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,

COMBINED REPLY IN SUPPORT OF MOTION OF ALL PETITIONERS, STATE AND LOCAL GOVERNMENT INTERVENORS, AND PUBLIC INTEREST ORGANIZATION INTERVENORS TO ESTABLISH BRIEFING SCHEDULE AND FORMAT AND RESPONSE IN OPPOSITION TO RESPONDENTS' MOTION TO ESTABLISH ALTERNATIVE BRIEFING SCHEDULE AND FORMAT

The Court should adopt the briefing schedule and format proposed by all Petitioners, State and Local Government Intervenors, and Public Interest Organization Intervenors and reject the alternative proposal advanced by Respondent Agencies.[1]

Movants' proposed schedule aims to afford this Court sufficient time to consider and resolve these petitions in Summer or Fall 2021 to minimize the number of vehicle model years affected by EPA's greenhouse gas emission standards and NHTSA's fuel-

[1] Petitioners CEI et al. in Case No. 20-1145 joined in the motion and support the relief it requests, *see* ECF No. 1860054, but do not join in this reply and response.

economy standards while those standards are subject to litigation. *See* ECF No. 1860054 (Mot.) 6–7. No one disputes that benefit of a timely decision. But the Agencies propose a delayed and attenuated schedule and suggest that, even if oral argument is heard next Term, the Court "may indeed" resolve this "unusually difficult, technical, and complex" case in Fall 2021. ECF No. 1861390 (Resp. Opp.) 9, 11. That is doubtful. The Agencies' chief concern with Movants' schedule—that it provides the Agencies 70 days to prepare their brief—is outweighed by the benefits of prompt disposition of this case. Still, we are amenable to a modest increase in the Agencies' briefing interval, up to and including the 20 additional days they request, if it will not preclude an oral argument this Term.

The Agencies propose a single, aggregate word allotment for all Petitioner briefs. Resp. Opp. 20. But there are three major groups of Petitioners here, one of which (Co-ordinating Petitioners) itself comprises three large groups. The major Petitioner groups, some of whose interests and arguments are adversarial, should receive separate word allotments rather than be forced to trade words within a common allotment.

Without challenging most of Movants' detailed word justifications, the Agencies attack Petitioners' proposed allotments while acknowledging—even emphasizing—the "sheer complexity" and scope of the actions under review. Resp. Opp. 9. The Agencies' proposed aggregate allotment of 32,000 words, if adopted, would effectively preclude judicial review of many serious errors in the Agencies' massively consequential actions.

No other party has moved for an alternative briefing schedule or format, but Movant-Intervenor Alliance for Automotive Innovation requests in its response that

this Court permit it to file a brief of 9,100 words. ECF No. 1861402, at 2. Similarly, the five individual automakers who have moved to intervene on remedy issues request that the Court permit them to file a brief of 3,000 words at the same time as respondent-intervenors, ECF No. 1861395, at 3. We do not oppose either of these requests, except to ask that this Court reduce the word allotments for briefs filed by the Alliance and the automakers commensurate with any reduction the Court may make to the word allotments Petitioners propose for their principal briefs.

ARGUMENT

The Agencies argue that Movants' proposed briefing schedule is "premature" and "unworkable," or else should have been filed *earlier* as a motion to expedite review. The Agencies also contend that Petitioners' proposed word allotments are "unreasonable." The Agencies' arguments are unpersuasive, and their alternative proposal is unjustified.

I. The petitions can and should be briefed in an orderly fashion that allows for an oral argument during this Term.

The Agencies argue that Movants' proposal comes too late and should have been filed earlier as a motion for expedited review. But expedition is not needed to secure an oral argument within 12–13 months and disposition within 16–20 months of filing a petition in this Court. The Agencies next argue that Movants' proposal comes too early because the Court has not ordered the parties to submit a proposed schedule and format, nor has it resolved pending motions regarding the Agencies' administrative records. The Agencies do not mention that some Movants tried for several weeks to engage

them in negotiations concerning schedule and format. Nor do the Agencies recognize that Coordinating Petitioners presented record disputes to the Court as speedily as possible in light of the time it took the Agencies to respond to, and narrow the scope of disputes over, Petitioners' prompt requests for completion and clarification of the contents of the administrative records. Finally, the Agencies assert that they need 90 days, not 70, to prepare a merits brief. If that additional time (or some lesser period) will not delay oral argument until next Term, we do not object to a longer briefing interval for the Agencies.

A. The Court can hear oral argument in this Term.

The Agencies mischaracterize Movants' proposal as a "backdoor" attempt to secure expedited review without showing irreparable harm or an unusual interest in prompt disposition. Resp. Opp. 12; *see* D.C. Circuit Handbook of Practice and Internal Procedures, Dec. 2019 (Handbook) 34. This Court routinely hears argument in non-expedited cases—including complex, non-expedited cases—within one year of docketing. *See, e.g.*, *Mozilla Corp. v. FCC*, D.C. Cir. No. 18-1051, ECF No. 1752107 (scheduling argument for less than one year after first of 16 petitions docketed). Indeed, 11 months is the median time for *disposition* of this Court's cases. *See* Administrative Office of U.S. Courts, U.S. Court of Appeals – Judicial Caseload Profile 4, June 2020, https://www.uscourts.gov/file/28391/download.

This is not the "very rare[]" case where expedited review is warranted due to the inadequacy of the Court's normal timetable. Handbook 34. Far from asserting an

"unusual interest in prompt disposition" of the petitions, *id.*, Movants desire only a schedule allowing the petitions to proceed, with this Court's *usual* promptness, to oral argument within 12–13 months and disposition within 16–20 months of docketing. Petitioners had no reason to anticipate that a motion to expedite would be required to obtain these normal timeframes for oral argument and disposition.

B. Movants' proposal is not "premature."

1. The Agencies wrongly accuse Movants (Opp. 3) of "short-circuit[ing] the typical period provided by the court for the parties to try to reach agreement on a joint proposal in this kind of complex case." This Court typically provides the parties 30 days to negotiate a proposed briefing schedule and format, and this motion was filed 29 days after Coordinating Petitioners made the first of several unsuccessful attempts to engage the Agencies in negotiations.

In this kind of complex case, the Court ordinarily issues "an order soliciting a proposed briefing schedule and format" after resolving "all outstanding procedural and dispositive motions." Handbook 10–11. The deadlines for procedural and dispositive motions were June 22, 2020, and July 6, 2020, respectively. ECF No. 1844068 (May 22, 2020). The only procedural motions filed by the deadline were five motions to intervene, four of which were unopposed, and the last of which was fully briefed as of July 16, 2020. ECF No. 1851963. No dispositive motions were filed, and all initial submissions had been filed by July 31, 2020. ECF No. 1854652.

Coordinating Petitioners "tr[ied] to reach agreement on a joint proposal." Resp. Opp. 3. On August 6, 2020, they proposed to the Agencies a briefing schedule for all parties and a format and word allotment for Coordinating Petitioners. Decl. of Matthew Littleton (Ex. A) ¶ 10. Counsel for Coordinating Petitioners emailed the Agencies' counsel on August 12th and 18th and left a voicemail with the Agencies' counsel on August 14th, requesting a response to the proposal. *Id.* ¶ 11, 13, 15. On August 24, 2020, or 18 days after receiving Coordinating Petitioners' proposal, the Agencies' counsel responded that the Agencies would not negotiate on briefing schedule or format until all Petitioners proposed word allotments for their briefs. *Id.* ¶ 21. On August 27, 2020, the Agencies again indicated that they had yet to formulate a position on briefing schedule or format. *Id.* ¶ 22. With time running out to request an orderly schedule allowing for oral argument this Term, Movants filed the instant motion on September 4, 2020. The Agencies' claim that Movants short-circuited negotiations is disingenuous.

2. The Agencies argue that it is premature for this Court to establish a briefing schedule and format before resolving motions to complete or supplement the Agencies' administrative records. Resp. Opp. 7. The parties agree "that merits briefing should be deferred until after record questions are fully resolved." *Id.* But Movants' proposed schedule allows for resolution of those questions prior to merits briefing. Even after accounting for extensions of time the Agencies received to respond to Petitioners' motions to complete or supplement the record, those motions will be fully briefed and ripe for disposition on September 25, 2020. The parties agree that "[a]llowing three weeks

thereafter for this court's consideration of those motions would allow resolution of those issues." *Id.* at 19. If the Court adopts Movants' proposed schedule and resolves the record motions in that timeframe, Petitioners will have sufficient time (25 days) to consider the Court's disposition of the record motions before filing their opening briefs.

The Agencies chide Movants (Opp. 3) for "wait[ing] over seven weeks after the filing of the [certified indexes of administrative] record to file contested motions" to add missing materials to the record. But, as explained below, Movants spent more than three of those weeks reviewing the Agencies' voluminous indexes, Federal Register notice, and related materials and documenting several categories of deficiencies in the indexes. After presenting the Agencies with those deficiencies, Movants waited more than three weeks for a full response from the Agencies. Waiting for that response allowed Movants to significantly narrow disputes over the record before requesting the Court's intervention. The Agencies should not be rewarded with a protracted schedule because of the substantial time Movants spent resolving informally what the Agencies ultimately admitted were improper omissions from their certified indexes of administrative record.

The indexes of record filed on July 6, 2020, totaled more than 750 pages. ECF No. 1850358. Because the indexes did not "adequately describ[e]" the contents of the Agencies' administrative records, Fed. R. App. P. 17(b)(1)(B), Movants spent many days wading through the indexes to identify numerous omissions, including more than 150 sources (some of them not publicly available) that the Agencies cited in their decision documents. Littleton Decl. ¶ 6.

In hopes of resolving record disputes informally, counsel for certain State and Local Government Petitioners and Public Interest Organization Petitioners sent a letter to counsel for the Agencies on July 31, 2020, requesting confirmation by August 12, 2020, that seven categories of materials that are missing or inadequately described in the indexes, or else unavailable in the Agencies' public rulemaking dockets, are nonetheless part of the record. Littleton Decl. ¶ 7. On August 12, 2020, the Agencies provided a partial response confirming that certain categories of materials omitted from the indexes are in fact part of their administrative records, denying that interagency-review materials omitted from the indexes are part of their administrative records, and deferring a response on several categories of missing materials. *Id.* ¶ 12. On August 17, 2020, counsel for certain State and Local Government Petitioners asked when the Agencies would provide a response on the remaining categories. *Id.* ¶ 14. On August 19, 2020, counsel for these Petitioners informed the Agencies that any outstanding issues would be brought to the Court if the Agencies did not respond the next day. *Id.* ¶ 16. On August 20, 2020, the Agencies confirmed that hundreds of other materials not listed in their certified indexes or available in their public rulemaking dockets are part of their administrative records. *Id.* ¶ 18.

Promptly after resolving all but one of their record disputes informally, State and Local Government Petitioners and Public Interest Organization Petitioners moved on August 25, 2020, that this Court complete and supplement the Agencies' administrative records with six interagency-review documents. ECF No. 1858308. Three days later,

CEI moved that this Court complete the Agencies' administrative records with three additional documents. ECF No. 1858924.[2] The Court granted the Agencies' requests to extend their deadline to respond to both motions until September 18, 2020. ECF No. 1861063. In short, with respect to record issues, Movants have acted expeditiously, in the interest of judicial economy, and consistent with the schedule they have proposed.

C. The Court can hear oral argument in this Term while affording the Agencies adequate time to prepare their merits brief.

The Agencies contend that a 70-day interval to prepare their merits brief is "inadequate given the dates over which it falls and the nature of this case," Resp. Opp. 8, but that "90-day briefing intervals are reasonable," *id.* at 19. We do not oppose a 90-day briefing interval for the Agencies so long as (1) the Court adopts the other, unopposed briefing intervals proposed by Movants, and (2) the resultant deadline for final briefs (March 26, 2021) will allow for oral argument to be heard this Term.

If those 20 days would foreclose a Spring argument, however, that would likely cascade into several months' delay in the disposition of these important cases, in which "Congress has emphatically declared a preference for immediate review." *Nat'l Recycling Coal., Inc. v. Reilly*, 884 F.2d 1431, 1434 (D.C. Cir. 1989) (quotation omitted); *see* 42 U.S.C. § 7607(b)(1); 49 U.S.C. § 32909(b). The Agencies and automakers elsewhere have noted the "special, increased costs that regulatory uncertainty imposes upon this long lead-

[2] CEI faced its own challenges obtaining a timely response from the Agencies on issues relating to their administrative records. *See* ECF No. 1858294, at 4, 8.

time industry" and those it affects. Mot. of Ass'n of Global Automakers, Inc. & Coalition for Sustainable Automotive Regulation for Expedited Consideration 12, ECF No. 1821514, *Union of Concerned Scientists v. NHTSA*, D.C. Cir. No. 19-1230 (Dec. 24, 2019); *see* Resp. Mot. to Expedite 6–7, ECF No. 1820782, *Union of Concerned Scientists*, *supra* (Dec. 18, 2019) ("Expeditiously resolving these challenges will provide the automotive industry with greater certainty and security in making decisions for the impending 2021–2025 model years. This will prevent industry disruptions—and resultant increases in planning and compliance costs—that have implications for the public's access to newer, affordable, safer, and more fuel-efficient vehicles."). We do not here contend that those considerations warrant *expedited* review, only that they disfavor *protracted* review.

Movants' proposed 70-day briefing interval is far from "rush[ed]." Resp. Opp. 3. The federal government admits that it has, "in previous cases, briefed rulemakings on similar, and indeed shorter, timeframes" without an order expediting review. *Id.* at 12. We likewise acknowledge that "numerous cases have been briefed on longer timeframes as well." *Id.* But that only shows that "each rule and each case is unique," *id.*, and Movants' proposed briefing interval for the Agencies falls within a range of reasonableness. When setting a briefing schedule, this Court must account for all the circumstances, including that a longer interval for the Agencies may greatly diminish, if not foreclose, the chance of a merits disposition in 2021—a goal whose value no one disputes. The Court also should consider that Movants have acted diligently to move proceedings forward thus far to allow for such a disposition, with no assistance from the Agencies.

For all these reasons, the Court should establish Movants' proposed schedule, or else a variant on that proposed schedule that lengthens the Agencies' briefing interval while still allowing for an oral argument this Term.

II. Petitioners should not be forced to share a single word allotment.

This Court should establish separate word allotments for briefs of CEI, CFDC, and Coordinating Petitioners rather than "leav[ing] to Petitioners' … discretion how to best allocate [a common word allotment] among" themselves. Resp. Opp. 20. Those Petitioners whose interests and arguments align sufficiently to enable such coordination already have proposed to trade words within a common allotment. Mot. 16. But CEI, CFDC, and Coordinating Petitioners lack "common interests," Resp. Opp. 20, and will raise entirely distinct arguments, *see* Mot. 14–22. In fact, as the Agencies admit, CEI and Coordinating Petitioners will make some adversarial arguments. Resp. Opp. 20. It would greatly prejudice all Petitioners, and quite possibly lead to further motions practice, to force major Petitioner groups to compete for words as merits briefing proceeds.

III. CFDC and Coordinating Petitioners each support the word allotments they proposed for their respective briefs and oppose the alternative word allotments proposed by the Agencies.

CEI, CFDC, and Coordinating Petitioners each moved on their own behalf for specific word allotments for their merits briefs without taking positions on each other's allotments. Mot. 14–22 & n.2. Below, CFDC and Coordinating Petitioners each reply on their own behalf to support their proposals and oppose the Agencies' alternative. No one has opposed Coordinating Intervenors' request to file two separate briefs with

an aggregate allotment of 8,000 words; the Agencies' proposal is consistent with that request. Resp. Opp. 18 (proposing that intervenors filing in support of respondents—i.e., Coordinating Intervenors, Alliance for Automotive Innovation, and Ingevity Corporation—be allowed to file up to four briefs, not to exceed a combined 22,400 words).

CFDC

CFDC Petitioners represent the unique perspective of fuel ethanol producers and sellers, groups whose members are engaged in the production of corn used in fuel ethanol, as well as groups that support the production of corn used in fuel ethanol in various regions of the country and advocate for environmentally sustainable biofuels. These petitioners have a significant and particular interest in ensuring the development of regulations that promote the use and market for high-octane, clean burning, fuel efficient biofuels, including higher ethanol blends. The final actions of the USEPA and NHTSA injure CFDC Petitioners and their members by failing to account for benefits from biofuels, including E15 and higher ethanol blends, discouraging car manufacturers from producing flex fuel vehicles and other more fuel efficient vehicles, and ultimately limiting consumers access to cleaner, more efficient high octane fuels and vehicles.

These distinct interests can only be properly addressed in a separate brief. Contrary to Respondents' argument, CFDC Petitioners' challenge is not limited to certain explicit references to fuel octane and flex-fuel vehicles in the Rule (Resp. Opp. 15), but includes more pervasive failures of Respondents to properly address, or even consider, the benefits of ethanol-based fuels that undermines the modeling and analysis

supporting the Rule. Further, CFDC Petitioners are not participating as intervenors in any challenge. Thus, a separate opening brief and reply brief will be the only opportunity such petitioners have to vindicate the issues raised in their Petition. Finally, Respondent's proposed joint word count proposal will significantly prejudice CFDC Petitioners' presentation of their unique challenge given the word count expectations of the other petitioning parties. Accordingly, CFDC Petitioners reiterate their request for a 13,000-word separate opening brief. CFDC Petitioners would accept a standard separate reply brief of 6,500 words in lieu of the 7,000 words initially requested.

Coordinating Petitioners

Coordinating Petitioners, who filed seven petitions for review, have moved to be allotted 42,000 words to be divided among three principal briefs and 23,000 words to be divided among three reply briefs. Their motion states "extraordinarily compelling reasons" for exceeding limits on brief length. Cir. R. 28(e)(1). It provides a breakdown of the words Petitioners anticipate will be needed to adequately present each section of their briefs and each of ten broad argument categories, and it details the contents of each argument category. Mot. 15–22.

The sole argument category addressed by the Agencies is the challenge to EPA's Revised Determination, which Petitioners propose to present in 2,500 words. *See* Mot. 4–5, 17, 21–22.[3] The Agencies assert (Opp. 17) that Petitioners do not need *any* words

[3] Five separate petitions seek review of EPA's Revised Determination. *Contra* Resp. Opp. 5 (stating that only two petitions challenge that determination).

to challenge that determination because they "already challenged that action and lost." But that loss was not on the merits. This Court reasoned that "only 'final action' under the Clean Air Act is judicially reviewable"; "[t]he term 'final action' is synonymous with the term 'final agency action' as used in Section 704 of the [Administrative Procedure Act]"; and EPA's Revised Determination is not final action. *California v. EPA*, 940 F.3d 1342, 1350 (D.C. Cir. 2019) (quotation omitted). Instead, that determination is "preliminary, procedural, or intermediate agency action" that is now "subject to review on the review of the final agency action" that EPA has taken to revise its emission standards. 5 U.S.C. § 704. Coordinating Petitioners will argue the merits of EPA's Revised Determination here, not "re-litigate th[e] question" whether it is final action. Resp. Opp. 17.

The Agencies claim (Opp. 16–17) that Petitioners' allocation of 3,000 words for summaries of argument is excessive because it constitutes "nearly a quarter of a standard-length brief." But, of course, Coordinating Petitioners are not proposing to file a single, standard-length brief. They propose to file three briefs totaling 46,000 words and devote 6.5% of those words (the equivalent of 848 words in a standard-length brief) to "succinct, clear statement[s] of the arguments made in the body of the brief[s]." Cir. R. 28(a)(6). That percentage is unexceptional.

The Agencies also argue that Coordinating Petitioners do not need 1,500 words to "set forth the basis for the claim of standing," Cir. R. 28(a)(7), because "a roughly identical group of petitioners briefed standing in half that amount" of words in a case challenging agency actions arising from the same notice of proposed rulemaking, Resp.

Opp. 16. But, at least for petitioner States, standing in that case is self-evident because the agency actions at issue declare certain laws of those States preempted; indeed, the Agencies have not contested standing in that case. Coordinating Petitioners' standing in this case should not be controversial either, but it is different, and the Agencies have not stated that they do not intend to contest the issue.

Even if the Agencies were correct about the number of words that Coordinating Petitioners need to brief standing, summaries of argument, and EPA's Revised Determination, that still would leave more than 40,000 words justified by Coordinating Petitioners and entirely unrebutted by the Agencies. Yet the Agencies propose a substantially smaller pie (32,000 words) for Coordinating Petitioners to share with CEI and CFDC—both of whom, as the Agencies concede, will present quite different arguments.

The Agencies' stance seems to be that *no* proceeding can warrant word allotments comparable to the aggregate 72,000 words Movants proposed for principal briefs of all Petitioners. *See* Resp. Opp. 13–14. But there is precedent for the Court to allot a similar number of words per side when reviewing multiple, complex agency actions together. In *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), a panel disposed of petitions for review of closely related EPA actions after considering 77,000 words of briefing per side. *See* ECF Nos. 1299257, 1299368, 1299440.[4] Although EPA

[4] The same panel also reviewed an additional 22,750 words of briefing per side before denying an "after-arising grounds" petition for review of another EPA action. *See* ECF No. 1299003; *Coalition for Responsible Regulation*, 684 F.3d at 129–44 (addressing *American Chemistry Council v. EPA*, D.C. Cir. No. 10-1167).

published those actions in separate Federal Register notices, the panel coordinated the petitions for argument, ECF No. 1357330, and resolved them together, just as a panel here will resolve challenges to EPA's rule, NHTSA's rule, and EPA's Revised Determination together. Notably, the 595 Federal Register pages EPA used to explain all the actions reviewed in *Coalition for Responsible Regulation* are far less than the 1,116 pages EPA and NHTSA used to explain the actions challenged in this case.[5]

The Agencies do not oppose Coordinating Petitioners' request to file three briefs, Resp. Opp. 14, but the Agencies question whether the interests of the three subgroups of Coordinating Petitioners (State and Local Government Petitioners, Public Interest Organization Petitioners, and Advanced Energy and Transportation Petitioners) are diverse enough to justify their proposed word allotments, *id.* at 15. Coordinating Petitioners did not premise the proposed allotments on "disparate or conflicting interests." *Id.* at 16. They explained the number of words needed to adequately present every argument that any Coordinating Petitioner intends to present, while committing to "coordinate to avoid duplication of any common arguments." Mot. 16. The Agencies did not try to rebut that showing, save for the relatively minor points addressed above.

[5] To give a sense of its extraordinary size, the Agencies' notice of final rulemaking here "was far too large for the [Office of Federal Register's] system to handle" and delayed dissemination of that day's issue. Aaron Boyd, *Federal Register Tech Issue Caused by Oversized Document*, Nextgov, Apr. 30, 2020, https://www.nextgov.com/cio-briefing/2020/04/federal-register-tech-issue-caused-oversized-document/165042.

"This will be an unusually difficult, technical, and complex briefing," Resp. Opp. 9, which should be reflected in the words allotted to Coordinating Petitioners. The Agencies' proposal is wholly incommensurate with Coordinating Petitioners' briefing needs. Coordinating Petitioners include nearly half the Nation's States, several major cities, air quality management districts, a dozen public-health and environmental organizations, and many companies and trade associations invested in electric-vehicle manufacturing, technology and infrastructure and clean-generation technologies. The Agencies' proposal would prevent these deeply affected parties from adequately presenting all the arguments detailed in their motion and thereby inhibit meaningful judicial review of these extraordinarily complex and consequential agency actions. The Court thus should reject the Agencies' cramped word allotments and allot Coordinating Petitioners their requested 46,000 words for principal briefs and 23,000 words for reply briefs.

CONCLUSION

The Court should grant the relief requested on page 23 of the motion and deny the Agencies' motion for an alternative briefing schedule and format.

Respectfully submitted,

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* Application for admission pro hac vice forthcoming.

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CERTIFICATE OF COMPLIANCE

The foregoing combined reply in support of a motion and response to a motion was prepared in 14-point Garamond font using Microsoft Word 365 (July 2020 ed.), and it complies with the typeface and typestyle requirements of Federal Rule of Appellate Procedure 27(d)(1)(E). It contains 4,235 words and complies with the type-volume limitation of Circuit Rule 27(c).

/s/ Matthew Littleton
Matthew Littleton

CERTIFICATE OF SERVICE

On September 21, 2020, I served a copy of the foregoing combined reply in support of a motion and response to a motion, accompanied by an exhibit, 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.

/s/ Matthew Littleton
Matthew Littleton

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,

DECLARATION OF MATTHEW LITTLETON

I, Matthew Littleton, declare as follows pursuant to 28 U.S.C. § 1746:

1. I am an attorney practicing in District of Columbia. I am a member in good standing of the bars of the District of Columbia and the State of New York, as well as the bar of this Court.

2. I am among the counsel for Petitioner Environmental Defense Fund in Cases No. 20-1168 and -1169. With respect to the events described below, I acted with the consent of and on behalf of all petitioners in those cases. The accompanying pleading refers to these petitioners collectively as Public Interest Organization Petitioners.

3. M. Elaine Meckenstock is among the counsel for Petitioner State of California, by and through its Governor Gavin Newsom, Attorney General Xavier Becerra, and

the California Air Resources Board in Case No. 20-1167. These parties are among those denominated in the accompanying pleading as State and Local Government Petitioners.

4. Chloe Kolman and Daniel Dertke of the U.S. Department of Justice, Environment and Natural Resources Division, Environmental Defense Section, are among the counsel for respondents National Highway Traffic Safety Administration (NHTSA) and U.S. Environmental Protection Agency (EPA) (collectively, Agencies).

5. On July 6, 2020, Ms. Kolman filed in this Court the Agencies' certified indexes of administrative record.

6. Between July 7, 2020, and July 31, 2020, counsel for State and Local Government Petitioners and counsel for and working with Public Interest Organization Petitioners reviewed the Agencies' certified indexes and compared them to the Agencies' public rulemaking dockets, their notices of proposed and final rulemaking, their preliminary and final regulatory impact statements, and NHTSA's draft and final environmental impact statements. Based on information I have received from counsel involved, I understand that this review necessitated well over 100 hours of attorney time. It uncovered hundreds of materials that are missing or inadequately described in the indexes and/or do not appear in the Agencies' dockets, but that, in the view of State and Local Government Petitioners and Public Interest Organization Petitioners, are properly part of the record for judicial review.

7. On July 23, 2020, I had a telephone conversation with Ms. Kolman in which we discussed, *inter alia*, plans to negotiate a proposed briefing schedule and format in

these consolidated cases. I stated in that conversation that some petitioners soon would be sending the Agencies a letter in an effort to resolve administrative-record disputes.

8. On July 31, 2020, Ms. Meckenstock and I emailed a letter (Attach. 1) to Ms. Kolman describing seven categories of materials omitted or excluded from the certified indexes and/or the public rulemaking dockets and requesting that the Agencies respond by August 12, 2020, specifying which of the materials the Agencies would agree are part of their administrative records; and, for materials that the Agencies would not agree are part of their administrative records, explaining the basis for their exclusion. For the first category—sources cited in the Agencies' notices of proposed and final rulemaking, their preliminary and final regulatory impact statements, and NHTSA's draft and final environmental impact statements—the letter requested that the Agencies provide a means for petitioners to access any materials not specifically identified and publicly available. The letter also made an eighth request, namely that EPA certify that its administrative record for its rule includes NHTSA's complete administrative record, just as NHTSA had certified that its record includes EPA's complete administrative record; or else that EPA explain why particular materials in NHTSA's administrative record are not included in the administrative record for EPA's rule. Ms. Meckenstock emailed the letter to Ms. Kolman, who emailed back the same day (July 31, 2020) to confirm receipt.

9. On August 3, 2020, Ms. Kolman emailed me to inquire whether petitioners would be able to share their proposal for a briefing schedule and format later that week.

10. On August 6, 2020, I emailed Ms. Kolman with a briefing schedule proposed by all parties referred to as Coordinating Petitioners in the accompanying pleading. That same day, Ms. Meckenstock and I had a telephone conversation with Ms. Kolman, and other counsel for the Agencies to discuss the proposed briefing schedule and format. In that conversation, I conveyed a proposal for Coordinating Petitioners' word allotment.

11. On August 12, 2020, Ms. Meckenstock emailed Ms. Kolman inquiring when the Agencies intended to respond to Coordinating Petitioners' proposed schedule and format. Ms. Kolman responded the same day by email and indicated that the Agencies did not yet have a response.

12. Also on August 12, 2020, Mr. Dertke emailed Ms. Meckenstock and me a partial response (Attach. 2) to our letter of July 31, 2020, respecting administrative records. In the response, the Agencies agreed that their administrative records include two of the seven categories of materials described in the letter (even when the materials do not appear in the Agencies' certified indexes); agreed that parties could cite to materials in a third category; and stated the Agencies' position that a fourth category of missing materials—namely, certain materials related to interagency review of EPA's and NHTSA's rules—is not part of either Agency's administrative record. With respect to the other three categories of materials and the letter's request that EPA certify that its administrative record for its rule includes NHTSA's complete administrative record, the Agencies stated an intent to respond as soon as possible.

13. On August 14, 2020, I left a voicemail with Ms. Kolman inquiring if the Agencies had a response to Coordinating Petitioners' proposed schedule and format. Ms. Kolman responded by email the same day and indicated that the Agencies did not yet have a response.

14. On August 17, 2020, Ms. Meckenstock emailed Mr. Dertke inquiring when the Agencies intended to respond to the remaining administrative-record requests in our letter of July 31, 2020. Mr. Dertke did not respond to this email.

15. On August 18, 2020, I emailed Ms. Kolman to inquire if the Agencies had a response to Coordinating Petitioners' proposed schedule and format. Ms. Kolman responded the same day and indicated that the Agencies did not yet have a response.

16. On August 19, 2020, Ms. Meckenstock emailed Mr. Dertke stating that petitioners were prepared to seek this Court's intervention on the remaining administrative-record requests if the Agencies did not respond by August 20, 2020.

17. On August 20, 2020, Mr. Dertke emailed Ms. Meckenstock and me a second response (Attach. 3) to our letter of July 31, 2020, respecting administrative records. In the response, the Agencies agreed that three of the remaining four categories of materials cited in the letter are part of their administrative records, including sources cited in the notices of proposed and final rulemaking, preliminary and final regulatory impact statements, and (for NHTSA) draft and final environmental impact statements—even if those materials are omitted from the certified indexes. The Agencies stated that they would be willing to work with petitioners to locate materials in this category that

petitioners cannot not find in the public domain. The Agencies did not agree to certify that the administrative record for EPA's rule includes NHTSA's administrative record.

18. On August 21, 2020, I emailed Mr. Dertke asking that the Agencies commit to produce any undocketed source cited in the Agencies' notices of proposed or final rulemaking, their preliminary or final regulatory impact statements, or NHTSA's draft or final environmental impact statement, within two business days of a party's request.

19. On August 24, 2020, Mr. Dertke emailed Ms. Meckenstock and me to relate a commitment from the Agencies to use their best efforts to expeditiously produce any undocketed, cited source upon any petitioner's request.

20. Also on August 24, 2020, Ms. Kolman emailed Ms. Meckenstock and me to relate that the Agencies could not provide a response to Coordinating Petitioners' proposed schedule or briefing format until all petitioners had proposed word allotments for their merits briefs.

21. On August 25, 2020, Public Interest Organization Petitioners and certain State and Local Government Petitioners moved that this Court complete or supplement the Agencies' administrative records with six interagency-review materials.

22. On August 27, 2020, Ms. Kolman emailed me and counsel for other petitioners to relate that the Agencies did not have a proposed briefing schedule or format and to request that other petitioners respond with their proposals.

23. On September 1, 2020, I emailed Mr. Dertke on behalf of Environmental Defense Fund with a letter asking that the Agencies produce as expeditiously as possible,

and in no event later than September 8, 2020, three undocketed sources cited in the Agencies' notice of final rulemaking but not included in the Agencies' certified indexes.

24. On September 4, 2020, all petitioners jointly moved that this Court establish a briefing schedule and format.

25. On September 9, 2020, Mr. Dertke emailed with NHTSA's partial response to Environmental Defense Fund's letter of September 1, 2020. NHTSA stated that one of the requested sources (appendices to a source cited in the Agencies' notice of final rulemaking) is not part of its administrative record. NHTSA directed me to a website with a link to a second requested source. Mr. Dertke indicated that NHTSA did not yet have a response on the third requested source.

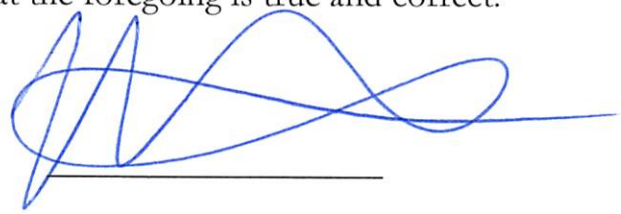
26. On September 10, 2020, I emailed Mr. Dertke inquiring when the Agencies intended to produce the third source requested in Environmental Defense Fund's letter of September 1, 2020. I received no response to this email.

27. On September 14, 2020, Ms. Kolman emailed counsel for all parties to ask for positions on the Agencies' cross-motion to establish a briefing schedule and format. This was the first occasion on which the Agencies shared a proposed schedule and format with Coordinating Petitioners.

28. On September 15, 2020, I emailed Mr. Dertke again inquiring when the Agencies intended to produce the third source requested in Environmental Defense Fund's letter of September 1, 2020. On September 16, 2020, Mr. Dertke emailed me to relate

that NHTSA did not yet have a response regarding that source. I had not received any such response from EPA or NHTSA at the time I executed this declaration.

I declare under penalty of perjury that the foregoing is true and correct.



Matthew Littleton

Executed on September 21, 2020, in Washington, D.C.

Attachment 1

07/31/2020 Letter from M. Elaine Meckenstock and Matthew Littleton to Chloe Kolman

July 31, 2020

By electronic mail

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Re: *Competitive Enterprise Institute v. NHTSA*, D.C. Cir. No. 20-1145 (and consolidated cases)

Dear Ms. Kolman:

Petitioner California (in Case No. 20-1167) and Public-Interest Petitioners (in Case Nos. 20-1168 and -1169) write concerning the Certified Indices of Record (Indices) filed by EPA and NHTSA on July 6, 2020. The Indices omit numerous materials that form part of the record for judicial review of *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 Rule). We write to request that EPA and NHTSA both file amended Indices including these materials. Alternatively, for some categories of materials indicated below, petitioners would accept certification statements accompanying the amended Indices confirming that the materials form part of the record for judicial review.

Please respond no later than **August 12, 2020**, specifying which materials discussed herein EPA and NHTSA agree are part of their administrative records for the Final Rule; and, where EPA or NHTSA disagrees, explaining the basis for their exclusion. After that date, petitioners intend to move that the D.C. Circuit compel completion or supplementation of the record if necessary.

Following extensive efforts, we have identified the following categories of materials that appear to be omitted or excluded from the Indices improperly:

A. Sources cited in EPA and NHTSA decision documents

The agencies' proposed and final decision documents cite numerous sources without providing docket identification numbers, and many of these sources are not obviously listed in the Indices. Petitioners' efforts to determine which of these sources are in the Indices have been complicated

by the number of sources for which the agencies failed to provide docket identification numbers and the agencies' inconsistent, and often incomplete, citations or descriptions.
After extensive efforts to match sources to entries in the Indices, petitioners have been unable to find matches for more than 150 cited sources. *See* Attach. A. Because the agencies failed to "adequately describ[e]" several hundred other docket entries that petitioners have been unable to locate in the available time,[1] petitioners' list of missing sources almost certainly does not comprise a complete list of the sources the agencies have improperly omitted from their Indices.

Petitioners request that EPA and NHTSA certify that each source cited in the Proposed or Final Rule, Preliminary or Final Regulatory Impact Analysis, or Draft or Final Environmental Impact Statement is part of each agency's administrative record; or, in the alternative, that each agency amend its Index to list all sources cited in any of these documents.

For multiple sources cited in the Final Rule and Final Regulatory Impact Statement, incomplete citations,[2] broken hyperlinks,[3] and missing footnotes[4] make it impossible to match the sources to the items listed in the Indices, and indeed prevent petitioners from identifying and accessing the original sources at all. *See* Attach. A (listing several examples). Petitioners request that, in addition to certifying that all these sources are part of the record for judicial review, EPA and NHTSA identify and provide a means of access to all sources listed in Attachment A **no later than August 21, 2020**. Petitioners also request that the agencies commit to doing the same for other such sources should petitioners continue to be unable to identify or access them based on the agencies' citations or links, no later than five business days after receiving petitioners' requests for them to do so.

B. Attachments to comment letters

Numerous attachments to public comments were mailed to one or both agencies in hard copy or on electronic media, in many cases because the attachments were too voluminous to submit via regulations.gov. For example, the California Air Resources Board submitted numerous attachments to its October 26, 2018, comment via a DVD mailed to the agencies. *See* Attach. B (index of these attachments). Based on petitioners' review, most of these attachments were not docketed. Moreover, the Indices often refer to entries as "Comment submitted by [commenter name]" and are ambiguous as to whether attachments to the comment are also included. Petitioners request that EPA and NHTSA certify that, for any public comment listed in their Indices, attachments to that comment (whether docketed or not) are part of each agency's administrative record; or, in the alternative, that the Indices be amended to list all attachments.

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[1] Fed. R. App. P. 15(b)(1)(B).
[2] *E.g.*, 85 Fed. Reg. at 24, 604 n.1583 (citing "Barry, et al. (1995)").
[3] *E.g.*, *id.* at 24,611 n.1621 (citing https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=pet&s=emm_epm0_pte_nusdpg&f=m).
[4] *See id.* at 24,514 nn. 1258-59; *id.* at 24,848-49 (omitting nn. 2156-67 and accompanying text).

This request includes, without limitation, all sources identified in Appendix B-1 and B-2 of the Final Environmental Impact Statement.

C. Models relied upon for the Proposal, Final Rule, or Environmental Impact Statement

The Indices do not include the full versions of computer models (including inputs, outputs, documentation, core models, and processors) relied upon for the Proposed or Final Rule, Preliminary or Final Regulatory Impact Analysis, or Draft or Final Environmental Impact Statement (e.g., CAFE model, NEMS for AEO 2018 and 2019, MOVES, and GREET). Petitioners request that EPA and NHTSA certify that all elements of these models are part of each agency's administrative record; or, in the alternative, that the Indices be amended to list all elements of these models.

D. Large datasets

Petitioners request that EPA and NHTSA certify that large datasets considered by the agencies (e.g., NHTSA's Fatality Analysis Reporting System crash data) are part of each agency's administrative record in their entirety; or, in the alternative, that the Indices be amended to list such datasets in their entirety.

E. Documents docketed but not posted on regulations.gov

Both agencies' Indices contain several docket entries whose content is not posted in the docket available at regulations.gov.[5] Petitioners ask that, upon request, EPA and NHTSA commit to timely identifying these sources and providing them to petitioners.

F. Amendments and corrections to the Final Rule

Petitioners request that EPA and NHTSA amend their Indices to include the amendments to the Final Rule published at 85 Fed. Reg. 22,609 (Apr. 23, 2020), and the correction to the Final Rule published at 85 Fed. Reg. 40,901 (July 8, 2020).

G. Interagency-review materials

Petitioners request that EPA and NHTSA amend their Indices to include interagency-review materials that were or should have been made public pursuant to 42 U.S.C. § 7607(d)(4)(B)(ii) and/or Executive Order 12,866; materials publicly released by Senator Thomas Carper that prompted EPA's Inspector General to commence an evaluation (Project No. OA&E-FY20-0269)

[5] *E.g.*, EPA-HQ-OAR-2018-0283-0212; EPA-HQ-OAR-2018-2083-4213.

of "procedural irregularities surrounding the promulgation of the [Final Rule]"; and materials that EPA officials have submitted to the Inspector General in connection with that evaluation. Petitioners request that the agencies make public, and list in amended Indices, any other documents that are properly part of the record for judicial review but that have not been made public or listed in the Indices.

H. Coextensive records

NHTSA's Index is accompanied by a statement certifying, without limitation, that NHTSA's administrative record incorporates EPA's administrative record. EPA's Index is accompanied by a statement certifying that EPA's administrative record incorporates comments made to NHTSA. Petitioners request that EPA certify, without limitation, that its administrative record includes NHTSA's administrative record; or else specify which materials in NHTSA's administrative record—including materials in NHTSA's certified index for its NEPA analysis—are excluded from EPA's administrative record, and explain why.

* * *

Thank you for your attention. Please reach out to us if you would like to discuss anything raised in this letter.

Sincerely,

/s/ M. Elaine Meckenstock
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Attachment 2

08/12/2020 Response of Daniel Dertke to
M. Elaine Meckenstock and Matthew Littleton

U.S. Department of Justice

Environment and Natural Resources Division

LJG:DRD
DJ # 90-5-2-3-21713

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August 12, 2020

By E-mail

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Re: *Competitive Enterprise Institute v. NHTSA*, D.C. Cir. No. 20-1145 (and consolidated cases)

Dear Elaine and Matt,

Thank you for your July 31, 2020, letter regarding the administrative record for EPA's and NHTSA's April 30, 2020, final rule. The agencies are still reviewing some of your requests and intend to respond as soon as possible. However, at this time I can address four of the eight categories in your letter.

In category B, you state that attachments to public comment letters were either not docketed, or the docket entry is ambiguous as to whether attachments are included. You identify as an example a DVD submitted by CARB containing numerous attachments listed in Attachment B to your letter. Although attachments are not separately listed in the certified indices, they are listed in the corresponding docket entries in regulations.gov, and EPA and NHTSA confirm that for any public comment listed on their indices, attachments to that comment are included in the administrative record. This includes the attachments to CARB's

October 26, 2018, comment submitted via DVD. *See* EPA-HQ-OAR-2018-0283-5842 in regulations.gov (noting as an attachment "media and physical item"). I also note that your Attachment B includes the EPA and NHTSA docket/index numbers for a few entries such as on pp. 22-24 that may have been separately submitted by CARB and thereby have their own separate docket/index entries.

In category E, you state that both agencies' indices contain entries whose content is not posted in the docket available at regulations.gov. However, the two examples you give, EPA-HQ-OAR-2018-0283-0212 and EPA-HQ-OAR-2018-0283-4213, are copyrighted materials. The reason why the content of these documents is restricted, and the process for inspecting them at each agency's Docket Center, is clearly posted in the docket entries on regulations.gov. Copyright restrictions limit the agencies' ability to make such material available on regulations.gov.

In category F, you ask that the agencies include the April 23 amendments and the July 8 correction notices. Although the April 23 amendments are a separate regulatory action which was not part of the SAFE 2 final rule, these are both publicly available Federal Register notices and we do not object to anyone citing them in this petition for review.

In category G, you ask that the agencies include interagency-review materials, materials released by Senator Carper, and documents that EPA has submitted to its Inspector General. We believe those materials are not part of the administrative record unless otherwise listed on either agency's index.

The agencies are reviewing your categories A, C, D, and H, and as noted above intend to respond as soon as possible.

Sincerely,

Daniel R. Dertke

Daniel R. Dertke
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section

cc: Hunter B. Oliver, National Highway Traffic Safety Administration
Mark Kataoka and Seth Buchsbaum, Office of General Counsel, U.S. EPA

Attachment 3

08/20/2020 Response of Daniel Dertke to
M. Elaine Meckenstock and Matthew Littleton

U.S. Department of Justice

Environment and Natural Resources Division

LJG:DRD
DJ # 90-5-2-3-21713

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August 20, 2020

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Re: *Competitive Enterprise Institute v. NHTSA*, D.C. Cir. No. 20-1145 (and consolidated cases)

Dear Elaine and Matt,

This is to follow up on my August 12 response to your July 31, 2020, letter regarding the administrative record for EPA's and NHTSA's April 30, 2020, final rule. I previously addressed categories B, E, F, and G, and can now address categories A, C, D, and H.

In category A, EPA and NHTSA confirm that each source cited in the Proposed or Final Rule, or the Preliminary or Final Regulatory Impact Analysis, is part of each agency's administrative record. Each source cited in the Draft or Final Environmental Impact Statement is part of NHTSA's administrative record. However, unless listed on EPA's certified index or otherwise addressed herein, each source cited in the Draft or Final Environmental Impact Statement is not part of EPA's administrative record.

You note that the preamble for the Final Rule is missing footnotes 1258-1259, and is missing footnotes 2156-2167 and accompanying text. This appears to be an inadvertent omission. The original language and footnotes appear verbatim in the Final Regulatory Impact Analysis. Missing footnotes 1258-1259 should correspond to footnotes 1384-1385 in the Final Regulatory Impact Analysis (at page 678). Missing footnotes 2156-2167 should correspond to footnotes 2282-2293 in the Final Regulatory Impact Analysis (at pages 1221-1223).

Finally, for category A you also note that there are incomplete citations and broken hyperlinks in the Final Rule and/or in the Final Regulatory Impact Analysis, and your Attachment A lists several examples. However, many of the documents you identified consist of full citations to public documents that should be readily identifiable and are equally available to Petitioners as to the agencies. Could you clarify whether you are asking the agencies to produce each of the documents listed in your Attachment A, or whether there is a subset of documents that you cannot locate and anticipate needing? We are willing to work with you on this point but further discussion would be helpful.

In categories C and D you ask about computer models (and their elements) and large datasets (in their entirety). EPA and NHTSA confirm that any computer model or dataset the agency considered or relied on is included in that agency's administrative record, although one of the models contains copyrighted components (which I've addressed separately).

In category H you ask whether EPA's administrative record includes NHTSA's administrative record in its entirety. It does not. For example, as noted above, EPA's administrative record does not necessarily include sources cited in the Draft or Final Environmental Impact Statement.

In addition, in your August 19 email you requested a clarification regarding copyrighted materials. EPA and NHTSA confirm that if the parties cite to any of those materials in their briefs, the agencies will not object to the inclusion of those materials in the joint appendix. However, a separate volume may be necessary, either filed under seal or subject to a protective order. The agencies are willing to investigate that issue further if copyrighted materials are cited in briefs.

Please let me know if you have any questions regarding the agencies' responses.

Sincerely,

Daniel R. Dertke

Daniel R. Dertke
U.S. Department of Justice
Environment & Natural Resources Division

Environmental Defense Section

cc:
Hunter B. Oliver, Office of the Chief Counsel, National Highway Traffic Safety Administration
Mark Kataoka and Seth Buchsbaum, Office of General Counsel, U.S. EPA