S. GHG emissions over the lifetimes of the light trucks. [ER 1357-58, 1362-63]

Presumably recognizing that it cannot decline to perform an EIS simply because the impacts are beneficial to the environment, since a "significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial," 40 C.F.R. § 1508.27(b)(1); *see Catron County*, 75 F.3d at 1437, NHTSA instead acknowledged that the projected reductions in CO2 emissions

"would represent a sizeable fraction of lifetime CO2 emissions by MY 2008-11 light trucks." Ignoring this "sizable fraction of lifetime CO2 emissions," however, NHTSA then dismissed the reductions as "much smaller when expressed as a percent of total CO2 emissions by motor vehicles, transportation sector emissions, or total U.S. CO2 emissions from all sources." [ER 1330] NHTSA concluded that the final rule would result in a "small decrease in emissions of CO2," and therefore the action "will not have a significant impact on the environment." [ER 1480]

There are critical errors in this analysis. First, NHTSA's approach of minimizing the significance of potential environmental impacts by comparing emissions changes to a larger national emission level, has been rejected in this Circuit. In *Public Citizen*, the Department of Transportation similarly attempted to avoid its obligation to prepare an EIS for a national rule change by dismissing increases in NOx and $PM_{10}$ as insignificant, because they were "very small relative to the national levels of emissions." *Public Citizen* 316 F.3d at 1023. This Court disagreed, holding that even a "marginal degradation" of air quality is environmentally significant for purposes of NEPA. *Id.* at 1024. The same analysis applies here. Even what NHTSA might consider to be a "marginal improvement" in GHG emissions, is significant in the context of global warming.

Second, the conclusory statements–"a small decrease in emissions of CO2 . . . will not have a significant impact on the environment"–with no discussion or analysis, does not even come close to the statutorily required "convincing statement of reasons" needed to support a decision not to prepare an EIS. *See Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989, 996 (9th Cir. 2004) (holding that generalized conclusory statements that effects are not significant is not adequate). NHTSA cannot possibly contend that there is no significant environmental impact from its proposed action, *because it has never evaluated the impacts of CO2 emissions on global warming* and the effect of any reduction or increase in those emissions.

The regulations accompanying NEPA define "significant" environmental impact to require a consideration of both the context and intensity of the impact. Thus, the significance of an action must be analyzed within the context of the society as a whole as well as any more limited region or locality. 40 C.F.R. § 1508.27(a). Intensity refers to the severity of the impact, including the degree to which the action affects public health or safety, the degree to which the effects on the human environment are unique, and the degree to which the action may establish a precedent for future actions. *Id.* § 1508.27(b).

In the case of global warming, the "intensity" of the CO2 emission impact of the action is particularly significant. As the documents in the record and the declarations submitted to this Court demonstrate, a difference of 1 or 2 degrees, caused by small amounts of GHG emissions, may tip us toward irrevocable global catastrophe. Conversely, any reduction in CO2 emissions, any effort to change the "business-as-usual" scenario and mitigate the effects of global warming, is significant. *See* Hansen Decl. at ¶¶ 34, 38, 39, 66, 81, 82. As Congress noted when it enacted NEPA, "[w]e no longer have the margins for error that we once enjoyed." S.Rep. No. 91-296 at 5.

Because of the current state of the science, NHTSA cannot simply fall back on the same approach to environmental assessment that it took twenty years ago when it insisted that its action to relax the passenger car standards did not require environmental review because a decrease of one mpg in the CAFE standard represented less than a one percent increase over existing emissions and therefore was "not significant." *City of Los Angeles v. National Highway Traffic Safety Administration*, 912 F.2d 478, 484, (D.C. Cir. 1990), *overruled on other grounds by Florida Audubon Soc. v. Bentsen*, 94 F.3d 658 (1998).

At the time, the Circuit Court for the District of Columbia held that NHTSA's explanation was sufficient. *Id.* at 487-88, 490. In a forward-looking

and strong dissent, however, Chief Judge Wald rejected NHTSA's conclusory statement that the increase in CO2 emissions was insignificant, because NHTSA "failed completely to discuss in any detail the global warming phenomenon itself, or to explain the benchmark for its determination of insignificance in relation to that environmental danger." She concluded that, absent some criteria for what is significant in terms of a contribution to global warming that is grounded in science, "NHTSA's bald conclusion that the mere magnitude of the percentage increase is enough to alleviate its burden of conducting a more thorough investigation cannot carry the day." *Id.* at 500.

Twenty years ago Judge Wald's analysis may have been ahead of its time; it is now persuasive. There is scientific consensus that global warming is real, that GHGs are the main contributors to global warming, and that we can no longer afford to ignore even small changes in GHGs. The margin of difference between manageable and cataclysmic climate change is narrow, and every "nonnegligible" reduction in CO2 emissions must be viewed as a *significant change* that can avert the "tipping point." Given the delicacy of this environmental balance, and the cataclysmic results that will occur if we continue on a path of increasing GHG emissions and increasing global warming, no federal agency has the luxury of overlooking changes in GHG emissions simply

because those changes are small in some absolute or comparative sense. The "small" changes to GHG emissions are now the most significant steps we can take to avert planetary disaster. *See* Hansen Decl. at ¶¶ 34, 38, 39, 66, 81, 82. Thus, based on the NHTSA's own analysis, the Agency must prepare an EIS to address the effects of motor vehicle GHG emissions on global warming.

### B. NHTSA Arbitrarily and Capriciously Failed to Consider Adequate Alternatives to the Proposed Action

As noted above, Petitioners maintain that, even under its own flawed analysis as set out in the EA, NHTSA was required to prepare an EIS to address the effects of light truck GHG emissions on global warming. Separate and apart from this argument, however, NHTSA committed significant errors in preparing the EA itself, errors that render the document inconsistent with NEPA and NHTSA's reliance on it arbitrary and capricious.

Whether preparing an EA or an EIS, NHTSA must provide a detailed statement of alternatives to the proposed action, 42 U.S.C. § 4332(2)(c) and "[r]igorously explore and objectively evaluate all reasonable alternatives" to the proposed action. 40 C.F.R. § 1502.14(a). This consideration of alternatives is the "heart of the environmental impact statement." 40 C.F.R. § 1502.14; *City of Carmel-By-the-Sea v. United States Department of Transportation*, 123 F.3d

1142, 1155 (9th Cir. 1997), and the touchstone for the inquiry is whether the "selection and discussion of alternatives fosters informed decision-making and informed public participation." *California v. Block*, 690 F.2d 753, 767 (9th Cir. (1982).

The alternatives derive from the definition of the underlying purpose of the proposed action. "The stated goal of a project necessarily dictates the range of 'reasonable' alternatives and an agency cannot define its objectives in unreasonably narrow terms." *Carmel-by-the-Sea*, 123 F.3d at 1155. Thus, the courts must first determine whether the agency's statement of the purpose and need of the project was reasonable and whether the alternatives considered were reasonable in light of the project goals. *Ibid.*

NHTSA made several initial and critical decisions in defining the scope of its project. First, it described the project as setting the CAFE standard to meet the needs of the "least capable full line manufacturer of light trucks."[6/] The Agency stated that it would only examine standards that "can be achieved by the least capable [full line] manufacturer [with a significant share of the market]

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6. NHTSA defined the least capable manufacturer as the one that would bear the largest cost burden for improving fuel economy to comply with the standard. EA at 9. [ER 1335]

without causing it to suffer unacceptable financial harm." [ER 1335] Further, it refused to set the standards in any manner that would "limit a manufacturer's ability to respond to shifts in the market" [ER 1342], or that would "require applying technologies under lead times more aggressive than those relied on by the agency. . ." [ER 1343]

These limitations that NHTSA imposed on the scope of its project are not imposed by EPCA. Rather they reflect the Agency's decision to give more weight to certain factors – in this case, economic factors– a decision that was made prior to any environmental review. In so defining its project, NHTSA engaged in the administrative equivalent of "loading the dice" by deciding in advance on a narrow range of alternatives it considered "feasible," based on a preconceived set of assumptions about which of the statutory factors were most important, without performing any environmental review. It was no surprise then, that when NHTSA rolled the dice, the impacts of its narrow range of alternatives were closely similar to each other and the baseline.

NHTSA's duty in setting the CAFE standard involves a weighing of a variety of factors: technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government, and the need to conserve energy. 49 U.S.C. § 32902(f). As noted by the National Academy of Sciences,

"Selection of fuel economy targets will require uncertain and difficult trade-offs among environmental benefits, vehicle safety, cost, oil import dependence, and consumer preferences." [ER 103] NHTSA is mandated by Congress to make the hard trade-offs between these statutory factors. It cannot, however, consistent with NEPA, even begin to weigh the various factors and make the necessary trade-offs until it performs an environmental evaluation, considering a *full range* of alternatives that are feasible, and that are not artificially limited by some preordained end result.

While ultimately, NEPA "does not mandate particular results," it does require that the federal agencies take a "hard look" at the environmental consequences of their actions. *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 814 (9th Cir. 1999). By defining the scope of its project in a manner that unduly limited the alternatives that could be considered, NHTSA acted arbitrarily and capriciously. *See California v. Block*, 690 F.2d at 767 (forest service cannot intelligently decide the trade-off between wilderness use and development, without considering additional alternatives); *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990) (EIS was inadequate where the government argued that it could not consider any alternatives to a timber harvest plan because it was limited by the terms of its contract with the

logging company; government's "failure seriously to consider any alternative to the rigid application of its own interpretation of the contract requirements raises serious questions of compliance with applicable law.") Had NHTSA considered additional reasonable alternatives, the measured impacts would have been significantly greater, thus requiring that the Agency prepare a full EIS.

### C. NHTSA Arbitrarily and Capriciously Omitted the Relevant Incremental and Cumulative Impacts of the CAFE Rule

NEPA requires the federal agency to examine the environmental consequences of its action, viewed incrementally and cumulatively, and to compare those impacts to the impacts of the alternatives. *See* 40 C.F.R. §§ 1502.14, 1502.16, 1508.7.

As noted above, NHTSA defined the impacts of its rulemaking by comparing the impacts of the Alternatives (B-E) (in terms of energy use and emissions) with the impacts that would result from leaving the CAFE standard at earlier levels. [ER 1315] This information, while one possible measure of impact, provides little relevant information for the public or the decision maker for purposes of NEPA compliance, since it omits the real-world impact of NHTSA's rulemaking. All that NHTSA's analysis tells the readers of the EA is

what they already know by virtue of common sense: if miles driven are held constant, increasing the fuel economy of the trucks will result in decreased gas consumption and GHG emissions from those vehicles. But fuel economy is only half the question. As noted by the National Academy of Sciences the "fuel economy of light-duty cars and trucks *and vehicle miles traveled (VMT) are the two most important factors* underlying the use of energy and release of greenhouse gases in the light-duty fleet." (emphasis added). [ER 161]

The importance of the VMT factor is illustrated by the EPA Report, "Trends in Greenhouse Gas Emissions" which demonstrates that "[f]rom 1990 to 2004, *transportation emissions rose by 29 percent* due, in part, to increased demand for travel and the stagnation of fuel efficiency across the U.S. vehicle fleet." (emphasis added). The number of miles driven increased 38 percent from 1990 to 2004 and "the gallons of gasoline consumed each year in the United States have increased steadily since the 1980s. . . ." The report notes that the increase in motor vehicle usage is a result of population growth, economic growth, urban sprawl, low fuel prices and the increasing popularity of SUVs and light duty trucks with lower fuel efficiency. [ER 1517] Furthermore, the emissions of CO2 from light duty trucks increased steadily from 1990 to 2004 increasing from 315.8 to 526 teragrams of CO2 equivalents. [ ER 1519] Thus, it

is evident that increasing fuel economy does not necessarily correlate with a real-world decrease in fuel consumption or GHG emissions.

NHTSA's measurement of impacts ignores the fact that VMT will continue to increase, leading to increased energy use and increased GHG emissions from previous years, continuing this country on the long climb toward greater global warming.

Second, the EA's narrow comparison, which focuses on a very thin slice of the transportation sector–light trucks manufactured from 2008 to 2011–does not even attempt to address the CAFE Rule's cumulative impacts. A federal agency is required to evaluate whether a project's impacts, though individually limited, are cumulatively significant. *See* 40 C.F.R. § 1502.16. A cumulative impact

> is the impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

*Id.* § 1508.7. "Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment." *Id.* § 1508.27(7).

Ultimately, the EIS is not adequate if it does not address the relevant past,

present, and future projects in sufficient detail to be "useful to the decisionmaker in deciding whether, or how, to alter the program to lessen cumulative impacts." *Muckleshoot Indian Tribe*, 177 F.3d at p. 810 (quoting *City of Carmel-By-The-Sea*, 123 F.3d at p. 1160); *see also Blue Mountains Biodiversity Project*, 161 F.3d at 1214-15 (cumulative impacts of multiple logging operations inadequately addressed in EA; EIS required); *City of Carmel-By-The-Sea*, 123 F.3d at p. 1160-61 (EIS failed adequately to catalogue past projects and to provide useful analysis of cumulative impact of past, present and future projects); *Tenakee Springs*, 915 F.2d at p. 1313 (EIS fails to address cumulative impacts); *Thomas v. Peterson*, 753 F.2d 754, 755 (9th Cir.1985) ( Forest Service required to analyze the combined impacts of road construction and timber sales on salmon and steelhead trout and the grey wolf in an EIS).

Here, the Agency made no effort to define a relevant set of past, present, and reasonably foreseeable future actions that, together with the rulemaking for light trucks manufactured from 2008 through 2011, may result in a significant impact. Focusing just on GHGs and global warming, several types of actions that NHTSA should have considered in its cumulative impacts analysis are apparent. Its own past actions in setting CAFE standards, including those for light trucks and for passenger vehicles, are relevant, as these actions have helped

to contribute to a situation where the transportation sector has contributed approximately 31% of U.S. GHGs overall. [ER 1357] If these past actions were critically evaluated, it may have become apparent that in order to "catch up" after past stagnation in standards, the Agency should have set a more aggressive standard. The Agency's future plans for setting CAFE standards are also relevant; the public is entitled to understand how this rulemaking fits into the Agency's overall goals for increasing fuel efficiency over the next several decades, a critical period if we are going to avoid the worst-case global warming impacts. At the very least, all of these past, present, and future impacts must be placed in the context of emissions from the transportation sector overall. Without such information, NHTSA cannot assess whether its rulemaking is part of the "business as usual scenario" that is pushing us toward global disaster, or is part of the "alternative scenario" which will enable us to control global warming so that we can adapt and accommodate to the inevitable changes.

## CONCLUSION

Congress noted when it enacted NEPA that we no longer have the margins for error that we once enjoyed. That statement is even more true today as applied to global warming. We are already seeing the impacts of global warming, and the next century, the next decades, are critical in determining our ability to

manage and adapt to those impacts.

In promulgating the CAFE standard, NHTSA has the power to affect a significant source of global warming– emissions from light trucks. Those emissions are *eight percent* of the U.S. GHG gas emissions overall. While NEPA does not mandate a particular outcome from the environmental review, it does require that the Agency take a "hard look" at the impact of its decision making. Had NHTSA actually performed an adequate environmental analysis, both it and the public might have been informed that, in reality, we continue to rush headlong down the "business-as-usual" path toward possible climate disaster. Perhaps that realization would have affected the Agency's decision-making as it made the hard choices between the factors it was required to consider.

Petitioners therefore request that the Court remand this matter to NHTSA to prepare a full EIS prior to issuing a revised CAFE standard for light trucks manufactured in MY 2011.

## Issue 2. EPCA DOES NOT PREEMPT CALIFORNIA'S CLEAN AIR ACT MOTOR VEHICLE GHG EMISSIONS STANDARDS

## PRELIMINARY STATEMENT

Petitioner's second issue concerns NHTSA's improper and erroneous effort to assert preemption of California's GHG emission standards that have been submitted to EPA for approval under the Clean Air Act. As noted *supra* in note 3, Petitioners felt compelled to address the issue of preemption here so as not to waive their right to challenge NHTSA's position. There are, moreover, reasons why this Court should consider the preemption question. The District Court for the Eastern District of California relied on NHTSA's discussion in a preliminary ruling determining that the California regulations may be impliedly preempted under EPCA. *Central Valley Chrysler-Jeep v. Witherspoon*, 2006 WL 2734359, slip op. at pp. 6, 7, 8, and n. 8 (E.D. CA) (ruling on motions for judgment on the pleadings). Thus, California is already suffering harm from NHTSA's preemption opinion. Similar legal challenges are pending in Vermont, *Green Mountain Chrysler-Plymouth-Dodge-Jeep v. Torti*, (D.VT.) Nos. 2:05-CV-302 and 2:05-CV-304, and in Rhode Island, *AIAM et al. v. Sullivan, Director of RIDEM*, Nos. O6-69T and 06-70T.

Petitioners' arguments, set out below, address only the pure legal issue of whether California's GHG emission standards can be expressly or impliedly preempted under EPCA if they are approved by EPA under the Clean Air Act, and are therefore "other motor vehicle standards of the Government" incorporated into EPCA through section 32902(f). Petitioners do not address the intensely factual question of whether, as NHTSA maintains, California's GHG emission standards can only be met by improving fuel economy. Further, if this Court determines that the California standards can be preempted under conflict preemption, notwithstanding incorporation by EPCA section 32902(f), Petitioners do not address the factual question of whether the California standards actually pose an obstacle to EPCA's goals and purposes. Both of the above factual questions are pending before the district court in the *Witherspoon* case.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

### I. The Clean Air Act

The Clean Air Act creates two sets of motor vehicle emission standards with federal status, those promulgated by the U.S. Environmental Protection Agency ("EPA") under Section 202, and those promulgated by California and approved by EPA under Section 209(b) of the Act, 42 U.S.C. § 7543(b)(1),

commonly referred to as the "waiver" provision. *See, e.g., Engine Mfrs. Ass'n v. U.S. EPA*, 88 F.3d 1075, 1079-1080 (D.C. Cir. 1996).

As the Court of Appeals for the District of Columbia explained long ago, the waiver provision acknowledges California's crucial role in pioneering motor vehicle emission standards:

> The history of congressional consideration of the California waiver provision, from its original enactment up through 1977, indicates that Congress intended the State to continue and expand its pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program; in short, to act as a kind of laboratory for innovation.

*Motor and Equipment Mfrs. Ass'n, Inc. v. E.P.A. ("MEMA I")*, 627 F.2d 1095, 1110-11 (D.C. Cir. 1979). Thus, California was granted the "broadest possible discretion in adopting and enforcing standards for the control of emissions from new motor vehicles." *Id.* at 1128. *See also id.* at 1108 n.22, 1110 & n.31.

The procedure for obtaining a waiver is straightforward. Before submitting a waiver request under section 209(b), California first must determine that its emission standards in the aggregate are as protective of public health and welfare as applicable federal standards. 42 U.S.C. § 7543(b). Once California has made this "protectiveness" determination, California's emission standards are

presumed eligible for a waiver, and the EPA Administrator *must* grant California's waiver request unless the Administrator finds that (1) California's determination is arbitrary or capricious; (2) California does not need separate standards to meet "compelling and extraordinary conditions;" or (3) California's standards and accompanying enforcement procedures are not consistent with section 202(a). *Id.* § 7543(b)(1); *see Motor & Equip. Mfrs. Ass'n v. Nichols* ("*MEMA III*"), 142 F.3d 449, 453 (D.C. Cir. 1998).

California emission standards that receive a section 209(b) waiver are effectively "federalized" under the Clean Air Act. Automobile manufacturers selling cars in California must meet California emission standards to comply with their federal obligations under the Clean Air Act, 42 U.S.C. § 7543(b)(3), and other states, although barred from setting their own standards, are authorized by section 177 of the Act to adopt California's emission standards as their own, in lieu of EPA's federal standards.[7/] 42 U.S.C. § 7507; *see MEMA III*, 142 F.3d at p. 453.

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7. Indeed, as noted above, ten States already have adopted California's greenhouse gas emission standards. *See* note 5, *supra*.

## II. EPCA and the Clean Air Act Emission Standards

The key provision that establishes the relationship between EPCA and the Clean Air Act is 49 U.S.C. § 32902(f). EPCA authorizes the Secretary of Transportation to set and revise fuel economy standards for non-passenger automobiles, and such standards must be set at the "maximum feasible average fuel economy level." 49 U.S.C. § 32902(a), (c). In determining the maximum feasible level, section 32902(f) requires the Secretary to consider "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) (emphasis added).

EPCA also contains a provision that preempts any state law "related to fuel economy standards or average fuel economy standards." 49 U.S.C. § 32919(a).[8/] As Petitioners will show below, section 32919(a) does not apply to a state emission standard that has been approved by EPA under section 209(b) of

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8. "'[F]uel economy' means the average number of miles traveled by an automobile for each gallon of gasoline (or equivalent amount of other fuel) used, as determined by the Administrator under section 32904(c) of this title." *Id.* § 32901(a)(10). "'[A]verage fuel economy standard' means a performance standard specifying a minimum level of average fuel economy applicable to a manufacturer in a model year." *Id.* § 32901(a)(6).

the Clean Air Act and that therefore is a "motor vehicle standard of the Government" recognized under EPCA section 32902(f).

## III. The California Greenhouse Gas Emissions Standards

In 2002, the California Legislature enacted California Health and Safety Code § 43018.5 as part of California's "Vehicular Air Pollution Control" provisions. California Health and Safety Code §§ 43000 *et seq.* Section 43018.5 requires the California Air Resources Board ("ARB") to adopt regulations that achieve "the maximum feasible and cost-effective reduction of greenhouse gas emissions" from motor vehicles manufactured in model year 2009 and later. Cal. Health & Safety Code § 43018.5(a). "Maximum feasible and cost-effective reduction" is defined to mean "[c]apable of being successfully accomplished within the time provided in this section, taking into account environmental, economic, social, and technological factors" and "[e]conomical to an owner or operator of a vehicle, taking into account the full life-cycle costs of a vehicle." *Id*. § 43018.5(i)(2); *see also id*. § 43018.5(c)(1), (c)(2) (requiring ARB to consider technological feasibility and economic impact).

Pursuant to section 43018.5, ARB adopted emission standards for MYs 2009-2016 for four greenhouse gases -- carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons. Cal. Code Regs, Tit. 13, § 1961.1(a)(1)(A) (Table). On

December 21, 2005, ARB submitted these GHG emission standards to EPA to obtain the waiver authorized by Clean Air Act section 209(b). EPA has not yet acted on ARB's request. *See Witherspoon*, 2006 WL 2734359, slip op. at p. 6. It is these standards, that are not yet in effect because EPA has not acted on the waiver, that NHTSA chose to address in its CAFE rulemaking, as described below.

## IV. The Preamble to the CAFE Light Truck Rule

The bulk of the preamble to the CAFE rule sets forth NHTSA's view of how the final CAFE light truck standards satisfy the four factors set out in 49 U.S.C. § 32902(f): technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need for the United States to conserve energy. In one significant section of the preamble, however, NHTSA departed from its focus on the CAFE standards and reached out to discuss a matter not related to the legal or factual basis for the CAFE standards – whether California's GHG emissions standards are preempted by EPCA. [ER 1461-78]

Framing its discussion as a matter of federal-state preemption under EPCA section 32919(a), NHTSA asserted that CO2 emissions could only be controlled by improving fuel economy and therefore that any regulation governing CO2

emissions is the same as a fuel economy standard because, "the effect of a State GHG standard on vehicle design and performance is the same as that of fuel economy standards."[9/] [ER 1464-65]. As a result, NHTSA asserted that such a state GHG standard is *expressly preempted* by 49 U.S.C. § 32919(a), which preempts state standards "related to fuel economy." [ER 1461, 1473] NHTSA further claimed that any ambiguity in EPCA's express preemption provision as it relates to other statutory provisions, "must be resolved in light of the policy considerations embodied in EPCA." [ER 1463]

Then, turning to conflict preemption, NHTSA also concluded that California's GHG standards are impliedly preempted because they would "frustrate 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." [ER 1474] Moreover, NHTSA, quoting statements made by EPA, argued that even CO2 standards promulgated *by the federal EPA itself* pursuant to the Clean Air Act would "abrogate EPCA's regime" [ER 1475], because "Congress has already created a detailed set of

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9. For the sake of the discussion below, Petitioners assume that California's GHG standards can only be met by improving fuel economy. That issue, however, is a matter of factual dispute that is before the court in the *Witherspoon* case.

mandatory standards governing the fuel economy of cars and light duty trucks, and has authorized DOT – not EPA – to implement those standards. The only way for EPA to proceed with CO2 emissions standards without upsetting this statutory scheme would be to set a standard less stringent than CAFE for cars and light duty trucks." *Id.* at 17658-59. [ER 1465-66] EPA's position that regulations to address CO2 emissions are not authorized by the Clean Air Act section 202(a), is now pending before the United States Supreme Court in *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), *cert. granted*, 126 S.Ct. 2690 (2006). That matter will be argued on November 29, 2006.

Recognizing the inconsistency in its argument that section 32919(a) of EPCA *preempt*s the same Clean Air Act motor vehicle emissions standards that Congress required NHTSA to *consider* under section § 32902(f) as "other motor vehicle standards of the Government," NHTSA attempted to distinguish between standards for CO2 emissions and for other pollutants, arguing that the CO2 emissions are not air pollutants that are regulated under the Clean Air Act. "The Clean Air Act authorizes the States to regulate emissions other than CO2, but not CO2 itself, because of the nature of combustion and the availability of different technologies for regulating those other emissions." [ER 1477].

## V. The California Litigation

On February 16, 2005, a coalition of automobile manufacturers, dealers, and others filed a first amended complaint in the Eastern District of California against the State of California, naming Catherine Witherspoon, ARB's executive officer, as the defendant, and alleging that the California GHG regulations were preempted by EPCA. On September 25, 2006, the trial court issued its ruling on Witherspoon's motion for judgment on the pleadings. The court declined to address express preemption under EPCA and instead decided that the plaintiffs had stated a claim for preemption based on the potential conflict between California's GHG regulations and EPCA. In this ruling on conflict preemption, the court "placed some weight" on NHTSA's above-described preemption discussion in the CAFE preamble, particularly NHTSA's determination that the GHG standards, even if authorized under the Clean Air Act, "would upset the efforts of NHTSA to balance and achieve Congress's competing goals." *Central Valley Chrysler-Jeep v. Witherspoon*, 2006 WL 2834359 at 4, 5, 7.

## SUMMARY OF ARGUMENT

In the preamble to the final rule setting the CAFE mileage for light trucks, NHTSA sets forth seventeen Federal Register pages of argument as to why, in its view, EPCA preempts California's greenhouse gas ("GHG") emission standards for motor vehicles. The discussion is irrelevant to the CAFE rule and, on the merits, wrong.

NHTSA's preamble discussion is a calculated and unwarranted attempt by the Agency to imbue its views with a formality and deference to which they are not entitled, in an apparent effort to influence the outcome of a lawsuit challenging California's standards that is pending in the Central District of California.

A straightforward reading of the language of EPCA demonstrates NHTSA's fundamental analytical error. At issue is not the preemption of *state law*, but rather the relationship of *two coordinated federal laws*, EPCA and the Clean Air Act. Section 32902(f) of EPCA mandates that, when determining the "maximum feasible average fuel economy level," NHTSA must consider the impact on fuel economy of "other motor vehicle standards of the Government." 49 U.S.C. § 32902(f). Clean Air Act standards set by EPA under section 202, or set by California and approved by EPA under section 209(b), are "other motor

vehicle standards of the Government" under section 32902(f). NHTSA must treat these standards as a given, and consider their fuel economy impacts, positive or negative, when setting CAFE standards. Thus, the Clean Air Act and EPCA work in harmony. As a matter of statutory interpretation and simple logic, the federal motor vehicle emission standards and federally-authorized state motor vehicle emission standards that Congress expressly incorporated into EPCA cannot be preempted by EPCA, nor can they conflict with the purposes of that statute.

NHTSA's preemption dissertation is nothing more than a power grab by an agency that is dissatisfied with Congress's decision to incorporate considerations about air pollution into the mileage standards that NHTSA must set. The discussion is entitled to no deference and is wrong. The Petitioners request that this Court rule, on the merits, that EPCA incorporates California's federally-authorized GHG emission standards; it does not preempt those standards.

## ARGUMENT

### I. EPCA Incorporates California's Federally Authorized CO2 Emissions Standards; It Does Not Preempt Those Standards

#### A. Standard of Review

##### 1. The Court Should Review this Issue *De Novo* and Should Not Defer to an Agency's Interpretation of the Interplay Between Two Federal Statutes Administered by Different Federal Agencies

NHTSA frames its analysis as one of preemption, relying on section 32919(a) of EPCA, which provides that EPCA preempts any state law "related to fuel economy standards or average fuel economy standards." This initial framing is wrong. At issue is not preemption of *state fuel economy standards* under section 32919(a) of EPCA, but rather the relationship between *two federal laws* and the incorporation of "other motor vehicle standards of the Government" into EPCA pursuant to section 32902(f). Specifically the question is the status under EPCA of emission standards approved by EPA under section 209(b) of the Clean Air Act.

This Court has made clear that the "courts do not owe deference to an agency's interpretation of a statute it is not charged with administering or when an agency resolves a conflict between its statute and another statute." *Ass'n of*

*Civilian Technicians v. Fed. Labor Relations Auth*., 200 F.3d 590, 592 (9th Cir. 2000) (citing *Cal. Nat'l Guard v. Fed. Labor Relations Auth*., 697 F.2d 874, 879 (9th Cir. 1983)). Thus, this Court should give no deference to NHTSA's opinion on how to resolve what it views as a conflict between its authority under EPCA and the authority of the EPA and the states under the Clean Air Act.

### 2. Even as Viewed Through the Lens of Preemption, The Court Should Not Defer to NHTSA's Discussion of the Preemptive Effect of a Statutory Provision

As noted above, California's GHG emission standards are incorporated into EPCA through section 32902(f), and the issue before the Court is one of harmonizing two federal statutes rather than examining the relationship between state and federal law. NHTSA's discussion of preemption is both irrelevant and wrong. Even if this issue were viewed as a question of preemption of state law, however, NHTSA's views would not deserve deference. The question of preemption of a statute should be decided *de novo* by the courts. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996), (noting that it assumed, without deciding, that the question of the preemptive effect of a statute must always be decided *de novo* by the courts); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 512 (1996) (O'Connor, J., concurring) (it is not certain that any "agency

regulation determining the pre-emptive effect of *any* federal statute is entitled to deference. . . ." (emphasis in original)).[10/]

Further, deference is not warranted where the presumption against preemption of a state health and safety statutes applies. *See Desiano v. Warner-Lambert Co.*, __ F.3d __, 2006 WL 2846454 (2d. Cir. 2006), at p. 11-12, n.9 (declining to defer to an agency discussion of preemption in a preamble to a rulemaking because "an agency cannot supply, on Congress's behalf, the clear legislative statement of intent required to overcome the presumption against preemption"). Air pollution regulation has historically been a matter of state concern. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960); *Exxon Mobil Corp. v. U.S. Envtl. Prot. Agency*, 217 F.3d 1246, 1255-56 (9th Cir. 2000); *MEMA I*, 627 F.2d at 1108, 1109 n. 26. Thus, this is an ideal case in which the presumption against preemption applies. Given that presumption, NHTSA's preemption discussion (even if it were relevant), cannot be used to

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10. Indeed, deferring to an agency's pronouncements on preemption is particularly inappropriate because of the agency's obvious interest in expanding its area of exclusive authority. C. Sunstein, *Law and Administration after Chevron* 90 Colum. L. Rev. 2071, 2099 (1990) (to allow agencies to determine the extent of their own jurisdiction "would allow them to be judges in their own cause, in which they are of course susceptible to bias"). Thus, agencies cannot be permitted to invade the province of the judiciary in determining the scope of preemption.

supply the clear congressional intent to preempt state law, and is entitled to no deference from the courts.

### B. California's Clean Air Act GHG Standards are "Other Motor Vehicle Standards of the Government" that are Incorporated Into EPCA and Therefore Cannot be Preempted by EPCA.

As with any exercise of statutory construction, the courts begin "with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). Thus, the Court must "look to the statute's language, structure, subject matter, context, and history–factors that typically help courts determine a statute's objectives and thereby illuminate its text." *Pacific Gas & Electric Co. v. California*, 350 F.3d 932, 943 (9th Cir. 2003) (quoting *Almendarez-Torres v. U.S.*, 523 U.S. 224 (1998).) The meaning of one statute may be affected by other statutes, "particularly where Congress has spoken subsequently and more specifically to the topic at hand," *FDA v. Brown & Williamson*, 529 U.S.120, 133 (2000), and "[i]t is well established that when two regulatory systems are applicable to a certain subject matter, they are to be reconciled and, to the extent possible, both given effect." *Pennsylvania v. Interstate Commerce Comm'n*, 561 F.2d 278, 292 (D.C. Cir. 1977); *see also, Morton v. Mancari*, 417 U.S. 535, 551

(1974) (when two statutes are capable of co-existence, courts must regard each as effective).

Since EPCA's enactment in 1975, Congress has been aware that Clean Air Act motor vehicle emission standards, including California's federally authorized emission standards, affected fuel economy. *See* H.R. Rep. No. 94-340, at 86-87, 89-91 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1762, 1848-49, 1851-53. For example, Congress knew that the installation of catalytic converters, required by California and federal emission standards, improved the prior year's fuel economy by 13.8 percent. *Id.* at 86-87. It also knew that other, more stringent California emission standards in place at that time *decreased* average fuel economy. *Id.* at 87 ("The California standards . . . appear to result in a 5.7 percent fuel penalty. . . .")

Although these Clean Air Act emission standards affected fuel economy, both positively and negatively, Congress did not prohibit or restrict them and did not displace California's role as a regulator of motor vehicle emissions, a function the state has exercised since before the enactment of the Clean Air Act. Rather, it incorporated the Clean Air Act emissions standards into EPCA, requiring that NHTSA take into account "the effect of other motor vehicle

standards of the Government on fuel economy" when it sets CAFE standards. 49 U.S.C. § 32902(f).

As a further demonstration that Congress was aware of the effect of the Clean Air Act standards on mileage and considered California's Clean Air Act standards to be equivalent to federal standards, EPCA allowed an automobile manufacturer to apply for a relaxation in the federal average fuel economy standard if the manufacturer could show that the "federal [emission] standards" resulted in lower fuel economy. EPCA, § 301, 89 Stat. at 904-05 (enacting subsection 502(d) of the act); H.R. Rep. No. 94-340, at 90-91; s*ee Center for Auto Safety v. National Highway Traffic Safety Administration* , 793 F.2d 1322, 1325 & n.12 (D.C. Cir. 1986). EPCA section 502(d)(3)(D) defined "federal standards" to include both federal *and* California standards under the Clean Air Act. *See* EPCA, § 301, 89 Stat. at 905 (defining federal standards under section 502(d)(3)(D) to include "Emission standards under section 202 of the Clean Air Act, and emission standards applicable by reason of section 209(b) of such Act").

Thus, recognizing the importance of the Clean Air Act standards, Congress chose to incorporate both section 202 and 209 standards into EPCA to ensure that the Clean Air Act emission standards would be honored when setting

fuel economy standards. If these emission standards made fuel economy standards harder to achieve, the statutory remedy was an adjustment of the federal fuel economy standard, not neglect or preemption of the emission standard.

Nothing has changed since EPCA's enactment in 1975 that would evidence a different congressional intent today.[11/] EPCA continues to require that the Secretary of Transportation take into account "the effect of other motor vehicle standards of the Government on fuel economy" when it sets fuel economy standards. 49 U.S.C. § 32902(f). In carrying out this requirement, NHTSA has consistently treated "other motor vehicle standards" in section 32902(f) to include both federal and California emission standards under the Clean Air Act, and has repeatedly taken California emission standards into account when setting fuel economy standards. *See, e.g.*, Light Truck Average Fuel Economy Standard, Model Year 2004, 67 Fed. Reg. 16052, 16057 (Apr. 4,

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11. EPCA section 502(d) in its original form applied only to model years 1978 through 1980. EPCA, § 301, 89 Stat. at 904 (section 502(d)(1) of the act). When it reorganized the transportation laws in 1994, Congress deleted original section 502(d) because it had been "[e]xecuted." *See* H.R. Rep. No. 103-180, at 584 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818, 1401 (reference to section 2002(d), the original U.S. Code section number). This 1994 reorganization made no substantive changes. *Id.* at 5.

2002) (discussing California emission standards as a government regulation that NHTSA must take into account in setting maximum feasible fuel economy); Request for Comments, National Academy of Science Study and Future Fuel Economy Improvements, Model Years 2005-2010, 67 Fed. Reg. 5767 (Feb. 7, 2002) (asking for information on fuel economy effects of California regulations).[12/]

Thus, the California GHG emissions standards, once approved by EPA, are incorporated into EPCA as "other motor vehicle standards of the Government" by virtue of section 32902(f). They are not preempted, as NHTSA suggests, as state fuel economy standards under 32919(a).

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12. There are other examples of how NHTSA has accepted California emission standards in setting fuel economy standards. *See* Light Truck Average Fuel Economy Standards, Model Years 1996-1997, 59 Fed. Reg. 16312, 16317 (Apr. 6, 1994) ("Standards are also becoming tighter in California"); Light Truck Average Fuel Economy Standards, Model Years 2005-2007, 68 Fed. Reg. 16868, 16896 (Apr. 7, 2003) (discussing California emission standards)*; see also* 40 C.F.R. §§ 600.207-86(a)(1), (b)(1), 600.207-93(a)(1), (b)(1), 600.307-86(c)(9), 600.307-93(c)(9), 600.311-86(c) (requiring certain CAFE-related actions if California vehicles "are likely to exhibit significant differences in fuel economy from those intended for sale in other states").

### C. There is No Distinction in the Clean Air Act or EPCA Between CO2 and Non-CO2 Emission Standards; All are Incorporated into EPCA.

After having incorporated Clean Air Act standards, including California's federally authorized standards, into the CAFE rules for the past thirty years, NHTSA suddenly attempts to argue that these same standards conflict with EPCA and are preempted. Recognizing the inconsistency of its analysis, NHTSA tries to justify its position by manufacturing a distinction between CO2 and non-CO2 standards. NHTSA acknowledges that EPA and California have authority under the Clean Air Act to require use of certain technologies when addressing *non*-CO2 pollutants, but asserts that neither has authority to require those same technologies when addressing CO2 itself, and that CO2 standards cannot be incorporated into EPCA. [ER 1465, 1476-77] This distinction between CO2 and non-CO2 emissions is found nowhere in the text or history of either EPCA or the Clean Air Act, and makes no sense. EPCA section 32902(f) directs, without exception, that the Secretary "shall consider . . .other motor vehicle standards." When "motor vehicle standards of the Government" that are designed to curb non-CO2 pollutants affect fuel economy– positively or negatively–NHTSA must take (and has taken) that effect into account. There is

no basis in the statutory text for a different view when the standard is addressed to emissions of CO2 or other greenhouse gas pollution.

NHTSA has ascribed to Congress a distinction and a policy choice it did not make under either the Clean Air Act or EPCA. NHTSA argues that because it sets miles per gallon for vehicles, both the EPA and the states are barred from addressing perhaps the most important air pollution problem that exists today – the emission of GHGs. EPCA's "language, structure, subject matter, context, and history"[13/] belie this distinction and make clear that section 32902(f) cannot be read to distinguish between CO2 emissions and other emissions. All Clean Air Act emission standards are incorporated into EPCA and NHTSA must take into account the effect of these standards when determining the appropriate fuel economy standards. So reading EPCA serves the objectives of both the Clean Air Act and EPCA: it honors Congress's intent in the Clean Air Act that California be permitted to adopt separate emission standards, and in EPCA that federally approved standards be taken into account when NHTSA determines

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13. *See Pacific Gas & Electric Co.,* 350 F.3d at 943.

fuel economy standards. Any other approach would render the Clean Air Act illusory and EPCA internally inconsistent.[14/]

### D. Clean Air Act Standards That Are Incorporated into EPCA Cannot Stand as an Obstacle to EPCA's Purposes

In addition to its express preemption argument, NHTSA argues that because EPCA requires that it set fuel economy standards at the "maximum feasible" level after considering a variety of factors identified in the statute, any GHG regulations, whether issued by EPA or by California, pose an impermissible obstacle to this balancing process and render NHTSA's "careful balancing of consideration[s] a nullity." [ER 1475]

Conflict preemption relates to the interaction of *state* and federal law and occurs when (1) compliance with both laws is physically impossible, or (2) the state law stands as an obstacle to the "full purposes and objectives of Congress." *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990). A conflict preemption

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14. Further, this Court has noted that if there is any doubt about congressional intent, "we are to err on the side of caution, finding no preemption, '[f]or the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden.'" *Malabed v. North Slope Borough*, 335 F.3d 864, 869 (9th Cir. 2003) (quoting *Beveridge v. Lewis*, 939 F.2d 859, 863 (9th Cir. 1991).

analysis does not, however, apply to the interaction of two federal laws, as is the case here.

Thus, NHTSA's analysis is wrong for the reasons already given. This is not a matter of preemption of state law; both EPA's emission standards and California's federally-authorized emission standards are incorporated into EPCA. There is no way in which these Clean Air Act emissions standards can stand as an obstacle to the CAFE standard-setting process because EPCA itself *requires* that these emission standards be considered in that process.

Further, NHTSA did not and cannot show that an auto manufacturer cannot comply with both CAFE standards and with the California emissions standards or that those standards stand as an obstacle to EPCA's purposes. NHTSA's analysis is based on its misperception of the role of the EPA in overseeing emission standards. NHTSA treats California GHG standards as if those standards were the isolated acts of a State that seeks to dictate how NHTSA performs its job. NHTSA, however, is not required to consider California's standards unless EPA, another federal agency, has approved them. This has important consequences. It means that California emission standards are an integral component of an overlapping federal scheme in which Congress has required one agency – NHTSA – to consider the motor vehicle standards adopted

or approved by another federal agency – EPA. Far from being an obstacle, they are part of the EPCA process for devising fuel economy standards and advance important *federal* objectives that must be taken into account.

The Clean Air Act imposes similar obligations on EPA that EPCA places on NHTSA. Both statutes require their respective agencies to consider the technological feasibility and economic practicability of standards. The Clean Air Act provides that EPA's emission standards "shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." 42 U.S.C. § 7521(a)(2); *see also Natural Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency*, 655 F.2d 318, 322 (D.C. Cir. 1981) (describing EPA's "technology-based" standards). Under section 209(b)(1)(c), EPA uses this same standard in determining whether to grant California emission standards a section 209(b) waiver. 42 U.S.C. § 7543(b); *see MEMA III, supra,* 142 F.3d at p. 463 (explaining that "[t]he 'technological feasibility' component of section 202(a) obligates California to allow sufficient lead time to permit manufacturers to develop and apply the necessary technology"). EPA is also required by section 202(a)(4), 42 U.S.C. 7521(a)(4),

to determine that no unreasonable safety risks are created by the technologies used to meet emission standards.[15/]

In addition, there is a federal legal remedy available to challenge EPA's grant of a Clean Air Act waiver to California under section 209(b). 42 U.S.C. § 7607(b); *see, e.g., MEMA I*, 627 F.2d 1095 (D.C. Cir. 1979).) This judicial oversight insures the integrity and validity of the Clean Air Act emission standards that EPCA requires NHTSA to consider.

Thus, technological feasibility, economic practicability, compliance lead time and safety are not the exclusive concerns of NHTSA. When NHTSA argues that California or EPA's CO2 standards would interfere with NHTSA's consideration of factors in setting the CAFE standards, it is really complaining about Congress's decision to allocate these judgments to *two* federal agencies,

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15. The California statute requires that these emission standards "achieve the maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles." Cal. Health & Safety Code § 43018.5(a). This level of reduction was specifically defined as the reduction "[c]apable of being successfully accomplished within the time provided by this section, taking into account environmental, economic, social, and technological factors" and "[e]conomical to an owner or operator of a vehicle, taking into account the full life-cycle costs of a vehicle." *Id.* § 43018.5(i)(2).

rather than one, in the coordinated regulatory system created by the Clean Air Act and EPCA. NHTSA cannot now ignore this regulatory scheme.

## CONCLUSION

California's GHG emission standards, once approved by EPA, are an integral component of a comprehensive federal scheme in which Congress has required one agency–NHTSA–to consider the motor vehicle standards adopted or approved by another federal agency–EPA– after both agencies have considered a similar set of factors. It would conflict with the purposes of both the Clean Air Act and EPCA to allow NHTSA to disregard federally approved emission standards, including California's GHG standards. And what NHTSA cannot disregard, it certainly cannot preempt.

Petitioners therefore request that this Court rule that California's GHG standards, once approved by EPA, must be considered by NHTSA in setting the fuel economy standard. In the alternative, if the Court deems this matter not appropriate for judicial review, Petitioners request that the Court rule that NHTSA's preamble opinion on the interaction of two federal statutes or on the preemption of state law is not entitled to any deference by the courts.

## STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6, Petitioners state that, other than the cases consolidated with these cases, there are no other known related cases pending in this Court.

Dated: November 15, 2006

Respectfully submitted,

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**Case Nos. 06-72317 and 06-72641**

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **OPENING BRIEF OF THE PETITIONERS IN CONSOLIDATED CASE NOS. 06-72317 AND 06-72641** is proportionately spaced, has a typeface of 14 points or more and contains 13,611 words.

Dated: November 15, 2006

Respectfully submitted,

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