ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1145

Consolidated with Cases No. 20-1167, -1168, -1169, -1173, -1174, -1176, -1177 & -1230

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

COMPETITIVE ENTERPRISE INSTITUTE et al.,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION et al.,

Respondents,

MOTION OF ALL PETITIONERS, STATE AND LOCAL GOVERNMENT INTERVENORS, AND PUBLIC INTEREST ORGANIZATION INTERVENORS TO ESTABLISH BRIEFING SCHEDULE AND FORMAT

These petitions collectively seek review of final rules that Respondents National Highway Traffic Safety Administration (NHTSA) and U.S. Environmental Protection Agency (EPA) (collectively, Agencies) published together as *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks*, 85 Fed. Reg. 24,174 (Apr. 30, 2020) (Final Rules); and a step toward EPA's final rule that the agency published as *Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light-Duty Vehicles*, 83 Fed. Reg. 16,077 (Apr. 13, 2018) (Revised Determination). Movants respectfully request that the Court establish a briefing format and schedule in these cases that will allow for oral argument during the current Term.

Petitioners are a diverse group of public and private entities that will present a wide range of arguments for why one or more of the Agencies' actions are unlawful. Some Petitioners also have moved to intervene to defend the Agencies against claims made by other Petitioners. But all Petitioners share the goal that these cases be briefed in an orderly fashion and that the Court be able to hear argument during its current Term. Accordingly, for the reasons stated *infra*, pages 6–9, all movants request that the Court establish the briefing schedule below, which anticipates disposition of this motion no later than October 9, 2020.

Petitioners	November 10, 2020
Amici curiae supporting Petitioners and amici curiae supporting neither party	November 17, 2020
Respondents	January 19, 2021
Amici curiae supporting Respondents	January 26, 2021
Intervenors supporting Respondents	January 26, 2021
Petitioners (reply)	February 22, 2021
Deferred Appendix	February 26, 2021
Final briefs	March 5, 2021

With respect to briefing format, for the reasons stated *infra*, at 9–13, movants request that this Court permit Petitioners to file five separate principal briefs:

- 1 brief for Competitive Enterprise Institute et al. (CEI) in Case No. 20-1145
- 1 brief for Clean Fuels Development Coalition et al. (CFDC) in No. 20-1230
- 3 briefs divided among the following "Coordinating Petitioners": State and Local Government Petitioners (Nos. 20-1167 and -1173), Public Interest Organization Petitioners (Nos. 20-1168 and -1169), and Advanced Energy and

Transportation Petitioners (Nos. 20-1174, -1176, and -1177). These three groups of Petitioners are described further on pages 11–13, *infra*.

In addition, for the reasons stated *infra*, at pages 14–22, CEI, CFDC, and Coordinating Petitioners each move on their own behalf, without the support of other movants, for the word allotments specified in the table below. Lastly, for the reasons stated *infra*, pages 22–23, those Petitioners that have moved to intervene in other petitions (hereinafter, Coordinating Intervenors) move on their own behalf for the word allotment specified below, to be divided between two intervenor briefs: one brief for State and Local Government Intervenors and one brief for Public Interest Organization Intervenors.

If the Court grants all relief requested in this motion by any party, the briefing format for Petitioners and Coordinating Intervenors will be as follows:

Briefs of Petitioners	CEI: 13,000 words CFDC: 13,000 words Coordinating Petitioners: 46,000 words split among 3 briefs
Briefs of Intervenors supporting Respondents	Coordinating Intervenors: 8,000 words split between 2 briefs
Reply briefs of Petitioners	CEI: 8,000 words CFDC: 7,000 words Coordinating Petitioners: 23,000 words split among 3 briefs

While this motion does not specify the number of briefs or word allotments for non-movants, movants respectfully request that the Court establish a briefing format for those parties that is consonant with the briefing format established for movants.

Respondents oppose this motion and will file a response. Ingevity Corporation does not oppose the motion and will file a response regarding briefing format. Alliance for Automotive Innovation; American Honda Motor Co., Inc.; BMW of North America, LLC; Ford Motor Company; Rolls-Royce Motor Cars NA, LLC; and Volkswagen Group of America, Inc. have not stated a position.

BACKGROUND

The Clean Air Act directs EPA to "by regulation prescribe … standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [the EPA Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). In 2012, EPA prescribed standards applicable to greenhouse gas emissions from light-duty vehicles (passenger cars and light trucks) of model years 2017–2025. 77 Fed. Reg. 62,624, 63,149–87 (Oct. 15, 2012). In the same Federal Register notice, NHTSA "prescribe[d] by regulation average fuel economy standards," 49 U.S.C. § 32902(a), for light-duty vehicles of model years 2017–2021 under the Energy Policy and Conservation Act, 77 Fed. Reg. at 63,187–99, and published "augural," nonbinding standards for model year 2022–2025 vehicles, *id.* at 62,629 & n.8.

EPA committed to conduct a "mid-term evaluation" "[n]o later than April 1, 2018," to "determine whether [its emission] standards … for the 2022 through 2025 model years are [still] appropriate." 40 C.F.R. § 86.1818-12(h). EPA issued that evaluation in 2017, determining that standards for those model years remained appropriate.

See California v. EPA, 940 F.3d 1342, 1347–48 (D.C. Cir. 2019). In 2018, EPA issued a Revised Determination, "'withdrawing' the [prior determination] and concluding that the standards were 'not appropriate.'" *Id.* at 1348. Many Petitioners here filed petitions for review of the Revised Determination at that time. This Court dismissed the petitions as unripe because "the Revised Determination is not judicially reviewable final action." *Id.* at 1353.

Earlier this year, EPA published a final rule revising its greenhouse gas standards for model year 2021–2025 light-duty vehicles and prescribing new standards for model year 2026 vehicles. Final Rules, 85 Fed. Reg. at 25,268–72. In the same 1,105-page Federal Register notice, NHTSA "prescribe[d] by regulation average fuel economy standards" for model year 2021–2026 light-duty vehicles under the Energy Policy and Conservation Act of 1975. 49 U.S.C. § 32902(a); *see* Final Rules, 85 Fed. Reg. at 25,272–78.

This Court has consolidated nine petitions for review of EPA's rule, NHTSA's rule, and/or EPA's Revised Determination. Seven of the petitions were filed by the Coordinating Petitioners: State and Local Government Petitioners (Cases No. 20-1167 and -1173), Public Interest Organization Petitioners (20-1168 and -1169), and Advanced Energy and Transportation Petitioners (20-1174, -1176, -1177). The remaining petitions were filed by CEI (20-1145) and CFDC (20-1230). Some State and Local Government Petitioners and some Public Interest Organization Petitioners also moved to intervene in support of Respondents in CEI's petition "and any other case in which … petitioners argue that the standards established in the [Final Rules] should be weakened further, or

seek to erode the ability of EPA and NHTSA to regulate the greenhouse gas emissions and fuel economy of cars and light trucks." ECF No. 1844912; *see also* ECF No. 1845212; D.C. Cir. R. 15(b). Alliance for Automotive Innovation and Ingevity Corporation moved to intervene in support of Respondents in all petitions. ECF Nos. 1844089, 1848163. Five major automakers moved to intervene in all petitions in support of no party but to be heard on remedy issues. ECF No. 1849385. This Court has not ruled on any of the motions to intervene.

On July 6, 2020, the Agencies filed certified indexes of administrative record in this Court. ECF No. 1850358. State and Local Government Petitioners and Public Interest Organization Petitioners moved on August 25, 2020, that this Court order the Agencies to complete and supplement their administrative records with certain inter-agency-review materials prior to merits briefing. ECF No. 1858308. CEI moved on August 27, 2020, that this Court order the Agencies to complete their records with certain other documents. ECF No. 1858924. Briefing on both record motions is expected to conclude on or before September 25, 2020.

REASONS FOR PROPOSED BRIEFING SCHEDULE AND FORMAT

I. Reasons for proposed schedule

Petitioners seek review of actions by the Agencies that prescribe or revise federal standards for greenhouse gas emissions and corporate average fuel economy of light-duty vehicles of model years 2021 and later. Holding oral argument during the Court's current Term will ensure the petitions are resolved expeditiously and thus provide all

parties with greater regulatory certainty. Model year 2021 is already underway for some vehicles and will conclude for all vehicles no later than January 1, 2022. If this Court does not hear argument on the petitions until its next Term, it is quite likely that the petitions will not be decided until after January 1, 2022. It is in the interest of all concerned to resolve the petitions in a way that minimizes the number of model years that are affected by the standards while they remain subject to dispute.

Movants propose a briefing schedule that provides adequate time to brief the petitions in an orderly fashion, commensurate with their complexity, while still enabling this Court to hear oral argument during this Term and issue a decision in Summer or Fall 2021, without the need for an order formally expediting consideration.

The proposed deadline for Petitioners' principal briefs (November 10, 2020) is justified for several reasons. Because movants have taken the initiative to propose a schedule without awaiting an order of this Court, their proposed schedule will advance the interest of the Court, the parties, and the public in the expeditious resolution of this important case. Indeed, movants propose what is at this point the earliest practicable due date for Petitioners' opening briefs consistent with this Court's ordinary procedures and the complexity of the petitions.

The proposed deadline for Petitioners' briefs reflects that this Court normally gives petitioners at least 30 days to file briefs after issuing a briefing order. The instant motion will not be fully briefed until late September, making issuance of a briefing order before early October unlikely. The typical minimum period between briefing order and

opening brief is appropriate here because Petitioners—in particular, Coordinating Petitioners—are limited in the degree to which they can prepare their briefs without confirmation of the allotted words. Moreover, the scope of the Agencies' administrative records is the subject of two pending motions that are not yet fully briefed, and the Court's resolution of those motions will substantially affect the content of Petitioners' merits briefs. Further, nearly all Coordinating Petitioners are also petitioners in *Union of Concerned Scientists v. NHTSA*, D.C. Cir. No. 19-1230, which challenges actions of the Agencies arising from the same underlying notice of proposed rulemaking. *See* NHTSA & EPA, *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program*, 84 Fed. Reg. 51,310 (Sept. 27, 2019). In that case, this Court has ordered the Agencies to file an answering brief by September 9, 2020, to which petitioners must reply by October 13, 2020. ECF No. 1843712. The substantial overlap in counsel between the two proceedings will make it difficult for Coordinating Petitioners to prepare their principal briefs in this proceeding during that time interval.

The proposed deadline for Respondents' brief (January 19, 2021), allows a briefing interval of 70 days and provides adequate time for Respondents to prepare a brief. This interval is comparable to that afforded the federal government in similarly complex cases, even accounting for the holidays within that interval. *E.g.*, Order of Jan. 31, 2020, *Am. Lung Ass'n v. EPA*, D.C. Cir. No. 19-1140, ECF No. 1826621; Order of July 30, 2018, *Mozilla Corp. v. FCC*, D.C. Cir. No. 18-1051, ECF No. 1743015. The proposed deadline for Intervenors' briefs (January 26, 2021) is likewise reasonable. A briefing

interval of 77 days to respond to Petitioners' briefs is ample time, and 7 days is the standard length of time this Court uses to stagger the briefing for an intervenor. D.C. Circuit Handbook of Practice and Internal Procedures (Handbook) 37.

The proposed deadline for reply briefs (February 22, 2021), allowing 34 days between Respondents' brief and Petitioners' replies—and 27 days between Intervenors' briefs and Petitioners' replies—is comparable to intervals afforded petitioners in like cases. *E.g.*, Order of Jan. 31, 2020, *Am. Lung Ass'n*, *supra*; Order of July 30, 2018, *Mozilla Corp.*, *supra*. Coordinating Petitioners would find it particularly difficult to prepare reply briefs in less time, given the need to coordinate a shared word allotment, complete internal review processes of numerous state and local governments, and respond to multiple Intervenor briefs in addition to Respondents' brief.

The proposed deadline for final briefs (March 5, 2021) provides adequate time for a merits panel to hear oral argument in April or May 2021. *See* Handbook 48 ("Typically, the argument date will be a minimum of 45 days after briefing is completed."). For instance, this Court recently calendared an oral argument for 56 days after receipt of final briefs in a similar, non-expedited proceeding. Order of Aug. 3, 2020, *Am. Lung Ass'n*, *supra*, ECF No. 1854843.

II. Reasons for separate briefs[1]

There are five distinct Petitioner groups (described further below), each with markedly different litigation perspectives. Coordinating Petitioners include three kinds of parties: State and Local Government Petitioners, Public Interest Organization Petitioners, and Advanced Energy and Transportation Petitioners. Coordinating Petitioners will work diligently to avoid unnecessary duplication of arguments and join parts of each other's briefs where possible but, as explained below, propose to share a common word allotment among three briefs. The fourth group, CEI, requires a separate brief to present unique arguments, some or all of which certain Coordinating Petitioners will oppose if granted intervention. The fifth group, CFDC, also requires a separate brief to present unique arguments, some or all of which certain Coordinating Petitioners may oppose if granted intervention. All movants request that this Court permit these five separate briefs.

Those State and Local Government Petitioners and Public Interest Organization Petitioners that have moved to intervene (Coordinating Intervenors) request two separate intervenor briefs to present their different perspectives.

CEI

CEI is diametrically opposed to all of the other petitioners in these consolidated cases. In fact, a number of those petitioners have intervened in Case No. 20-1145 to

[1] CEI, CFDC, Coordinating Petitioners, and Coordinating Intervenors each make statements under their own names in this Part that are not attributable to other movants.

expressly oppose CEI. These petitioners believe that the SAFE rule is an unwarranted reduction of the standards promulgated under the Obama Administration; in CEI's view, on the other hand, the Agencies did not go far enough in reducing the stringency of those standards. For this reason, the issues raised by CEI are substantially different than those of the other petitioners and require a separate brief to deal with them.

CFDC

The CFDC Petitioners include Clean Fuels Development Coalition, Environmental and Energy Study Institute, National Farmers Union, Farmers Union Enterprises, Inc., Glacial Lakes Energy, LLC, Governors' Biofuels Coalition, Montana Farmers Union, North Dakota Farmers Union, Siouxland Ethanol, LLC, South Dakota Farmers Union, and Urban Air Initiative, Inc. The CFDC Petitioners' challenge is uniquely focused on the consideration and treatment of renewable fuels in the SAFE rulemaking, the elimination of incentives for flex fuel vehicles, the failure to consider harms and cost associated with existing aromatic-laden fuels, and the Agencies' determinations with respect to the feasibility and effectiveness of higher-octane low-carbon fuels to improve fuel economy and achieve emission reductions beyond those adopted in the Final Rule. Given the lack of substantive overlap with the issues raised by other petitioner groups, the breadth and complexity of the Final Rule and the record supporting it, the standing statements contemplated for this diverse group of Petitioners, and the challenges associated with coordinating with the other petitioners within

the timeframes contemplated in the proposed briefing schedule, a separate brief for the CFDC Petitioners is justified.

Coordinating Petitioners

State and Local Government Petitioners are 23 States; the District of Columbia; the cities of Denver, Los Angeles, and New York; the City and County of San Francisco; and California's South Coast, Bay Area, and Sacramento Metropolitan Air Quality Management Districts. These States, cities, and other governmental bodies develop, adopt, and implement plans and policies to reduce air pollution and protect public health and the environment. Only these Petitioners can adequately defend their interests in these objectives, which are undermined by the actions challenged here. Further, these Petitioners' decades of experience administering pollution-control laws give them a unique perspective on why the actions under review are unlawful. This Court ordinarily does not compel governmental petitioners to join in a single brief with other petitioners, *see* D.C. Cir. R. 28(d)(4), 29(d), and there is no reason to depart from that sound practice here.

Public Interest Organization Petitioners are 12 regional and national nonprofit organizations committed to protecting public health and the environment by reducing vehicular air pollution. Collectively, these Petitioners count millions of members throughout the country affected by the challenged agency actions. These Petitioners have broad expertise in the legal, administrative, technical, environmental, and public-health aspects

of controlling vehicular emissions; and they submitted extensive comments on the Agencies' proposed rules.

Advanced Energy and Transportation Petitioners are the National Coalition for Advanced Transportation (Case No. 20-1174), Advanced Energy Economy (20-1176), Calpine Corporation, Consolidated Edison, Inc., National Grid USA, New York Power Authority, and Power Companies Climate Coalition (20-1177). These Petitioners collectively have invested billions of dollars in electric vehicle manufacturing, technology and infrastructure and clean generation technologies. The challenged actions directly undermine incentives for manufacturing and adoption of electric vehicles and related infrastructure and technologies, threatening these investments. These Petitioners submitted extensive comments on the challenged actions, and they bring unique perspectives regarding costs and technical assumptions made by the Agencies and the benefits to both consumers and the electricity grid to be obtained from widespread adoption of electric vehicles.

This Court permitted state petitioners, public interest organization petitioners, and advanced energy and transportation petitioners to file separate merits briefs in prior litigation challenging EPA's Revised Determination. Order of Jan. 11, 2019, *California v. EPA*, D.C. Cir. No. 18-1114, ECF No. 1768141.

Coordinating Intervenors

Coordinating Intervenors will endeavor to avoid duplication of arguments but seek to file separate briefs for the reasons stated above with respect to State and Local

Government Petitioners and Public Interest Organization Petitioners. *See also* D.C. Cir. R. 28(d)(4).

III. Reasons for word allotments[2]

CEI, CFDC, Coordinating Petitioners, and Coordinating Intervenors request, each on their own behalf, the word allotments for their merits briefs that are set forth below and summarized on page 3, *supra*.

CEI

As noted above, CEI is opposed to the other petitioners, and many of them have intervened to oppose CEI. There is no overlap between the arguments raised by CEI and those of the other petitioners, and thus there is no commonality that warrants reducing the word count of CEI's brief, especially in a rulemaking this complex. For this reason, CEI requests the standard FRAP allotment of 13,000 words for our principal brief. For our reply brief, we seek 8,000 words. This is slightly larger than standard FRAP word limit, but we believe it is necessary as we will need to respond to both the Agencies' brief and to the arguments presented by the Coordinating Intervenors in the two briefs that they propose.

[2] CEI, CFDC, Coordinating Petitioners, and Coordinating Intervenors each make statements and word-allotment requests under their own names in this Part that are not attributable to other movants.

CFDC

As noted above, the issues raised by CFDC Petitioners are wholly distinct from those raised by the other petitioner groups. This absence of commonality warrants allowing the CFDC Petitioners the standard FRAP allotment of 13,000 words for their principal brief and an allotment of 7,000 words for their reply brief.

Coordinating Petitioners

Coordinating Petitioners filed seven petitions that collectively challenge three actions by two federal agencies under two distinct and intricate statutory regimes. Two of the actions—EPA and NHTSA rules revising and prescribing standards for vehicular greenhouse gas emissions and corporate average fuel economy, respectively—are exceedingly complex, as evidenced by the sheer size (roughly 660,000 words) of the Federal Register notice accompanying the rules. The Agencies' "analysis supporting [these rules] spans a range of technical topics, uses a range of different types of data and estimates, and applies several different types of computer models." Rollback, 85 Fed. Reg. at 24,271.[3] Petitioners require a large number of words to adequately present the many fatal errors they have identified in diverse aspects of the Agencies' analysis. The technical nature of many of those errors means that this Court cannot fairly assess Petitioners' arguments unless Petitioners provide detailed explanations of complex topics

[3] The White House described these final rules as "the largest deregulatory action of [the Trump] Presidency." White House Press Statement (Mar. 31, 2020), http://www.whitehouse.gov/briefings-statements/statement-press-secretary-124.

including automotive technologies and their costs and efficacies, as well as theories and techniques for modeling automaker and consumer behavior and environmental impacts of automobile regulation. The record material that these arguments must discuss is voluminous. The *indexes* of administrative record filed by the Agencies run more than 750 pages, and the Agencies have acknowledged to counsel that those indexes exclude hundreds of additional documents that are part of the record for judicial review.

In addition to presenting all their record-based and highly technical arguments, these Petitioners will argue that the Agencies' rules violate multiple provisions of their governing statutes, as well as the National Environmental Policy Act and Endangered Species Act. And the third agency action under review—EPA's Revised Determination, itself the subject of extensive briefing in a prior case—raises its own, novel legal and record-based arguments that require substantial additional words to present.

Each subgroup of Coordinating Petitioners has its own perspective and will present different arguments for why the Agencies' actions are invalid, while coordinating to avoid duplication of any common arguments. To support this request for words, Coordinating Petitioners have provided below nonbinding estimates of the number of words they collectively need to adequately present their arguments to the Court in principal briefs. A more detailed explanation of these arguments follows this summary.

a. Standing (1,500 words)
b. Background and other required sections of briefs (10,000 words)
    1. Statement of the case, presented principally in a single brief (6,000 words)

2. Summaries of each brief's particular arguments (3,000 words)
3. Statements of jurisdiction and issues, standards of review, conclusions (1,000 words)

c. Argument: Arbitrary and capricious findings and conclusions (18,000 words)
   1. Technology costs (4,000 words)
   2. Consumer costs and preferences (3,500 words)
   3. Public and environmental health (3,500 words)
   4. Vehicle safety (3,000 words)
   5. Overall societal costs and benefits (4,000 words)

d. Argument: Statutory violations (14,000 words total)
   1. EPA's violation of the Clean Air Act (4,500 words)
   2. NHTSA's violation of the Energy Policy and Conservation Act (5,000 words)
   3. The Agencies' violation of the Clean Air Act's conformity provisions (1,500 words)
   4. NHTSA's violation of the National Environmental Policy Act (1,500 words)
   5. The Agencies' violation of the Endangered Species Act (1,500 words)

e. Argument: EPA's Revised Determination (2,500 words total)

Arbitrary and capricious findings and conclusions

Coordinating Petitioners will argue that the Agencies made material errors in the analyses of their rules, including in their assumptions, modeling, and conclusions on technology costs, consumer costs and preferences, public and environmental health, vehicle safety, and overall social costs and benefits. Petitioners will argue that these

errors individually and collectively undermine the Agencies' justifications for their rules and inflate the rules' alleged benefits by tens of billions of dollars. Most of these arguments are technical and cannot be adequately presented without extended discussion. For example:

1. *Technology costs.* Petitioners will contend that the Agencies' cost of compliance projections include numerous fundamental errors, such as mistakenly disallowing certain technologies in their modeling that the Agencies themselves state should have been allowed; disallowing certain technologies in their modeling that are already installed and proven on vehicles in the marketplace; failing to update their analysis with EPA's own state-of-the-art data regarding technological effectiveness and feasibility; assuming that automakers will achieve significant emissions and fuel economy improvements even without regulatory requirements to do so; including inaccurate counts of manufacturers' existing overcompliance credits; and imposing restrictions on future use of overcompliance credits that do not reflect the law.
2. *Consumer Costs and Preferences.* Petitioners will argue that, among other errors, the Agencies miscalculate consumer costs; misunderstand consumer preferences for certain vehicles and technologies; incorrectly model the degree to which consumers respond to changes in vehicle prices; fail to correctly account for consumer valuation of fuel economy; and improperly exclude from

their analysis the effects of increased gasoline prices due to the large increase in demand for gasoline under the rules, based on a flawed modeling analysis.

3. *Public and Environmental Health.* Petitioners will argue that the Agencies significantly underestimate the public and environmental health costs of their rules, by, for example, using erroneous emissions factors; undervaluing the estimated benefits of certain emissions reductions; using an arbitrary and unjustified estimate of the social cost of carbon emissions; and unjustifiably assuming that the increased fuel consumption under the rules will be met predominantly by increased oil production and refining abroad, rather than domestically, thus excluding increased domestic emissions from the Agencies' analysis.
4. *Vehicle Safety.* Petitioners will argue that the Agencies' assessment of impact of the standards on safety is without merit because, for example, the Agencies adopt an unjustifiable estimate of the amount driving may increase due to fuel economy improvements reducing the cost of driving; the Agencies misunderstand how mass reduction of vehicles under the standards affects safety; and the Agencies' modeling of mass reduction contains technical errors.
5. *Overall Social Costs and Benefits.* Petitioners will contend that the Agencies' calculation of total social costs and benefits is unreliable because, for example, the Agencies' extrapolation of traffic congestion costs from a 1997 study suffers from several clear errors, including failing to account for inflation and mischaracterizing data; and the Agencies' improper adjustment of the fuel

economy standard for domestically manufactured passenger automobiles undermines key fleet composition projections in the Agencies' modeling.

Statutory arguments

Coordinating Petitioners will contend that EPA violated Section 202 of the Clean Air Act, 42 U.S.C. § 7521, by, among other things, failing to properly consider the central statutory factors and environmental-protection purpose undergirding Section 202; improperly reinterpreting statutory factors; and impermissibly assigning non-statutory factors determinative weight. Petitioners also will argue that EPA unlawfully abdicated to NHTSA the duty to independently judge what level of emission standards is appropriate, and that EPA did not apply its own technical expertise to answer that question.

Petitioners will contend that NHTSA violated Section 502 of the Energy Policy and Conservation Act, 49 U.S.C. § 32902, in several respects. Petitioners will argue, among other things, that Section 502 bars NHTSA from elevating other factors (including non-statutory factors) over petroleum conservation and other congressionally mandated objectives when setting "maximum feasible" standards. Petitioners also will argue that NHTSA's finding that a more fuel-efficient vehicle fleet would be "economically impracticable" cannot be squared with NHTSA's own analysis, which shows that the fleet could be expected to be more fuel efficient even if the standards were flatlined at model year 2020 levels. Petitioners will further argue that NHTSA violated Section 502's bar on consideration of the fuel economy of alternative-fuel vehicles or credits

when determining maximum feasible average fuel economy. Petitioners also will argue that NHTSA's minimum domestic passenger-car standard violates Section 502.

Petitioners will contend that both Agencies' actions violate the Clean Air Act's conformity provisions. Petitioners will explain that the final rules cause indirect emissions from increased gasoline use and, absent an exemption, the Clean Air Act required the Agencies to consider whether their actions conform to state implementation plans.

Petitioners will argue that NHTSA issued its final rule without considering a reasonable range of alternatives as required by the National Environmental Policy Act, and that the consideration of cumulative environmental impacts in NHTSA's Environmental Impact Statement is deficient.

Petitioners will argue that the Endangered Species Act required the Agencies to consult with the U.S. Fish and Wildlife Service and National Marine Fisheries Service on whether and how weakened greenhouse gas and corporate average fuel-economy standards may affect species listed as endangered or threatened under the Act or their designated critical habitats. Petitioners will further contend that the Agencies' rules do adversely affect many species by substantially increasing emissions of greenhouse gases and other air pollutants.

EPA's Revised Determination

Coordinating Petitioners will argue that the Revised Determination, which is now subject to review along with EPA's final rule, is arbitrary, capricious, and contrary to governing regulations. Petitioners will contend that EPA did not make findings needed

to support a determination that its greenhouse gas emission standards for model year 2022–2025 vehicles were no longer appropriate and that the Agency failed to consider extensive record evidence to the contrary. Petitioners require a substantial number of words to present these arguments. *See* Final Br. of State of California et al., *California v. EPA*, D.C. Cir. No. 18-1114, ECF No. 1789881 (May 28, 2019) (devoting 4,201 words to merits arguments respecting the Revised Determination); Final Br. of Center for Biological Diversity et al., *California*, *supra*, ECF No. 1789848 (May 28, 2019) (1,990 words for same); Final Br. of National Coalition for Advanced Transportation et al., *California*, *supra*, ECF No. 1789858 (May 28, 2019) (1,267 words for same); Final Br. of Respondents, *California*, *supra*, ECF No. 1789798 (May 28, 2019) (5,316 words for same).

Coordinating Intervenors

Coordinating Intervenors' briefs will respond to arguments by certain Petitioners that would result in further weakened federal standards or erode the Agencies' abilities to regulate greenhouse gas emissions or fuel economy. In particular, CEI will argue that "the Agencies did not go far enough in reducing the stringency of [their] standards," and that they overestimated "vehicle emission health costs" and underestimated their standards' "effect in restricting vehicle size and weight, and in increasing vehicle prices." ECF No. 1848430, at 2 (statement of issues). Although Coordinating Intervenors will make contrary arguments in their principal briefs as petitioners, they require additional words as intervenors to respond to CEI's specific arguments on these points and any other arguments CEI may raise in its principal brief. Coordinating Intervenors also may

need words to respond to any arguments made by CFDC that, if accepted, would result in further weakened federal standards or erode the Agencies' abilities to regulate greenhouse gas emissions or fuel economy. *Cf. United States v. Pogue*, 19 F.3d 663, 666 & n.2 (D.C. Cir. 1994) (holding that an appellant's "non-binding preliminary statement of the issues" filed in this Court "does not irrevocably define the limits of the scope of an appeal" (emphasis omitted)).

This Court's rules permit a respondent-intervenor to file a 9,100-word brief in response to a single 13,000-word brief, such as the one CEI proposes to file. D.C. Cir. R. 32(e)(2)(B)(i). Coordinating Intervenors' request for only 8,000 words, to be divided between two briefs in response to CEI's brief (and, potentially, in response to CFDC's brief), is reasonable under the circumstances.

CONCLUSION

All movants request that this Court adopt the briefing schedule set forth on page 2, *supra*, and permit the five petitioner briefs set forth on page 2, *supra*. Coordinating Intervenors request that the Court permit them to file two intervenor briefs as set forth on page 3, *supra*. CEI, CFDC, Coordinating Petitioners, and Coordinating Intervenors each request on their own behalf that the Court adopt their proposed word allotments set forth on page 3, *supra*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On September 4, 2020, I served a copy of the foregoing motion using this Court's CM/ECF system. All parties are represented by registered CM/ECF users that will be served by the CM/ECF system.

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