ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1080 (and consolidated cases)

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

NATURAL RESOURCES DEFENSE COUNCIL, et al.,
Petitioners,

v.

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

PROOF BRIEF OF STATE AND LOCAL GOVERNMENT RESPONDENT-INTERVENORS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel provides the following information for all consolidated cases.

A. Parties and Amici

All parties, intervenors, and amici appearing in these consolidated cases are listed in the Proof Brief of Respondents (ECF No. 1991134), with the exception of the following:

Amici for Respondents:

The Institute for Policy Integrity at New York University School of Law; Senator Thomas R. Carper and Representative Frank Pallone, Jr.

B. Rulings Under Review

The agency action under review is entitled, "Corporate Average Fuel Economy Standards for Model Years 2024-2026 Passenger Cars and Light Trucks," 87 Fed. Reg. 25,710 (May 2, 2022).

C. Related Cases

There are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

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GLOSSARY

Carper-Pallone Amicus Br.	Brief of *Amici Curiae* Senator Tom Carper and Representative Frank Pallone
EPA	U.S. Environmental Protection Agency
EPCA	Energy Policy Conservation Act of 1975 (as now codified at 49 U.S.C. § 32901 et seq.)
Indus. Resp.-Int. Br.	Brief of Respondent-Intervenors National Coalition for Advanced Transportation and Zero Emission Transportation Association
JA	Joint Appendix
NHTSA	National Highway Traffic Safety Administration
NHTSA Br.	Brief for Respondents
Pet. Br.	Brief of Petitioner American Fuel & Petrochemical Manufacturers and State Petitioners
Pet.-Int. Br.	Brief for Intervenors in Support of Petitioners

INTRODUCTION

In setting fuel-economy standards for model years 2024-2026, the National Highway Traffic Safety Administration (NHTSA) forecasted a reasonable projection of what the new-vehicle fleet would look like in those years if the agency made no changes to its standards. NHTSA compared that "no-action" fleet to the one that would result if manufacturers faced more stringent fuel-economy standards but could not further electrify their fleets in response. This comparison allowed NHTSA to determine what additional fuel-economy improvements—other than electrification—could feasibly and practicably be made, and thereby promulgate "maximum feasible" standards for model years 2024-2026. *See* 49 U.S.C. § 32902(a). NHTSA has set fuel-economy standards following this course—determining what manufacturers would do in a no-action scenario and how much, if any, further fuel-economy progress should be required—since Congress established this program in 1975.

Petitioners now claim that NHTSA is prohibited from including electric vehicles in its no-action fleet—even though increasing numbers of those vehicles are indisputably being sold with each passing year. Congress does not generally require agencies to put on such blinders. And it did not do so here—in a statute that charges NHTSA with iteratively promulgating

technology-forcing standards. In fact, the provision Petitioners rely on—Section 32902(h)—directs NHTSA to disregard electric vehicles' fuel-economy values only when the agency determines how much, if any, *additional* fuel-economy improvement manufacturers should be required to make. That provision does not require the use of a counterfactual no-action fleet.

Petitioners claim their expansive interpretation is a plain reading of a prohibition "with no qualifications or carveouts." Pet. Br. 29. But Section 32902(h) expressly applies only when NHTSA is "carrying out" specific duties, none of which is the development of a no-action fleet. 49 U.S.C. § 32902(h). Petitioners' atextual reading would also produce bizarre results Congress plainly did not intend and would hinder, rather than advance, the statute's objectives. That reading should be rejected.

STATUTES AND REGULATIONS

Pertinent statutes not in the addenda to Petitioners' and Respondents' briefs are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

State Respondent-Intervenors adopt NHTSA's Statement of the Case and provide the following brief summary and supplement as background for their particular arguments.

A. Fuel-Economy Standard-Setting under EPCA

The purpose of the Energy Policy and Conservation Act's (EPCA) fuel-economy program is to reduce the amount of petroleum-based fuels consumed by the Nation's vehicles. *Ctr. for Auto Safety v. NHTSA*, 710 F.2d 842, 844 (D.C. Cir. 1983) (EPCA was "a reaction to the energy shortage and resulting economic downturn that followed the oil embargo of 1973-1974"); NHTSA Br. 3. To that end, Congress established standards requiring improvements in the average fuel-economy of new automobiles for model years 1978-1980. Pub. L. No. 94-163, §§ 501, 502, 89 Stat. 871, 901-902 (1975). Starting with model year 1981, *id.* § 502, 89 Stat. 902-903, Congress tasked NHTSA with establishing average fuel-economy standards at the "maximum feasible … level that [the agency] decides the manufacturers can achieve" in a given model year, 49 U.S.C. § 32902(a).

The statute requires NHTSA to prescribe fuel-economy standards "for each model year" with no end date. *Id.* § 32902(a), (b)(1). But NHTSA may only prescribe standards for five model years at a time. *Id.* § 32902(b)(3)(B). Thus, NHTSA must repeatedly consider the industry's capabilities, at least every five years. NHTSA may also reconsider its standards after-the-fact, pursuant to subsections (c) and (g), which permit amendments to previously promulgated standards. *Id.* § 32902(c), (g).

NHTSA determines "the maximum feasible average fuel economy level that … manufacturers can achieve" in a given model year in several steps. *See* 49 U.S.C. § 32902(a). Beginning with the actual fleet sold in the most recent model year for which it has data, the agency projects what the fleet would look like in the future if the fuel-economy standards remained the same. NHTSA Br. 16-18. NHTSA then compares that no-action baseline with the fleets that manufacturers would produce under proposed changes to the fuel-economy standards. *Id.* at 20-21. This allows NHTSA to derive maximum feasible levels of average fuel economy by determining how much, if any, improvement above the baseline to require, considering, *inter alia*, "technological feasibility" and "economic practicability." 49 U.S.C. § 32902(f); *see also* NHTSA Br. 20-21.

When it amends previously promulgated standards, NHTSA must make an additional determination: that it is, in fact, appropriate to amend the existing standards, rather than wait for the next round of mandatory standard promulgation. 49 U.S.C. § 32902(c), (g) (authorizing, but not requiring, such amendments). If NHTSA does decide to amend, it sets the amended standards in the same way it does when initially prescribing them. *Id.* § 32902(g)(1); 87 Fed. Reg. 25,710, 25,960 (May 2, 2022).

In addition to the "maximum feasible" standards, EPCA requires manufacturers to "meet the minimum standard for domestically manufactured passenger automobiles." 49 U.S.C. § 32902(b)(4). This standard prevents domestically produced automobiles from lagging too far behind the overall industry, requiring them to achieve "the greater of … 27.5 miles per gallon" or "92 percent of the average fuel economy projected by [NHTSA]" for passenger automobiles in a given model year. *Id*. Projected fuel economy has consistently been greater than 27.5 miles per gallon, so the domestic minimum standard has been 92 percent of the projected average. 87 Fed. Reg. at 25,962.

Congress also provided an avenue for relief for small manufacturers that produce "fewer than 10,000 passenger automobiles" per year. 49 U.S.C. § 32902(d)(1). If one of these manufacturers cannot meet the maximum feasible standards promulgated for the industry as a whole, NHTSA must prescribe an alternative standard for that manufacturer. *Id.*

B. Alternative Means of Compliance

Congress established three ways manufacturers can meet the maximum feasible fuel-economy standards in a given model year without changing their vehicles that run exclusively on petroleum-based fuels (hereafter "gasoline-powered vehicles").

The first alternative means of compliance involves credits generated by exceeding the standards in a particular model year. 49 U.S.C. § 32903(a), (c). Manufacturers can use overcompliance credits from one year to boost their calculated fuel economy in other years, *id.* § 32903(b)(2)(B), or they can sell them to another manufacturer, *id.* § 32903(f).

The second and third alternative compliance mechanisms involve vehicles that can run on alternative fuels—initially "methanol, ethanol, and natural gas," but now electricity, among others. Pub. L. No. 100-494, § 2, 102 Stat. 2441, 2441 (1988); Pub. L. 102-486, § 403, 106 Stat. 2776, 2878 (1992); *see* 49 U.S.C. § 32901(a)(1). Recognizing that the production of alternative-fueled vehicles would reduce the Nation's consumption of oil, Congress sought "to encourage … the production of" those vehicles and to facilitate the commercialization and "consumer acceptability" of alternative fuels so that they could "successfully compete with petroleum-based fuels." Pub. L. No. 100-494, §§ 2, 3, 102 Stat. 2441-42.

Congress did so by allowing manufacturers to include alternative-fueled vehicles in their average fuel-economy compliance calculations. *Id.* §§ 32904(a)(2)(B), 32905(b). However, vehicles that run on alternative fuels (like electricity) do not consume "fuel" and have no "fuel economy" within the meaning of the statute. *Id.* § 32901(a)(10), (11) (definitions of "fuel" and

"fuel economy"). So Congress had to provide a way to calculate fuel-economy equivalencies for "dedicated automobiles" (those that, like electric vehicles, run entirely on alternative fuels) and "dual fueled automobiles" (those that, like plug-in hybrids, can run on *either* alternative fuels or gasoline). 49 U.S.C. § 32901(a)(2), (a)(8), (a)(9). These calculated fuel-economy equivalencies for alternative-fueled vehicles tend to be higher than the fuel economies of similar gasoline-powered automobiles. *See id.* § 32901(a)(9)(B); NHTSA Br. 11. Thus, the inclusion of these equivalency values in the compliance calculation eases compliance for manufacturers that produce these vehicles.

C. NHTSA's Consideration of the Alternative Means of Compliance

As NHTSA explains, Congress did not intend these alternative means of compliance to undercut the primary objective of the statute: improvement in the fuel economy of gasoline-powered vehicles. *E.g.*, NHTSA Br. 53. Thus, Congress instructed NHTSA to disregard the statute's alternative means of compliance when the agency considers how much, if any, additional improvement to demand of manufacturers through the fuel-economy standards. Specifically, Section 32902(h) provides:

> *In carrying out subsections (c), (f), and (g)* of this section, [NHTSA]

> (1) may not consider the fuel economy of dedicated automobiles;
>
> (2) shall consider dual fueled automobiles to be operated only on gasoline or diesel fuel; and
>
> (3) may not consider, when prescribing a fuel economy standard, the trading, transferring, or availability of credits….

49 U.S.C. § 32902(h) (emphasis added). As discussed above, subsections (c) and (g) give NHTSA discretion to amend previously promulgated standards. *Id.* § 32902(c), (g). Subsection (f) identifies four factors—including "technological feasibility" and "economic practicability"—that NHTSA must consider "[w]hen deciding maximum feasible average fuel economy." *Id.* § 32902(f). Thus, NHTSA must disregard the alternative means of compliance when concluding it is appropriate to make existing standards more stringent by amendment and when considering the factors identified in subsection (f).

SUMMARY OF THE ARGUMENT

1. Petitioners ascribe a sweeping scope to Section 32902(h), asserting "Congress forbade NHTSA to account for the fuel economy of *any* electric vehicle…. No exceptions—full stop." Pet. Br. 29. But, by its plain terms, Section 32902(h) applies only when NHTSA "carr[ies] out subsections (c), (f), and (g)" of Section 32902. 49 U.S.C. § 32902(h). NHTSA's

development of a no-action fleet as a baseline for regulatory analysis is not among the actions constrained by the inclusion of subsections (c), (f), or (g). Rather, NHTSA is prohibited from considering alternative means of compliance—including vehicle electrification—only when it determines how much, if any, additional fuel-economy progress to demand from manufacturers. This reading not only comports with the text of Section 32902(h), it also advances Congress's objectives and avoids bizarre results the statute would mandate under Petitioners' interpretation, including the perpetual generation of massive numbers of worthless overcompliance credits.

2. Petitioners also contend NHTSA erred by assuming, for purposes of developing the no-action fleet, that manufacturers would continue complying with state zero-emission-vehicle standards. But NHTSA's assumption is not unreasonable simply because Petitioners hope that these state standards might someday be held preempted.

3. Petitioner-Intervenors separately claim that NHTSA was required to express a view as to whether state zero-emission-vehicle standards are preempted. Petitioners did not raise this issue, and the Court should decline to reach it. Regardless, there was no reason for NHTSA to express its views on preemption because those views would lack the force of law and, thus,

could not reasonably affect NHTSA's assumptions about manufacturer behavior. Petitioner-Intervenors also argue that state zero-emission-vehicle standards are preempted, but those arguments are not before the Court in this review of NHTSA's regulation.

ARGUMENT

I. SECTION 32902(h)(1) CONSTRAINS ONLY NHTSA'S DETERMINATION OF HOW MUCH, IF ANY, FUEL-ECONOMY IMPROVEMENT TO REQUIRE

As NHTSA explains, Section 32902(h) directs its constraints "at NHTSA's consideration of what *additional* fuel-economy improvements manufacturers can make." NHTSA Br. 37 (emphasis added). That "forward-looking determination" is commanded by the statute's text and lies at the heart of the statute's structure and purpose. *Id.* at 35. Thus, NHTSA's interpretation gives effect to the statute's constraints. *Id.* at 42. As shown below, NHTSA's interpretation also gives meaning to the express limitations Congress placed on Section 32902(h)'s application. By contrast, Petitioners' interpretation ignores those limitations and would nullify the fuel-economy program, *id.* at 40, impeding Congress's primary goal: improving the fuel economy of gasoline-powered vehicles.

A. Section 32902(h)'s Expressly Cabined Constraints Do Not Extend to the Entire Standard-Setting Process

Petitioners turn the statute on its head when they claim that Section 32902(h)'s plain text applies to "the responsibility to set fuel-economy standards" with "no qualifications or carveouts." Pet. Br. 28, 29. On its face, Section 32902(h) applies only when NHTSA is "carrying out subsections (c), (f), and (g)." 49 U.S.C. § 32902(h). Thus, the question here is not whether NHTSA can identify a relevant *exception* to Section 32902(h)'s application, Pet. Br. 27, but whether the action Petitioners challenge—the use of a realistic no-action fleet—is part of "carrying out" the enumerated subsections, 49 U.S.C. § 32902(h). It is not. "Courts must give effect to Congress' express inclusions and exclusions." *Nat'l Ass'n of Mfrs. v. Dep't of Defense* (*NAM*), 138 S. Ct. 617, 631 (2018). Here, Congress's choices confirm that it constrained only NHTSA's determinations of how much, if any, *additional* improvement the fuel-economy standards should demand, NHTSA Br. 35, 37. Indeed, that is the "unifying feature" of the subsections to which Section 32902(h) applies. *See NAM*, 138 S. Ct. at 629.[1]

[1] Having argued that Section 32902(h) contains "[n]o exceptions," Pet. Br. 29, Petitioners should be precluded from making a "new and contradictory argument" in reply—i.e., that Section 32902(h)'s inclusions and exclusions somehow support their claim, *United States v. Van Smith*, 530 F.3d 967, 973 (D.C. Cir. 2008).

1. Congress Chose *Not* to Apply Section 32902(h)'s Constraints to Every Element of Standard-Setting

NHTSA's standard-setting authorities—for maximum feasible average standards, the domestic minimum standards, and the alternative standards for certain small manufacturers—appear in subsections (a), (b), and (d). 49 U.S.C. § 32902(a), (b), (d). Those subsections are *excluded* from Section 32902(h)'s scope, *id.* § 32902(h), indicating that Congress did not constrain the standard-setting process from start to finish. And there is no reason to conclude Congress prohibited the use of a realistic no-action fleet as a baseline.

1. When setting fuel-economy standards, NHTSA has consistently projected what the fleet would likely look like if NHTSA made no change and then "considered what, if any, additional actions the manufacturers could take to improve their fuel economy." 50 Fed. Reg. 40,528, 40,533-34 (Oct. 4, 1985); *see also, e.g.*, 42 Fed. Reg. 33,534, 33,535 (June 30, 1977). As NHTSA explains, its consideration of the factors identified in subsection (f), including technological feasibility and economic practicability, logically occurs only at the latter "forward-looking" step. NHTSA Br. 36-37, *see also, e.g.*, 42 Fed. Reg. at 33,535; 50 Fed. Reg. at 40,537; 51 Fed. Reg. 35,594, 35,603 (Oct. 6, 1986). This was the regulatory backdrop against which

Congress first enacted, and later amended, what is now Section 32902(h). *See* Pub. L. No, 100-494, § 6, 102 Stat. 2441, 2450, 2452 (1988).[2]

Had Congress intended Section 32902(h) to apply to NHTSA's entire process—including the development of the no-action fleet—it could easily have said so. Instead, while "presumed to be aware of" NHTSA's approach, Congress constrained subsection (f) but left subsections (a), (b), (d)—under which NHTSA promulgates the actual standards—outside Section 32902(h)'s scope. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran* (*Curran*), 456 U.S. 353, 382 n.66 (1982). And, although Congress has substantially reworked the statute, and has specifically amended Section 32902(h) since 1988, it has not disturbed NHTSA's understanding that the factors in subsection (f)—which are constrained by Section 32902(h)—apply only to NHTSA's determination about how much, if any, *additional* progress manufacturers should be required to make. *See* Pub. L. No. 110-140, § 104(b)(1)(C), 121 Stat. 1492, 1503 (2007).

[2] This consistent regulatory history belies Petitioners' feints at the major questions doctrine. Pet. Br. 26. NHTSA's actions here are not remotely novel, and Petitioners cannot claim that NHTSA's development of a "no action" alternative carries economic or political significance—indeed, by definition, it captures what the industry is *already going to do*. NHTSA Br. 46-47.

2. Congress's decision *not* to apply Section 32902(h)'s constraints to the setting of the domestic minimum standard in subsection (b)(4) illustrates the limited scope of those constraints. The domestic minimum subsection is not within the scope of Section 32902(h)'s application, 49 U.S.C. § 32902(h), and contains no cross-reference to the constrained subsections (c), (f), and (g), *id*. § 32902(b)(4). Thus, the "projection" of average fuel economy that becomes the basis for the domestic minimum standard, *id.*, must include *all* vehicles.[3] Indeed, Congress directed NHTSA to project average fuel economy "for … automobile fleets manufactured … by all manufacturers." *Id.* And it defined automobiles to include electric vehicles, *id.* § 32901(a)(3), and "automobile manufactured by a manufacturer" to include "*every* automobile manufactured," *id.* § 32901(a)(4) (emphasis added).

If Petitioners were correct that a maximum feasible standard cannot reflect the alternative-fueled vehicles in the no-action fleet, the *maximum* standard would quickly drop below the domestic *minimum* standard.

[3] Accordingly, NHTSA included electric vehicles and their fuel-economy equivalency values in this projection here. NHTSA used, as a starting point, the fleet it forecasted the revised standards could produce. 87 Fed. Reg. at 25,963. No petitioner has challenged the inclusion of electric-vehicle fuel-economy equivalencies in the domestic minimum standard.

NHTSA's simplified illustration demonstrates the point. *See* NHTSA Br. 39. If the "compliance fuel economy of the real-world fleet would be 100 miles per gallon," because 50 percent of the vehicles sold would be electric vehicles with a fuel-economy equivalency of 160 miles per gallon, *id.*, the domestic minimum requirement would be about 92 miles per gallon, 49 U.S.C. § 32902(b)(4) (standard is "92 percent of the average fuel economy projected"). But, according to Petitioners, Section 32902(h)(1) would cap the maximum feasible average fuel-economy standards at 40-50 miles per gallon. NHTSA Br. 39. That result—a minimum standard greater than a maximum— is not only atextual, it is also "contrary to common sense" and "inconsistent with the clear intentions of" Congress. *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998).

3. The text and structure of the subsections directing promulgation of the maximum feasible standards further undermine Petitioners' interpretation. "Each standard shall be the maximum feasible average fuel economy *level* that … *the manufacturers can achieve* in that model year." 49 U.S.C. § 32902(a) (emphasis added). A natural reading of the "fuel economy level … manufacturers can achieve," *id.*, is the level their fleets will be assigned when their fuel economies are calculated. The standards here reflect that level because they include what manufacturers would achieve

under the status quo *plus* the amount of incremental improvement that is "technologically feasible" and "economically practicable" without regard to the alternative means of compliance (including further electrification). NHTSA's reading thus produces a standard that, as required, is "for automobiles manufactured by a manufacturer," *id.* § 32902(a)—i.e., "*every* automobile" the manufacturer produces, *id.* § 32901(a)(4) (emphasis added). *See also id.* § 32902(b)(2)(B) (requiring standard "for each fleet").

The text describing the qualifications for the small manufacturer exemption further confirms this reading. A small manufacturer can qualify for an alternative standard when the "level" of fuel economy that "manufacturer can achieve" will not reach the generally applicable maximum feasible standard. 49 U.S.C. § 32902(d)(1)(A). Of course, this relief is not available to manufacturers unless they actually need it, so the qualifying "level that the manufacturer can achieve" can only be understood as the maximum average fuel economy of the manufacturer's *entire* fleet—as that average would be calculated to determine compliance, *id.* § 32904. *See also Ctr. for Auto Safety v. Claybrook*, 627 F.2d 346, 349 (D.C. Cir. 1980) ("inability to comply [must be] adequately shown"). There is nothing to suggest that Congress intended NHTSA to omit vehicles when it used a

virtually identical phrase to describe the stringency of the maximum feasible standards in subsection (a).

4. Section 32902(h) constrains NHTSA's consideration of the three alternative means of compliance established specifically for the fuel-economy program. 49 U.S.C. § 32902(h)(1)-(3). These constraints logically apply only when NHTSA considers those alternative means of compliance—namely, when NHTSA assesses how manufacturers could comply with more stringent fuel-economy standards. *See* 49 U.S.C. § 32902(h)(1)-(3); NHTSA Br. 37, 53. The availability of alternative means of compliance cannot change the real-world fleet from the most recently completed model year. NHTSA Br. at 35, 37. Those alternative means of compliance are likewise irrelevant when NHTSA projects how manufacturers might respond to *other* regulatory programs—like California's zero-emission-vehicle standards, *id.* at 53—under which these program-specific mechanisms have no utility. NHTSA's interpretation thus comports with the place these alternative fuel-economy compliance mechanisms occupy "in the overall statutory scheme." *Am. Hosp. Ass'n v. Azar*, 983 F.3d 528, 533 (D.C. Cir. 2020).

2. Congress Constrained NHTSA's Consideration of the Factors Identified in Section 32902(f)

Section 32902(h) does constrain one element of NHTSA's standard-setting: the consideration of the four factors identified in subsection (f). 49 U.S.C. § 32902(h). That subsection requires NHTSA 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" "[w]hen deciding maximum feasible average fuel economy." *Id.* § 32902(f). Although this subsection bears significantly on the standard-setting process, it does not govern NHTSA's development of the no-action fleet. Rather, subsection (f) simply identifies four (non-exclusive) factors NHTSA must consider when determining whether *more* improvement is possible. 49 U.S.C. § 32902(f); NHTSA Br. 20-21, 36-37; 87 Fed. Reg. at 25,960.

Certainly, a realistic no-action fleet "is foundational" to the determination subsection (f) contemplates because NHTSA cannot consider factors like technological feasibility and economic practicability in a vacuum. NHTSA Br. 52. For example, many fuel-economy-improving technologies can only be applied to vehicles with certain characteristics, so NHTSA cannot consider the feasibility of those technologies without an

understanding of which vehicles would likely be present in the real world. *Id.* But NHTSA does not "consider" technological feasibility and economic practicability when developing the no-action fleet, 49 U.S.C. § 32902(f), as demonstrated here, where NHTSA simply assumed manufacturers would continue complying with longstanding legal obligations. Subsection (f) contemplates—and Section 32902(h) constrains—a determination of whether *more* improvement would be "maximum feasible." *Id.*

3. Congress Constrained NHTSA's Discretion to Determine that Amending Existing Standards Is Appropriate

Congress's inclusion of the amendment provisions—subsections (c) and (g)—in Section 32902(h) similarly constrains the otherwise "substantial discretion" NHTSA has "in deciding whether to amend previously-established fuel economy standards." *General Motors Corp. v. NHTSA*, 898 F.2d 165, 167 (D.C. Cir. 1990). By including these amendment-authorizing subsections but excluding the initial standard-setting subsections—(a), (b), and (d)—Congress clearly sought to constrain that determination, which is

involved in the former but not the latter. *Compare id.* § 32902(a) ("*shall* prescribe"), *with id.* § 32902(c) ("*may* prescribe) (emphasis added).[4]

Even when more stringent standards could be determined to be "maximum feasible," NHTSA is not required to amend the standards to that level. 49 U.S.C. § 32902(c), (g). It has the option to wait for the next round of iterative standard-setting. The decision whether to amend, thus, involves distinct "policy and administrative concerns" from the promulgation of standards in the first instance, including the "efficient administration" of the program, *General Motors*, 898 F.2d at 172, and the potential for "serious reliance interests that must be taken into account," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). In other words, to amend previously established standards, NHTSA must not only decide the level at which it would set any amended standards—the determination partly constrained by Section 32902(h)'s application to subsection (f). *Supra* Sec. I.A.2. It must also conclude whether promulgating amended standards is appropriate.

[4] Standards amended under subsection (g) must "meet[] the requirements of subsection (a) or (d)," *id.* § 32902(g). Thus, had it intended to constrain the full standard-setting process, Congress would have included subsections (a) and (d), and not (g), in Section 32902(h).

Section 32902(h) constrains the reasons NHTSA may amend existing standards to make them more stringent. It may not do so simply because manufacturers are producing more alternative-fueled vehicles or have accumulated large credit banks. 49 U.S.C. § 32902(h). NHTSA may, however, conclude it is appropriate to make existing standards more stringent for other reasons, as it did here. 87 Fed. Reg. at 25,721 (amending "because NHTSA has reconsidered how to balance the relevant statutory considerations" and because more stringent standards "appear economically practicable" for gasoline-powered vehicles).

The application of Section 32902(h) to the amendment subsections protects the alternative compliance mechanisms Congress built into the fuel-economy program. Indeed, "it would disrupt the manner in which Congress chose to deal with manufacturer [fuel-economy] shortfalls and excesses," *General Motors*, 898 F.2d at 172, if NHTSA could use the existence of large credit banks to amend the standards and effectively demand the immediate surrender of those credits. Similarly, if NHTSA could make already existing standards more stringent simply because manufacturers were producing more alternative-fueled vehicles, the fuel-economy program would provide little incentive for manufacturers to innovate with alternatives to the gasoline engine.

B. Petitioners' Interpretation of Section 32902(h) Would Thwart Congress's Objectives

Petitioners' interpretation would also hinder, rather than advance, *both* of Congress's objectives: forcing the development and application of fuel-efficiency technologies for gasoline-powered automobiles *and* incentivizing the production of alternative-fueled vehicles.

Petitioners' reading would require NHTSA to set standards using a "systematically understate[d]" baseline fuel economy. NHTSA Br. 38. But standards set that way will likely be met with little to no action beyond business as usual—particularly as more and more alternative-fueled vehicles (with higher-than-average fuel-economy equivalencies) are sold in response to consumer demand, other legal requirements, and manufacturers' own plans. NHTSA Br. 39. In other words, as modest percentages of the fleet become the very alternative-fueled vehicles Congress sought to incentivize, the fuel-economy standards cease to be a tool for driving *any* further reductions in the consumption of oil. This statute—with its perpetual requirements that NHTSA promulgate iterative "maximum feasible" standards at least every five years and issue credits for overcompliance—gives no hint that Congress intended such obsolescence to result from a modestly successful incentive. *See United States v. Cordova*, 806 F.3d 1085,

1101 (D.C. Cir. 2015) (reviewing "how [the relevant activities] work in practice" to adopt reading by which "congressional purpose is best served").

The substantial and worthless credit banks Petitioners' interpretation would produce underscore the point. In NHTSA's illustration, a manufacturer with an average 100 miles-per-gallon compliance fuel economy facing a 50 miles-per-gallon standard would generate 500 credits *per vehicle* that model year. NHTSA Br. 39-40; 49 U.S.C. § 32903(c). Had Congress intended Section 32902(h) to operate as Petitioners claim, it would have easily foreseen such large credit banks given the 0.15 multiplier it assigned to fuel-economy values for dedicated automobiles. 49 U.S.C. § 32905(a). But Congress anticipated precisely the opposite: that the standards would be stringent enough, and credits therefore scarce enough, that manufacturers unable to meet the standards in a given year would have to submit plans for NHTSA's approval explaining how they would earn sufficient credits "within the next 3 model years" to address the shortfall. *Id.* § 32903(b)(2)(A). Congress also anticipated credits would be so valuable that it required NHTSA to "give the manufacturer written notice and reasonable opportunity to comment" before applying the manufacturer's credits to its compliance calculation. *Id.* § 32903(d).

Congress permitted manufacturers to earn credits because it "[r]ecogniz[ed] that manufacturers would not always be able to attain the … standard for a particular year." *General Motors*, 898 F.2d at 173. Petitioners' interpretation would turn this statutory scheme upside down, requiring NHTSA to perpetually issue credits for overcompliance with weak standards. And, though continuously issued, those credits would be worthless because standards below business-as-usual levels will inevitably generate large credit banks at the same time that no credits are needed to meet the standards. Leaving an agency to set ineffectual standards and issue worthless credits over and over again "is just the type of absurd result courts should avoid." *Holland as Tr. of UMWA 1992 Benefit Plan v. Arch Coal, Inc.*, 947 F.3d 812, 819 (D.C. Cir. 2020).

Congress intended NHTSA to continue pressing the goal of reducing the Nation's oil dependency and national security. It did not intend its alternative-fueled-vehicle incentive "to allow manufacturers to relax their efforts to achieve better mileage in the remainder of their fleets that are still fueled with gasoline." H.R. Rep. No. 100-476, at 12 (1987). The Court should reject an interpretation that defeats the objectives of the statute, particularly when a more natural reading "will effect[uate] the statute's

purpose." *Wagner v. FEC*, 717 F.3d 1007, 1014 (D.C. Cir. 2013) (cleaned up).

II. NHTSA Reasonably Assumed Automakers Would Continue Complying with Existing Legal Obligations

Petitioners also claim that even if the statute allows NHTSA to include electric vehicles in its no-action fleet, it could not do so by assuming manufacturers will produce those vehicles to comply with state zero-emission-vehicle standards. Pet. Br. 44. Petitioners contend this assumption could prove incorrect "[i]f a party successfully challenges any one of those laws." *Id*. Petitioners acknowledge, however, this would only be "an independent ground for invalidating NHTSA's rule *in [that] event*." Pet. Br. 45 (emphasis added). But agencies are required to act based on "the best information available at the time" of their decision, and "[t]he potential for changed circumstances in the future does not render a rule unlawful." NHTSA Br. 55.

Petitioners identify nothing in the record suggesting that California's standards might be declared invalid. Manufacturers have been over-complying with California's standards for years, 87 Fed. Reg. at 25,744, and, before NHTSA' decision, had announced plans to sell even more zero-emission vehicles going forward, 86 Fed. Reg. 74,434, 74,486 (Dec. 30,

2021). Moreover, there was no pending challenge to California's standards at the time of NHTSA's action.[5] Petitioners point only to petitions for review of an EPA action filed *after* NHTSA's decision, Pet. Br. 44-45, in which some Petitioners have (improperly) asked this Court to declare California's standards preempted, *see Ohio v. EPA*, No. 22-1081, ECF No. 1990949, pp. 46-51 (D.C. Cir. Mar. 20, 2023). That filing cannot establish that NHTSA's earlier decision was in error. And, in any event, NHTSA's assumption of manufacturer compliance with California's standards did not affect the stringency of the promulgated standards. NHTSA Br. 55-59.

Finally, there is no problem with NHTSA's use of projected sales in these standards. No one contends NHTSA overestimated the number of electric vehicles in the no-action fleet. And Congress itself chose to bind manufacturers to *projections* of average fuel-economy—the basis of the domestic minimum standard, 49 U.S.C. § 32902(b)(4)(B)—notwithstanding the real possibility that those projections might prove inaccurate. *See, e.g.*,

[5] Since they filed their opening briefs, Petitioner-Intervenors have filed suit in federal district court in Minnesota, seeking to enjoin that State's implementation of zero-emission-vehicle (and other) standards. Complaint, *Clean Fuels Dev. Coal. v. Kessler*, No. 23-cv-610-KMM-DTS (D. Minn. Mar. 13, 2023), ECF No. 1. That suit is irrelevant here—both because it occurred long after NHTSA's decision, NHTSA Br. 13, and because NHTSA did not assume compliance with Minnesota's standards in its no-action fleet, 87 Fed. Reg. at 25,762-63.

51 Fed. Reg. at 35,610 (discussing adjustments to earlier fuel-economy projections due to fleet mix shifts from lower oil prices).

If Petitioners identify a flaw in NHTSA's standards in the future, they may petition NHTSA to reevaluate the standards, NHTSA Br. 55, and take any appropriate legal action concerning the agency's response (or lack thereof), *e.g.*, *Exhaustless Inc. v. FAA*, 931 F.3d 1209, 1213 (D.C. Cir. 2019). Petitioners are not entitled to a remedy now.

III. PETITIONER-INTERVENORS' ARGUMENTS ARE NEITHER PROPERLY PRESENTED NOR MERITORIOUS

Petitioner-Intervenors mount a different line of attack. They argue that California's zero-emission-vehicle standards are preempted by EPCA and the Clean Air Act's Renewable Fuel Standard, and that NHTSA erred by "declin[ing] to assess" those claims. Pet-Int. Br. 1-2. These arguments should be rejected.

A. This Court Should Decline to Reach Petitioner-Intervenors' Separate Arguments

This is not an "extraordinary case[] in which this Court should "exercise [its] discretion to hear" arguments "brought only by an intervenor and not by any of the petitioners." *Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 590 (D.C. Cir. 2019) (cleaned up); *see also* NHTSA Br. 60. Several Petitioner-Intervenors "participated in the agency proceedings and

had the opportunity to file an independent petition for review." *Am. Fuel*, 937 F.3d at 590 (cleaned up).[6] Moreover, although the injuries Petitioner-Intervenors allege for standing purposes—"depressing the demand" for their product, Pet.-Int. Br. 12—"gave [them] every incentive to file [their] own petition for review," they have "offered no excuse for [their] failure to do so." *Am. Fuel*, 937 F.3d at 590-91.

Finally, Petitioner-Intervenors' argument that NHTSA erred by not declaring certain state standards preempted is far from "an 'essential predicate'" to Petitioners' claims. *Id.* at 590. Petitioners' statutory claim—*i.e.*, whether "Congress forbade NHTSA to account for the fuel economy of *any* electric vehicle, from *any* model year, for *any* purpose," Pet. Br. 29—does not require resolution of Petitioner-Intervenors' arguments. Neither does Petitioners' claim that NHTSA arbitrarily and capriciously assumed manufacturers would produce enough electric vehicles to comply with unchallenged state laws, particularly since no one claims the projected electric-vehicle sales that resulted from that assumption are inaccurate.

Should the Court nonetheless decide to reach Petitioner-Intervenors' separate claims, it should reject them, as explained below.

[6] Valero and the Kansas Corn Growers Association each submitted comments. NHTSA-2021-0053-1541; NHTSA-2021-0053-1517.

B. NHTSA Reasonably Declined to Express Its Views on Preemption

Petitioner-Intervenors claim NHTSA was required to express its views as to the scope of preemption.[7] Pet.-Int. Br. 11. But NHTSA has no power to give those views any legal effect, and Petitioners do not explain what value the agency's expression of its non-binding views would have provided here. "Agencies have only those powers given to them by Congress." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). NHTSA has no such "special authority to pronounce on pre-emption." *Wyeth v. Levine*, 555 U.S. 555, 577 (2009). Rather, the fuel-economy chapter's express preemption provision is self-executing. 49 U.S.C. § 32919. NHTSA's conclusion—in an unchallenged prior rule—"that it lack[s] authority to dictate the scope of EPCA preemption," 86 Fed. Reg. 74,236, 74,238 (Dec. 29, 2021), was not reopened, let alone disputed, here. NHTSA Br. 65. Particularly because any preemption conclusion NHTSA might have reached would have had no legal effect, it was eminently reasonable of NHTSA to decline to make such a conclusion. Indeed, even if NHTSA had announced the conclusion

[7] Petitioner-Intervenors' arguments regarding preemption under the Renewable Fuel Standard were not exhausted and are forfeited. NHTSA Br. 61-62. However, if those arguments were properly before the Court, they would suffer from many of the same flaws as Petitioner-Intervenors' EPCA preemption arguments.

Petitioner-Intervenors hoped for, it would not have changed either (1) a reasonable forecast of manufacture behavior or (2) the standards NHTSA adopted, NHTSA Br. 55-59.

C. This Court Lacks Jurisdiction to Consider Petitioner-Intervenors' Meritless Preemption Theories

Although they seek relief only as to NHTSA's rule, Petitioner-Intervenors dedicate half their argument section to contending that state zero-emission-vehicle standards are preempted by EPCA and the Renewable Fuel Standard. Pet-Int. Br. 14-20. These claims are beyond the Court's jurisdiction in this case and are meritless.

1. This Court Lacks Jurisdiction Here to Declare State Regulations Preempted

All parties agree this Court has jurisdiction to review NHTSA's rule pursuant to 49 U.S.C. § 32909(a), Pet. Br. 4; NHTSA Br. 5; Pet-Int. Br. 3, which, as relevant here, provides for judicial review of a "regulation prescribed in carrying out any of sections 32901-32904." 49 U.S.C. § 32909(a)(1). Far from granting a roving license for appellate courts to independently determine *state laws* are preempted, EPCA's judicial review provision does not even permit direct review of all NHTSA actions taken under EPCA. *Delta Const. Co. v. EPA*, 783 F.3d 1291, 1298 (D.C. Cir. 2015) (rejecting direct review of denial of petition for rulemaking). And

EPCA's preemption section—49 U.S.C. § 32919—is not among the sections enumerated in that judicial review provision. *Id.* § 32909(a); *see also NAM*, 138 S. Ct. at 631.

Moreover, "judicial review of agency action is limited to the grounds that the agency invoked when it took the action." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) (cleaned up). Petitioner-Intervenors object to NHTSA's decision not to take a position on preemption. If this Court agrees that was error, it should remand for the agency to consider its views.[8] But, to the extent Petitioner-Intervenors seek to invalidate California's standards, the Court has no authority to do so here, just as it has no authority to set aside any other existing legal requirements NHTSA might have incorporated into its analysis. NHTSA Br. 64.

Finally, Petitioner-Intervenors have not even attempted to establish Article III standing to challenge California's or other States' zero-emission-vehicle standards, much less overcome other hurdles they would face if they brought a preemption challenge in district court where States would have full opportunities to defend their laws. *See Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 302 (D. Vt. 2007)

[8] The appropriate remedy for any errors not found harmless would be remand without vacatur. NHTSA Br. 78-84, Indus. Resp.-Int. Br. 12-16.

(rejecting EPCA preemption claims after sixteen-day trial); *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1189 (E.D. Cal. 2007) (same, after resolving evidentiary disputes). Petitioner-Intervenors remain free to press preemption claims in other courts, *supra* 26 n.5, but cannot do so here.

2. State Zero-Emission-Vehicle Standards Are Not Preempted by EPCA

If the Court were nonetheless to address Petitioner-Intervenors' EPCA preemption claim, it should reject that claim.[9] Far from preempting state zero-emission-vehicle standards, Congress has repeatedly embraced them. Moreover, these state standards are not "related to fuel economy standards." 49 U.S.C. § 32919(a).

1. When Congress enacted EPCA in 1975, it designed the fuel-economy program to accommodate all emission standards authorized by the Clean Air Act—including California standards for which EPA waives

[9] Petitioner-Intervenors' unexhausted Renewable Fuels Standard claim is likewise meritless. That program's requirements are "expressed in terms of a volume percentage of transportation fuel sold or introduced into commerce in the United States." 42 U.S.C. § 7545(o)(3)(B)(ii)(II); *see also id.* § 7545(o)(2)(B)(iii), (iv), (v). There is no conflict, therefore, if the increased sales of electric vehicles result in lower total fuel sales because the federal volume mandates would adjust automatically, by congressional design.

preemption under 42 U.S.C. § 7543(b)(1). *Green Mountain*, 508 F. Supp. 2d at 345-46. That accommodation would make no sense if Congress had also preempted those California standards as "related to fuel economy standards." 49 U.S.C. § 32919(a).

In the early years of the fuel-economy program, Congress set the passenger-car standards itself, 15 U.S.C. § 2002(a)(1) (1976), but directed NHTSA to grant variances to manufacturers if other "Federal standards" impeded their compliance, *id*. § 2002(d). Those "Federal standards" expressly included all emission standards for which California obtained a Clean Air Act waiver. *Id*. § 2002(d)(3)(D)(i). For later years, Congress directed NHTSA to set the passenger-car fuel-economy standards and to account for the effects of "federal motor vehicle standards" on fuel economy when doing so. *Id*. § 2002(a)(3), (a)(4), (e).[10] In other words, although Congress altered the way NHTSA was required to accommodate Clean Air Act emission standards, that requirement persisted, Carper-Pallone Amicus Br. 11-13, demonstrating that Congress did not preempt the very laws it "previously sought to foster" under the Clean Air Act. *Cal. Div. of Labor*

[10] From the outset of the fuel-economy program, NHTSA was assigned to set fuel-economy standards for light trucks according to the same factors. 15 U.S.C. § 2002(b).

Stds. Enf't v. Dillingham Constr., N.A., 519 U.S. 316, 331 n.7 (1997); *see also Green Mountain*, 508 F. Supp. 2d at 347 n.54 (compiling NHTSA rules consistently interpreting EPCA this way).

2. Since 1975, Congress has continued to embrace California's vehicle emission standards, including specifically its zero-emission-vehicle standards. Two years after EPCA's enactment, in 1977, Congress amended the Clean Air Act waiver provision. *Motor & Equip. Mfrs. Ass'n. v. EPA*, 627 F.2d 1095, 1110 (D.C. Cir. 1979). Far from conveying that California emission standards might be preempted by EPCA, Congress expressly "elected to expand California's flexibility to adopt a complete program of motor vehicle emissions control." *Id.*

In the 1990 Clean Air Act Amendments, Congress went even farther, instructing EPA to incorporate elements of California's nascent zero-emission-vehicle standards into federal regulations. 42 U.S.C. § 7586(f)(4). And, two years later, when Congress amended EPCA to allow alternative-fueled vehicles to count toward compliance with federal fuel-economy standards, *see supra* 6-7, Congress expressed nothing but praise for California's standards. H.R. Rep. No. 102-474, pt. 1, at 137 (1992); *id.* pt. 2, at 87, 90-91.

Congress has reaffirmed its embrace of California's emission standards since becoming aware of the argument that EPCA preempts some of those standards. In 2007, after two federal courts held that EPCA does not preempt any emission standards for which California has a Clean Air Act waiver, Congress rejected repeated attempts to overrule those decisions. *See* Carper-Pallone Amicus Br. 20-21. Instead, when it comprehensively reexamined and reinvigorated EPCA's fuel-economy program later that same year, Pub. L. No. 110-140, §§ 101-113, 121 Stat. 1498-1508 (2007), Congress left the preemption provision untouched, thereby ratifying those judicial interpretations of its scope. *See Curran*, 456 U.S. at 381-82 & n.66; *see also* Carper-Pallone Amicus Br. 21. Finally, just last year, in the Inflation Reduction Act, Congress specifically authorized EPA to support other States' adoption and implementation of California's zero-emission-vehicle standards. Pub. L. No. 117-169, § 60105(g), 136 Stat. 1818, 2068-69 (2022); Carper-Pallone Amicus Br. 23-25; Dotson & Maghamfar, *The Clean Air Act Amendments of 2022*, 53 Env. L. Rept. 10017, 10030-32 (2023).[11]

[11] By contrast, the two unenacted bills Petitioner-Intervenors cite do not address "state electric-vehicle mandates" at all, let alone demonstrate that Congress has "consistently rejected" them." Pet.-Int. Br. 20.

This continuing congressional support for California's zero-emission-vehicle standards cannot plausibly be squared with the notion that those standards are preempted.

3. California's zero-emission-vehicle standards are also not "related to fuel-economy standards," 49 U.S.C. § 32919(a), because, unlike the taxi ordinances in the cases Petitioner-Intervenors cite, Pet-Int. Br. 16, these *emission* standards are not fuel-economy standards on their face or in disguise. *See Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013) ("'[R]elated to' does not mean the sky is the limit."). While the parties here dispute the scope of EPCA's constraint on NHTSA's consideration of the fuel-economy equivalencies of alternative-fueled vehicles, all agree that the fuel-economy standards are designed to be technology-forcing only as to gasoline-powered vehicles. California's zero-emission-vehicle standards require manufacturers to sell (or obtain credits for) specified percentages of *other* vehicles, only in the States that have adopted the standards, and without regard to those vehicles' assigned fuel-economy equivalencies. 87 Fed. Reg. at 25,763. They do not "bind" manufacturers "to any particular choice" about the gasoline-powered vehicles they sell, *Rutledge v. Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474, 480 (2020) (cleaned up), and are not "related to" any standard NHTSA is authorized to promulgate.

CONCLUSION

The petitions should be denied. If the Court does find error, it should remand without vacatur. NHTSA Br 84; Indus. Resp.-Int. Br. 12-15.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitations of the applicable rules and this Court's briefing format order dated September 22, 2022 (ECF No. 1965625). According to Microsoft Word, the portions of this document not excluded by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1) contain 7,099 words. Combined with the word counts of the other Respondent-Intervenors briefs, this does not exceed the 10,800 words the Court allocated to all Respondent-Intervenors.

I further certify that this brief complies with the typeface requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared using a proportionally spaced typeface (Times New Roman) in 14-point font.

Dated: April 11, 2023

/s/ M. Elaine Meckenstock

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2023, I electronically filed the foregoing **PROOF BRIEF OF STATE AND LOCAL GOVERNMENT RESPONDENT-INTERVENORS** with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system.

I further certify that all parties are participating in the Court's CM/ECF system and will be served electronically by that system.

Dated: April 11, 2023

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