

ORAL ARGUMENT NOT YET SCHEDULED

**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,

ALLIANCE FOR AUTOMOTIVE
INNOVATION, et al.

Intervenors for Respondents.

No. 20-1145 (consolidated with
Nos. 20-1167, 20-1168, 20-1169,
20-1173, 20-1174, 20-1176, 20-
1177, 20-1230)

**BRIEF OF AMICUS CURIAE CONSUMER REPORTS
IN SUPPORT OF COORDINATING PETITIONERS**

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Dated: January 21, 2021

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Except for the following, all Petitioners, Respondents, Intervenors, and Amici Curiae appearing before this Court are as listed in the Briefs of Petitioners Center for Biological Diversity, *et al.*, City and County of Denver, *et al.*, and National Coalition for Advanced Transportation, *et al.*

Amici Curiae:

Consumer Reports; and

The Coalition to Protect America's National Parks, the National Parks Conservation Association, New Mexico Wilderness Alliance; and

American Thoracic Society, American Lung Association, American Medical Association, Medical Society of the District of Columbia; and

National League of Cities, U.S. Conference of Mayors, Annapolis, Boulder County, Glen Rock, Harris County, Texas, Houston, Minneapolis, Pittsburgh, Providence, Saint Paul, Salt Lake City, Santa Fe, Mayors of Durham, Fayetteville, Las Cruces, and Phoenix;

Andrew Dessler, Philip Duffy, Michael MacCracken, James McWilliams, Noelle Eckley Selin, Drew Shindell, James Stock, Kevin Trenberth, and Gernot Wagner;

Michael Greenstone; and

Institute for Policy Integrity at New York University School of Law.

B. Rulings Under Review

References to the rulings at issue appear in the Briefs of Petitioners Center for Biological Diversity, *et al.*, City of County of Denver, *et al.*, and National Coalition for Advanced Transportation, *et al.*, filed January 14, 2021.

C. Related Cases

Amicus Curiae Consumer Reports adopts the statement of related cases presented in the Briefs of Petitioners Center for Biological Diversity, *et al.*, City of County of Denver, *et al.*, and National Coalition for Advanced Transportation, *et al.*, filed January 14, 2021.

Dated: January 21, 2021

/s/ Cale Jaffe

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. Rule 26.1, Amicus Curiae Consumer Reports submits the following disclosure statement:

Consumer Reports is a non-profit, non-stock corporation with six million, individual members. Consumer Reports has no parent corporations and no publicly held corporation owns 10% or more of its stock. It was established in 1936 to empower and inform consumers.

Dated: January 21, 2021

/s/ Cale Jaffe

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42 U.S.C § 7521(a)	6, 7, 9, 26
42 U.S.C. § 4370m <i>et seq.</i>	24
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Other Authorities

Benjamin Preston, Consumer Reports, <i>Alcohol Detection Systems in Cars Could Prevent Thousands of Deaths Each Year</i> , https://www.consumerreports.org/car-	
--	--

safety/alcohol-detection-systems-in-cars-could-prevent-many-deaths/ (July 23, 2020).....	22
Benjamin Preston, Consumer Reports, <i>EVs Offer Big Savings Over Traditional Gas-Powered Cars</i> , https://www.consumerreports.org/hybrids-evs/evs-offer-big-savings-over-traditional-gas-powered-cars/ , (Oct. 8, 2020).....	17, 20, 21
Benjamin Preston, Consumer Reports, <i>Hot New Electric Cars are Coming Soon</i> , https://www.consumerreports.org/hybrids-evs/hot-new-electric-cars-are-coming-soon/ , (Nov. 12, 2020).....	20
Chris Harto, Consumer Reports, <i>Electric Vehicle Ownership Costs: Today's Electric Vehicles Offer Big Savings for Consumers</i> , https://advocacy.consumerreports.org/wp-content/uploads/2020/10/EV-Ownership-Cost-Final-Report-1.pdf , (Oct. 2020).....	27
Chris Harto & Shannon Baker-Branstetter, Consumer Reports, <i>The Un-SAFE Rule Update: Weakening Fuel Economy & Emissions Standards Costs Consumers Money in Every State</i> , https://advocacy.consumerreports.org/wp-content/uploads/2019/11/CRs-Updated-Analysis-of-the-UnSAFE-Rule.pdf (Nov. 2019).....	15
Chris Harto, <i>et al.</i> , Consumer Reports, <i>The Un-SAFE Rule: How a Fuel-Economy Rollback Costs Americans Billions in Fuel Savings and Does Not Improve Safety</i> , https://advocacy.consumerreports.org/wp-content/uploads/2019/08/The-Un-SAFE-Rule-How-a-Fuel-Economy-Rollback-Costs-Americans-Billions-in-Fuel-Savings-and-Does-Not-Improve-Safety-2.pdf , (Aug. 2019).....	13, 14
Christine Kormos & Reuven Sussman, Consumers Union, <i>Auto Buyers' Valuation of Fuel Economy: A Randomized Stated Choice Experiment</i> , https://consumersunion.org/wp-content/uploads/2018/06/FINAL-Kormos-and-Sussman-2018-%E2%80%93-Auto-buyers-valuation-of-fuel-economy.pdf , (June 12, 2018).....	11
Comment Letter from Lisa Jacobson, President, Business Council for Sustainable Energy, to Hon. Elaine L. Chao, Secretary, U.S. Dep't of Transportation, Docket ID No: EPA-HQ-OAR-2018-0283, https://www.bcse.org/images/2018%20Clean%20Air/Final%20BCSE%20Comments%20on%20SAFE%20Rule%2010.26.pdf , (filed Oct. 26, 2018).....	19
Comments of Generation180 and the Environmental Law and Community Engagement Clinic, <i>Ex Parte: Electrification of Motor Vehicles</i> , Virginia State Corporation Commission, Case No. PUR-2020-00051, https://scc.virginia.gov/docketsearch/DOCS/4nkq01!.PDF (filed June 23, 2020).....	18

Consumer Reports, <i>About Us: What We Do / Media</i> , https://www.consumerreports.org/cro/about-us/what-we-do/media-page/index.htm (last visited Dec. 21, 2020).....	2
Consumer Reports, <i>About Us: What We Do</i> , https://www.consumerreports.org/cro/about-us/what-we-do/index.htm (last visited Jan. 13, 2021).....	2
Consumer Reports, <i>Behind the Scenes at Consumer Reports' Test Track</i> , https://www.consumerreports.org/video/view/cars/auto-test-track/2144550984001/behind-the-scenes-at-consumer-reports-test-track/ (last visited Jan. 13, 2021).....	4
Consumer Reports, <i>Best and Worst New Cars: Highlights from our tests and surveys</i> , https://www.consumerreports.org/new-cars/best-and-worst-new-cars/ (Feb. 20, 2020).....	3
Consumer Reports, <i>Consumer Reports calls on Congress to stop federal rollbacks of fuel economy standards</i> , https://advocacy.consumerreports.org/press_release/consumer-reports-calls-on-congress-to-stop-federal-rollbacks-of-fuel-economy-standards/ , (June 21, 2019).....	22
Consumer Reports, <i>Cover Worthy: 80 Years of Consumer Reports Magazine</i> , https://www.consumerreports.org/consumer-protection/cover-worthy-80-years-of-consumer-reports-magazine/ (last visited Jan. 13, 2021).....	3
Consumer Reports, <i>CR finds DOT and EPA made questionable choices in trying to justify the rollback of federal fuel economy and vehicle emissions standards</i> , https://advocacy.consumerreports.org/research/cr-finds-dot-and-epa-made-questionable-choices-in-trying-to-justify-the-rollback-of-federal-fuel-economy-and-vehicle-emissions-standards/ , (Apr. 14, 2020).....	15
Consumer Reports, <i>Electric Cars 101: The Answers to All Your EV Questions</i> , https://www.consumerreports.org/hybrids-evs/electric-cars-101-the-answers-to-all-your-ev-questions/ , (Nov. 5, 2020).....	20
Consumer Reports, <i>Nearly 9 in 10 Americans Want Automakers to Raise Fuel Efficiency According to Latest Consumers Union Survey</i> , http://consumersunion.org/news/2017-fuel-economy-survey , (June 29, 2017).....	10
Consumer Reports, <i>New Survey Finds Strong Consumer Interest in Improved Fuel Economy, Especially Among Growing Segment of SUV and Pickup Truck Owners</i> , https://advocacy.consumerreports.org/press_release/fueleconomysurvey2019/ , (Aug. 23, 2019).....	5

Consumer Reports, Press Release, https://advocacy.consumerreports.org/press_release/new-analysis-from-cr-finds-that-the-most-popular-electric-vehicles-cost-less-to-own-than-the-best-selling-gas-powered-vehicles-in-their-class/ (Oct. 8, 2020)	14
Consumer Reports, <i>Supplemental Comments in Response to Alliance Critique Regarding Auto Buyers' Valuation of Fuel Economy Report Submitted in Docket ID Nos. NHTSA-2018-0067; EPA-HQ-OAR-2018-0283 (The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, Docket Nos. EPA-HQ-OAR-2018-0283 and NHSTA-2018-0067, https://beta.regulations.gov/document/EPA-HQ-OAR-2018-0283-7460, (Feb. 27, 2019)</i>	5
Consumer Reports, <i>Three big myths worth busting for consumers when it comes to fuel economy standards</i> , https://advocacy.consumerreports.org/research/fuel-economy-mythbuster/ , (Aug. 9, 2016)	13
Consumers Union, <i>Comments on NHTSA and EPA's Notice of Proposed Rulemaking "Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, Docket Nos. EPA-HQ-OAR-2018-0283 and NHSTA-2018-0067, https://beta.regulations.gov/document/EPA-HQ-OAR-2018-0283-6175 (Oct. 26, 2018)</i>	4, 6, 10, 11, 12, 17, 27
Consumers Union, <i>Comments on NHTSA and EPA's Notice of Proposed Rulemaking "Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, Docket Nos. EPA-HQ-OAR-2018-0283 and NHSTA-2018-0067, https://beta.regulations.gov/document/EPA-HQ-OAR-2018-0283-6180, (Oct. 26, 2018)</i>	4, 6, 10, 11, 12, 17, 27
Gwen Arnold et al., Consumers Union, <i>Content Analysis of Unique Auto Ads in the United States: 2005, 2012, 2015, and 2017</i> , at 22, Fig. 21, https://advocacy.consumerreports.org/wp-content/uploads/2018/10/Final-Report-Auto-Ad-Content-Analysis-080318-1-1-1.pdf , (Oct. 19, 2018)	26
Insurance Institute for Highway Safety, <i>NHTSA urged to require rear seat belt warning systems</i> , https://www.iihs.org/news/detail/nhtsa-urged-to-require-rear-seat-belt-warning-systems , (Dec. 5, 2019)	21
Jeff S. Bartlett and Gabe Shenar, Consumer Reports, <i>How Consumer Reports Tests Cars</i> , https://www.consumerreports.org/cars-how-consumer-reports-tests-cars/ , (Dec. 15, 2020)	3, 4
Jeff S. Bartlett, Consumer Reports, <i>The Most Fuel-Efficient SUVs</i> , https://www.consumerreports.org/suvs/the-most-fuel-efficient-suvs-best-mpg/ , (Jan. 6, 2021).	10, 11

Jon Linkov, Consumer Reports, <i>Special Report: The Electric Car Comes of Age</i> , https://www.consumerreports.org/hybrids-evs/electric-car-comes-of-age/ , (Aug. 8, 2019).....	18, 19
Malcolm Hazel, <i>et al.</i> , Consumer Reports, <i>Investigation of Relationship between Fuel Economy and Owner Satisfaction</i> , https://advocacy.consumerreports.org/wp-content/uploads/2016/06/CU-MPG- Satisfaction-report-final.pdf , (June 2016)	12
Mike Wollschlager, <i>Going Under the Hood at Consumer Reports' Test Track</i> , CONNECTICUT MAGAZINE, https://www.connecticutmag.com/the-connecticut- story/going-under-the-hood-at-consumer-reports-test-track/article_65599bd8- 00aa-11e9-9c12-13a2a3a4ec77.html , (Dec. 20, 2018)	3
News Release, Consumer Reports, <i>Consumer Reports Puts Emphasis on Safety, Vehicle Price In Naming Its 10 Top Pick Cars, SUVs, Trucks For 2020</i> https://www.consumerreports.org/media-room/press-releases/2020/02/consumer- reports-puts-emphasis-on-safety-vehicle-price-in-naming-its-10-top-pick-cars- suvs-trucks-for-2020/ (Feb. 20, 2020).....	3
NHTSA, <i>FAQS: SAFE Vehicles Final Rule</i> , https://www.nhtsa.gov/corporate- average-fuel-economy/faq-safe-vehicles-rule , (last visited December 26, 2020).	17
NHTSA, <i>Final Report: Relationships Between Fatality Risk, Mass, and Footprint in Model Year 2000-2007 Passenger Cars and LTVs</i> , https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/811665 (Aug. 2012)	26
Nic Lutsey, The International Council on Clean Transportation, <i>California's Continued Electric Vehicle Market Development</i> , https://theicct.org/sites/default/files/publications/CA-cityEV-Briefing- 20180507.pdf , (May 2018).....	19
Nick Yekikian, <i>Every 2021 Ford Mustang Mach-E First Edition Has Sold Out</i> , MOTOR TREND https://www.motortrend.com/news/every-2021-ford-mustang- mach-e-first-edition-sold/ , (Dec 30, 2019).....	20
U.S. Dep't of the Treasury, <i>Tax Cuts for the American Family</i> , https://home.treasury.gov/policy-issues/top-priorities/tax-cuts-and-jobs-act/tax- cuts-for-the-american-family (last visited Jan. 5, 2021)	24
U.S. Dep't of Transportation, <i>Fixing America's Surface Transportation Act or "FAST Act</i> , https://www.fhwa.dot.gov/fastact/milestones.cfm (last visited Jan. 16, 2021).....	24

U.S. Dep’t of Transportation, NHTSA, *Summary of Fuel Economy Performance (Public Version)*, <https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/performance-summary-report-12152014-v2.pdf>, (Dec. 14, 2014)9

Veronica Penney, *Electric Cars Better for the Planet – and Often Your Budget, Too*, NEW YORK TIMES, <https://www.nytimes.com/interactive/2021/01/15/climate/electric-car-cost.html>, (Jan. 15, 2021)21

GLOSSARY

National Highway Traffic Safety Administration	NHTSA
Environmental Protection Agency	EPA
Corporate Average Fuel Economy	CAFE
Clean Air Act	CAA
Energy Policy and Conservation Act	EPCA
Electric vehicle	EV
Plug-in hybrid electric vehicle	PHEV
Vehicle-mile-traveled	VMT

Consumer Reports (formerly Consumers Union), by and through undersigned counsel, hereby files this brief as Amicus Curiae in support of Coordinating Petitioners.¹ All parties in the consolidated action have indicated their consent to the filing of this brief. *See* ECF No. 1876643 (Dec. 21, 2020). Pursuant to D.C. Cir. R. 29(d), undersigned counsel states that a separate brief is necessary due to Amicus Curiae’s distinct expertise and interests. Consumer Reports, as outlined in its “Statement of Identity and Interests of the Amicus Curiae,” has a unique capacity to aid the Court in understanding the automobile market from a consumer’s perspective.

Respectfully, Amicus Curiae posits that the National Highway Traffic Safety Administration and the Environmental Protection Agency have relied upon material misapprehensions of the consumer market in developing the 2020 CAFE standards and mobile-source regulations for greenhouse gases. *See* 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) (“The standards set by this action ... recogniz[e] the realities of the marketplace and consumers’ interest in purchasing vehicles that meet all of their diverse needs.”). Accordingly, Amicus Curiae certifies

¹ Pursuant to Fed. R. App. P. 29(a)(4)(E), undersigned counsel for Amicus Curiae states that no party or party’s counsel authored this brief in whole or in part, and no other person besides Amicus Curiae or their counsel contributed money intended to fund preparing or submitting the brief.

that joining a multi-party brief would not be practicable and respectfully seeks leave of this Court to file a separate brief as Amicus Curiae.

I. STATEMENT OF IDENTITY AND INTERESTS OF THE AMICUS CURIAE

Consumer Reports is an independent, nonprofit member organization that empowers and informs consumers, while helping policymakers create a fair and just marketplace for all. Founded in 1936 to provide customers with credible information necessary to make informed decisions, Consumer Reports boasts more than six million members. It produces a widely respected magazine that covers a diverse array of consumer products and consumer-oriented industries.² In addition to publishing the print magazine, Consumer Reports also maintains an award-winning website that publishes daily articles related to consumer news and insights. The website averages more than 15 million unique visitors monthly and provides subscriber-only resources to nearly half of the organization's members.³

From its inception more than eighty years ago, Consumer Reports has published research on new motor vehicles. It currently evaluates characteristics that

² See Consumer Reports, *About Us: What We Do*, <https://www.consumerreports.org/cro/about-us/what-we-do/index.htm> (last visited Jan. 13, 2021).

³ See Consumer Reports, *About Us: What We Do / Media*, <https://www.consumerreports.org/cro/about-us/what-we-do/media-page/index.htm> (last visited Dec. 21, 2020).

are important to consumers, including fuel economy, reliability, and safety.⁴ Every year, Consumer Reports disseminates a “Best and Worst Cars, Trucks, and SUVs” issue⁵ that has long focused on the goal of helping consumers “identify the best vehicle for their needs, at an affordable price and with all the latest safety features.”⁶ As part of its testing regime, Consumer Reports purchases approximately fifty vehicles each year to evaluate at the organization’s 327-acre facility in Connecticut.⁷ Consumer Reports’ ratings on fuel economy, reliability, safety and other attributes

⁴ See Consumer Reports, *Cover Worthy: 80 Years of Consumer Reports Magazine*, <https://www.consumerreports.org/consumer-protection/cover-worthy-80-years-of-consumer-reports-magazine/> (highlighting an October 1945 feature on “Buying a New Car” and noting that the organization first began testing cars in 1936) (last visited Jan. 13, 2021).

⁵ See Consumer Reports, *Best and Worst New Cars: Highlights from our tests and surveys*, <https://www.consumerreports.org/new-cars/best-and-worst-new-cars/> (Feb. 20, 2020).

⁶ See News Release, Consumer Reports, *Consumer Reports Puts Emphasis on Safety, Vehicle Price In Naming Its 10 Top Pick Cars, SUVs, Trucks For 2020* <https://www.consumerreports.org/media-room/press-releases/2020/02/consumer-reports-puts-emphasis-on-safety-vehicle-price-in-naming-its-10-top-pick-cars-suvs-trucks-for-2020/> (Feb. 20, 2020).

⁷ See Jeff S. Bartlett and Gabe Shenar, Consumer Reports, *How Consumer Reports Tests Cars*, <https://www.consumerreports.org/cars-how-consumer-reports-tests-cars/>, (Dec. 15, 2020); Mike Wollschlager, *Going Under the Hood at Consumer Reports’ Test Track*, CONNECTICUT MAGAZINE, https://www.connecticutmag.com/the-connecticut-story/going-under-the-hood-at-consumer-reports-test-track/article_65599bd8-00aa-11e9-9c12-13a2a3a4ec77.html, (Dec. 20, 2018).

are relied upon as authoritative thanks in part to evaluations that test vehicle performance, handling, and off-road capability of light trucks and SUVs.⁸

Consumer Reports maintains special expertise in fuel economy and understands its relationship to the statutory mandates for the National Highway Traffic Safety Administration (“NHTSA”) and the U.S. Environmental Protection Agency (“EPA”) (collectively, the “Agencies”).⁹ Leveraging its expertise, Consumer Reports has provided comments to the Agencies on fuel efficiency and greenhouse gas pollution standards for mobile sources, including comments on the 2009 proposal and 2010 standards (covering Model Years 2012-2016), the prior standards adopted in 2012 (covering Model Years 2017-2025), and the 2020 rollback (covering Model Years 2021-2026). Consumer Reports filed comments on October

⁸ See Jeff S. Bartlett and Gabe Shenar, Consumer Reports, *How Consumer Reports Tests Cars*, <https://www.consumerreports.org/cars-how-consumer-reports-tests-cars/>, (Dec. 15, 2020); Consumer Reports, *Behind the Scenes at Consumer Reports' Test Track*, <https://www.consumerreports.org/video/view/cars/auto-test-track/2144550984001/behind-the-scenes-at-consumer-reports-test-track/> (last visited Jan. 13, 2021).

⁹ See Consumers Union, *Comments on NHTSA and EPA's Notice of Proposed Rulemaking "Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, Docket Nos. EPA-HQ-OAR-2018-0283 and NHSTA-2018-0067*, <https://beta.regulations.gov/document/EPA-HQ-OAR-2018-0283-6175>; *id.* at <https://beta.regulations.gov/document/EPA-HQ-OAR-2018-0283-6180>, (providing a series of Consumer Reports analyses as Attachments 1-7, 10-12, 21-30, 35) (Oct. 26, 2018).

26, 2018,¹⁰ and on February 27, 2019,¹¹ to provide the Agencies with data on consumer acceptance of new technology, consumer support for standards that reduce greenhouse gas pollution and improve fuel efficiency, and consumer willingness to pay for such improvements. Survey data that Consumer Reports submitted to the Agencies during the public comment process on the 2020 rulemaking documented that 73% of consumers driving SUVs or light trucks were interested in improved fuel efficiency.¹² Improved fuel economy was, in fact, the very first attribute that survey participants identified when asked what they wanted in their next vehicle, with 88% of respondents agreeing that automakers should improve fuel economy for all types of vehicles.¹³

In sum, the data demonstrates that consumers value fuel-saving technologies and are willing to pay for them. At the same time, and for the reasons outlined in

¹⁰ *See id.*

¹¹ Consumer Reports, *Supplemental Comments in Response to Alliance Critique Regarding Auto Buyers' Valuation of Fuel Economy Report Submitted in Docket ID Nos. NHTSA-2018-0067; EPA-HQ-OAR-2018-0283 (The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, Docket Nos. EPA-HQ-OAR-2018-0283 and NHSTA-2018-0067, <https://beta.regulations.gov/document/EPA-HQ-OAR-2018-0283-7460>, (Feb. 27, 2019).*

¹² Consumer Reports, *New Survey Finds Strong Consumer Interest in Improved Fuel Economy, Especially Among Growing Segment of SUV and Pickup Truck Owners, https://advocacy.consumerreports.org/press_release/fueleconomysurvey2019/, (Aug. 23, 2019).*

¹³ *Id.*

comments submitted to the Agencies, an unregulated market cannot deliver the necessary fuel-efficiency savings that customers seek.¹⁴ Stringent Corporate Average Fuel Economy (“CAFE”) standards and EPA-established air pollution regulations are therefore needed to remedy market failures. Further, Congress has obligated the Agencies to develop technology-forcing standards that reduce air pollution and improve fuel economy. *See* 42 U.S.C § 7521(a); 49 U.S.C. § 32902(b)(2)(B); 49 U.S.C. § 32902(f).

Accordingly, Consumer Reports urged the Agencies to adopt the no-action alternative in its proposed rulemaking and for NHTSA to finalize the Model Year 2022-2025 CAFE standards in the prior rule adopted in 2012. *See* 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,624 (Oct. 15, 2012) (hereinafter the “Prior Rule”). Consumer Reports also supported the Agencies’ approach in 2010. *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010). As noted in Consumer Reports’ comments, the 2020 regulations at issue here, 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), (the “2020 Rule”) represent a rollback from the annual increase in stringency required under the

¹⁴ *See* Consumers Union, *supra* note 9 at Attachment 14.

Prior Rule and stand in stark contrast to the steady progress that the CAFE and EPA mobile-source regulations are intended to deliver. Today, Consumer Reports continues to express support for stronger CAFE standards and air pollution reductions for mobile sources, consistent with the Prior Rule. The organization reiterates its concern that the 2020 Rule marks a retreat from the Prior Rule and would be unlawful.

II. BACKGROUND ON THE PRIOR RULE

Analysis of the 2020 Rule first necessitates a brief review of the Prior Rule that the Agencies seek to unwind. In the Clean Air Act (“CAA”) and in the Energy Policy and Conservation Act (“EPCA”), as amended by the Energy Independence and Security Act of 2007, Congress directed the Agencies to develop fuel economy standards and emissions reduction regulations that serve two overarching goals: reducing air pollution from mobile sources and improving the fuel efficiency of consumers’ motor vehicles. *See* 42 U.S.C § 7521(a) (“The Administrator shall by regulation prescribe (and from time to time revise) ... standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles ... which reflect the greatest degree of emission reduction achievable...”); 49 U.S.C. § 32902(b)(2)(B) (“For model years 2021 through 2030, the average fuel economy required to be attained by each fleet of passenger and non-passenger automobiles

manufactured for sale in the United States shall be the maximum feasible average fuel economy standard for each fleet for that model year.”).

These overlapping but distinct programs were designed to improve fuel economy and reduce air pollution. *See Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (“EPA has been charged with protecting the public’s ‘health’ and ‘welfare,’ 42 U.S.C. § 7521(a)(1), a statutory obligation wholly independent of DOT’s mandate to promote energy efficiency. *See Energy Policy and Conservation Act*, § 2(5), 89 Stat. 874, 42 U.S.C. § 6201(5).”). The Agencies correctly applied these twin standards in the Prior Rule, recognizing that more stringent standards were necessary and achievable as “market forces ... may not be strong enough to bring about the necessary fuel conservation which a national energy policy demands.” *Ctr. for Auto Safety v. NHTSA*, 793 F.2d 1322, 1340 (D.C. Cir. 1986) (citing S. Rep. No. 94-179, at 9 (1975)).

Indeed, the Prior Rule recognized that the CAFE program and CAA mobile-source requirements had stagnated for a quarter century and needed to be towed out of the proverbial ditch. The first CAFE standards for passenger cars were set by NHTSA at 18 miles per gallon (“mpg”) combined for the 1978 Model Year; passenger vehicle fuel efficiency requirements progressed steadily to 27.5 mpg by

the 1985 Model Year.¹⁵ Yet from 1985 through 2010, passenger vehicle CAFE standards remained largely flat at a combined 27.5 mpg, while those for light trucks hovered at just over 20 mpg. Similarly, the EPA resisted its obligation to set greenhouse gas pollution standards for mobile sources, wrongly believing that the CAA gave it the freedom to delay action indefinitely. *See Massachusetts v. EPA*, 549 U.S. at 506-09, 532-33. The Prior Rule, therefore, represented a long overdue effort to properly implement congressional directives for fuel efficiency mandates under the EPCA and air pollution regulations for mobile sources under the CAA.

III. ARGUMENT

A. The Agencies Unlawfully Rely on a Misguided Assessment of Upfront Costs.

The Agencies ignore congressional mandates to (1) reduce air pollution from mobile sources and (2) improve fuel efficiency, by misconstruing factors related to achievability under the CAA and economic practicability under the EPCA. *See* 49 U.S.C. § 32902(f); 42 U.S.C. § 7521(a)(1). *See also Massachusetts v. EPA*, 549 U.S. at 533 (exercise of agency “‘judgment’ is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits.”); *Ctr. for Auto Safety*, 793 F.2d at 1341 (“[I]t would clearly be impermissible for NHTSA

¹⁵ U.S. Dep’t of Transportation, NHTSA, *Summary of Fuel Economy Performance (Public Version)*, <https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/performance-summary-report-12152014-v2.pdf>, (Dec. 14, 2014).

to rely on consumer demand to such an extent that it ignored the overarching goal of fuel conservation.”).

Specifically, the Agencies materially misapprehend consumer demand and consumer acceptance of fuel-efficient technologies. Thus, they erroneously reject suggestions to adopt more nuanced analyses of customers’ willingness to pay for greater fuel economy: to account for manufacturer differences (85 Fed. Reg. at 24,625-26), opportunities for advertising campaigns (*Id.* at 25,115), and academic literature on the economics of consumer decision-making (*Id.* at 25,132-33). The Agencies’ broad-scale reluctance also ignores data that Consumer Reports placed before them, which documented consumers’ strong preference and willingness to pay for higher fuel economy.¹⁶

In a nationally representative survey from 2018, Consumer Reports found that fuel economy was *the number one attribute* that vehicle owners targeted for improvement.¹⁷ Fuel economy topped the list of factors that American drivers identified as having the most room for progress, beating out purchase price,

¹⁶ See Consumer Reports, *Nearly 9 in 10 Americans Want Automakers to Raise Fuel Efficiency According to Latest Consumers Union Survey*, <http://consumersunion.org/news/2017-fuel-economy-survey>, (June 29, 2017). See also Consumers Union, *supra* note 9 at Attachment 17.

¹⁷ See Consumers Union, *supra* note 9 at Attachment 3 (providing 2018 Automotive Fuel Economy Survey Report). See also Jeff S. Bartlett, Consumer Reports, *The Most Fuel-Efficient SUVs*, <https://www.consumerreports.org/suvs/the-most-fuel-efficient-suvs-best-mpg/>, (Jan. 6, 2021).

maintenance costs, connectivity, vehicle comfort, passenger room, safety, cargo space, reliability, horsepower, vehicle size, off-road capability, style, and handling.¹⁸ Strikingly, fuel economy was flagged as needing improvement *almost twice as often* as purchase price.¹⁹ The pressing need to address fuel efficiency stood out among a remarkably diverse range of automobile consumers, ranking first in the survey across each of three income groups studied, each of four regions, and among both Republicans and Democrats.²⁰

The message from the survey data was clear, as Amicus Curiae Consumer Reports outlined in comments filed with the Agencies. Improving fuel economy is not only “acceptable to consumers,” it is something for which new vehicle buyers are willing to pay.²¹ Consumer Reports has documented a positive correlation

¹⁸ See Consumers Union, *supra* note 9 at Attachment 15. See also Jeff S. Bartlett, Consumer Reports, *The Most Fuel-Efficient SUVs*, <https://www.consumerreports.org/suvs/the-most-fuel-efficient-suvs-best-mpg/>, (Jan. 6, 2021).

¹⁹ See *id.*

²⁰ Consumers Union, *supra* note 9 at Attachment 3.

²¹ Consumers Union, *supra* note 9 at Attachment 4. See also Christine Kormos & Reuven Sussman, Consumers Union, *Auto Buyers’ Valuation of Fuel Economy: A Randomized Stated Choice Experiment*, <https://consumersunion.org/wp-content/uploads/2018/06/FINAL-Kormos-and-Sussman-2018-%E2%80%93-Auto-buyers-valuation-of-fuel-economy.pdf>, (June 12, 2018).

between consumer satisfaction and higher fuel efficiency, holding other factors constant.²²

Although this research and other robust evidence²³ were presented to the Agencies before the 2020 Rule was finalized, they curiously argued that “literature has offered little consensus about consumers’ willingness-to-pay for greater fuel economy....” 85 Fed. Reg. at 24,604. The Agencies’ reliance on alleged “uncertainty” about willingness to pay is unsupported by the administrative record. *See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (an agency cannot “merely recite the terms ‘substantial uncertainty’ as a justification for its actions” and instead must offer a “‘rational connection between the facts found and the choice made.’” (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))).

The Agencies further seek to justify the rollback of the Prior Rule by positing that consumers are “reluctant to pay the upfront and certain higher prices for models offering better fuel economy when the future savings they expect to realize are more distant and less certain.” 85 Fed. Reg. at 24,611. Yet that assumption is not supported by the evidence because most consumers acquire new cars through leasing

²² Malcolm Hazel, *et al.*, Consumer Reports, *Investigation of Relationship between Fuel Economy and Owner Satisfaction*, <https://advocacy.consumerreports.org/wp-content/uploads/2016/06/CU-MPG-Satisfaction-report-final.pdf>, (June 2016).

²³ Consumers Union, *supra* note 9.

or financing. Thus, the purchase price is not paid “upfront” at all; it is spread out over several years. The Agencies acknowledge that 85 percent of consumers finance a new vehicle purchase. *See* 85 Fed. Reg. at 24,706. This is a critical detail, as leasing and multi-year financing options, extending out as many as five or seven years from the date of vehicle acquisition, change the analysis of overall cost of ownership. Leasing and financing “spread the increased vehicle cost over the life of the loan, while the gas savings a consumer enjoys are immediate.”²⁴

Most importantly, consumers recoup the additional cost of fuel-efficient technologies well within the average loan period.²⁵ Analysis of potential rollback scenarios by Consumer Reports in 2019 showed that, “under all rollback scenarios, consumers who finance their vehicle will start losing money on day one, despite lower sticker prices for their vehicles.”²⁶ In contrast, another analysis by Consumer Reports found that when purchasing electric vehicles, “overall out-of-pocket-costs for many consumers who finance will be lower in their *very first year of ownership*,

²⁴ Consumer Reports, *Three big myths worth busting for consumers when it comes to fuel economy standards*, <https://advocacy.consumerreports.org/research/fuel-economy-mythbuster/>, (Aug. 9, 2016).

²⁵ *Id.* at Table ES-4 (showing payback period and net consumer savings for an average vehicle).

²⁶ *See* Chris Harto, *et al.*, Consumer Reports, *The Un-SAFE Rule: How a Fuel-Economy Rollback Costs Americans Billions in Fuel Savings and Does Not Improve Safety*, <https://advocacy.consumerreports.org/wp-content/uploads/2019/08/The-Un-SAFE-Rule-How-a-Fuel-Economy-Rollback-Costs-Americans-Billions-in-Fuel-Savings-and-Does-Not-Improve-Safety-2.pdf>, (Aug. 2019).

despite the fact that the upfront cost of electric vehicles remains higher today than their gas-powered counterparts.”²⁷

The Prior Rule recognized that “[fuel] savings immediately outweigh[ed] the cost of a credit purchase ... even in the first month of ownership....” *See* 77 Fed. Reg. at 62,298. The 2020 Rule would reverse course and increase net costs for Model Year 2026 cars by an average of \$3,300 over the life of a vehicle.²⁸ The lion’s share—more than 70 percent—of the total net cost to consumers from weaker fuel-economy standards would fall on drivers of light trucks and sport utility vehicles.²⁹ Consumer Reports also alerted the Agencies to research finding that the Prior Rule, had it remained in place from 2017 to 2025, would have delivered “net present value (NPV) consumer benefits of \$660 billion, result[ed] in the sales of 3.5 million additional vehicles through 2035, and save[d] 450 billion gallons of fuel.”³⁰ Amicus Curiae have translated the nationwide data into a net cost for the individual

²⁷ Consumer Reports, Press Release, https://advocacy.consumerreports.org/press_release/new-analysis-from-cr-finds-that-the-most-popular-electric-vehicles-cost-less-to-own-than-the-best-selling-gas-powered-vehicles-in-their-class/ (Oct. 8, 2020) (emphasis added).

²⁸ *See* Chris Harto, *et al.*, Consumer Reports, *The Un-SAFE Rule: How a Fuel-Economy Rollback Costs Americans Billions in Fuel Savings and Does Not Improve Safety*, <https://advocacy.consumerreports.org/wp-content/uploads/2019/08/The-Un-SAFE-Rule-How-a-Fuel-Economy-Rollback-Costs-Americans-Billions-in-Fuel-Savings-and-Does-Not-Improve-Safety-2.pdf>, (Aug. 2019).

²⁹ *See id.*

³⁰ *Id.* at 13 (“Analysis of the Effects of Changes to Fuel-Economy Standards”).

consumer, and the results are sobering. The 2020 Rule would be equivalent to adding a fuel tax of 39 cents per gallon.³¹

To state the obvious, consumers who finance vehicles (*i.e.*, most of us) would be immediately worse off under the 2020 Rule than under the Prior Rule. And part of the reason for the 2020 Rule's adverse impact on affordability is the disconnect between the cost of a new vehicle and fuel efficiency. The Agencies' action in rolling back the Prior Rule irrationally contradicts their own findings on the total cost of ownership.³² The 2020 rollback is therefore arbitrary and capricious because it artificially inflates some costs (capital costs) while downplaying other costs that go into the purchase price and overall cost of ownership (*e.g.*, fuel costs, resale value). *See* 85 Fed. Reg. at 24,997 (Table VII-86). The Agencies' cost-benefit analysis unlawfully puts "a thumb on the scale by undervaluing the benefits and overvaluing the costs of more stringent standards." *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1198 (9th Cir. 2008).

³¹ *See* Chris Harto & Shannon Baker-Branstetter, Consumer Reports, *The Un-SAFE Rule Update: Weakening Fuel Economy & Emissions Standards Costs Consumers Money in Every State*, at 5, Table 1, <https://advocacy.consumerreports.org/wp-content/uploads/2019/11/CRs-Updated-Analysis-of-the-UnSAFE-Rule.pdf> (Nov. 2019).

³² *See* Consumer Reports, *CR finds DOT and EPA made questionable choices in trying to justify the rollback of federal fuel economy and vehicle emissions standards*, <https://advocacy.consumerreports.org/research/cr-finds-dot-and-epa-made-questionable-choices-in-trying-to-justify-the-rollback-of-federal-fuel-economy-and-vehicle-emissions-standards/>, (Apr. 14, 2020).

What is more, even under their own flawed cost-benefit analysis, the Agencies' 2020 rollback of the Prior Rule still fails to save money. In the 2020 Rule, the Agencies posit that net benefits "straddle zero" while ignoring that the median point of the "straddle" is decidedly on the negative side for the carbon dioxide reduction program required by the CAA. *See* 85 Fed. Reg. at 24,176. Fleetwide societal net benefits vary from a claimed net benefit of \$6.4 billion at a 7 percent discount rate to a \$22 billion net cost at a 3 percent discount rate. The median point on the Agencies' "straddle" amounts to a net societal cost of \$7.8 billion. Drilling down on the impact for automobile consumers, the net savings resulting from the 2020 Rule for purchasers of Model Year 2030 vehicles over the lifetime of those vehicles are *negative*. *See* 85 Fed. Reg. at 24,991-98.

The 2020 Rule costs consumers money. The data relied upon by the Agencies shows that consumers are, at best, no better off under the 2020 Rule, while estimates of fuel efficiency and greenhouse emissions are undeniably worse.

B. The Agencies Misconstrue Consumer Acceptance of New Technologies.

As Consumer Reports explained in public comments, the Agencies have misunderstood the data on consumer acceptance, and unfortunately have relied on vague and unsupported assertions about consumer resistance to electric vehicles ("EVs"), plug-in hybrid electric vehicles ("PHEVs"), and more fuel-efficient internal combustion engines. *See* 85 Fed. Reg. at 24,242. Thus, the Agencies

erroneously insist that “consumer demand” requires a retreat from the Prior Rule. *Id.* at 25,134. In a “Frequently Asked Questions” explainer on its website, NHTSA doubled down on this misguided view, positing that “Americans are choosing to buy more crossovers and SUVs rather than compact passenger cars *and* ‘microcars’ the 2012 rule assumed people would flock toward.”³³ On this point, the Agencies are flatly incorrect.

First, consumer surveys report that car buyers’ number-one desire is for greater fuel efficiency from larger and mid-size vehicles. And the strongest fuel-efficiency gains are being made in the crossovers/SUV segment, as that is where the opportunities for improvement are greatest.³⁴ In addition, improvements to traditional internal combustion engines will also provide the bulk of fuel-efficiency gains, a fact that was central to the analysis underpinning the Prior Rule. 77 Fed. Reg. at 62,841 (discussing technologies that “offer the potential to move gasoline combustion efficiency closer to its thermodynamic limit”). Consumers want popular crossover vehicles, *and* they want those vehicles to be more affordable to operate. The Prior Rule was set to deliver on those targets.

³³ See NHTSA, *FAQS: SAFE Vehicles Final Rule*, <https://www.nhtsa.gov/corporate-average-fuel-economy/faq-safe-vehicles-rule>, (last visited December 26, 2020) (emphasis added).

³⁴ Consumers Union, *supra* note 9. See also Benjamin Preston, *Consumer Reports, EVs Offer Big Savings Over Traditional Gas-Powered Cars*, Consumer Reports <https://www.consumerreports.org/hybrids-evs/evs-offer-big-savings-over-traditional-gas-powered-cars/>, (Oct. 8, 2020).

Second, EVs are finding wider acceptance in the market and are aiding corporate efforts to meet the standards from the Prior Rule. The market is eager to embrace electrification in the light-truck market, with adoption of EVs, PHEVs, and traditional hybrid-electric powertrains in popular vehicles. *See* 77 Fed. Reg. at 62,841 (discussing evidence in the Prior Rule). Consumer Reports has identified explosive growth in EV sales in recent years, with U.S. numbers increasing from 1,919 EVs sold in 2010 to 233,411 in 2018.³⁵ The Commonwealth of Virginia also provides a case study on the growth in EV registration over the last decade. The Virginia DMV reports that the per-year EV registration increased from 538 EVs registered in the year 2009 to over 14,000 registered in the year 2019.³⁶ Market analyses anticipate that the share of EVs sold in the United States will grow to 7.6 percent of the market in 2025, driven by consumer interest and expanding charging infrastructure.³⁷ Comments submitted to the Agencies by the Business Council for

³⁵ Jon Linkov, Consumer Reports, *Special Report: The Electric Car Comes of Age*, <https://www.consumerreports.org/hybrids-evs/electric-car-comes-of-age/>, (Aug. 8, 2019).

³⁶ *See* Comments of Generation180 and the Environmental Law and Community Engagement Clinic, *Ex Parte: Electrification of Motor Vehicles*, Virginia State Corporation Commission, Case No. PUR-2020-00051, <https://scc.virginia.gov/docketsearch/DOCS/4nkq01!.PDF> (filed June 23, 2020).

³⁷ Jon Linkov, Consumer Reports, *Special Report: The Electric Car Comes of Age*, <https://www.consumerreports.org/hybrids-evs/electric-car-comes-of-age/>, (Aug. 8, 2019).

Sustainable Energy document that in 2017 sales of EVs increased 23 percent.³⁸ The Business Council’s findings are consistent with a Consumer Reports survey, which found that 36% of prospective car buyers are considering an EV or PHEV for their next car.³⁹

Contrary to the Agencies’ flawed assumptions, growth in the EV market is not predicated on consumer adoption of “microcars.” Legacy automobile manufacturers BMW, General Motors, and Volvo have already transitioned their fleets to greater electric vehicle shares (9 to 11 percent) than what is required for the fleet to meet California’s 2025 regulation⁴⁰ and surpassing what would be needed under the Prior Rule. *See* 77 Fed. Reg. at 62,824 (Table III-17). Importantly, electrification options serving the light-truck market are among the most highly anticipated for Model Years 2021 and 2022. The fully electric Ford Mustang Mach-E, a midsize SUV, sold out its limited run of Special Editions before production or

³⁸ Comment Letter from Lisa Jacobson, President, Business Council for Sustainable Energy, to Hon. Elaine L. Chao, Secretary, U.S. Dep’t of Transportation, Docket ID No: EPA-HQ-OAR-2018-0283, <https://www.bcse.org/images/2018%20Clean%20Air/Final%20BCSE%20Comments%20on%20SAFE%20Rule%2010.26.pdf>, (filed Oct. 26, 2018).

³⁹ Jon Linkov, Consumer Reports, *Special Report: The Electric Car Comes of Age*, <https://www.consumerreports.org/hybrids-evs/electric-car-comes-of-age/>, (Aug. 8, 2019).

⁴⁰ Nic Lutsey, The International Council on Clean Transportation, *California’s Continued Electric Vehicle Market Development*, <https://theicct.org/sites/default/files/publications/CA-cityEV-Briefing-20180507.pdf>, (May 2018).

delivery dates were even announced.⁴¹ Other Model Year 2021 family-sized crossovers include the Volvo XC40 Recharge, the Volkswagen I.D. 4, the Nissan Ariya, the Audi Q4 e-tron, the Chevrolet Bolt EUV, and the Mercedes EQ series of SUVs.⁴² The coming year also promises to present breakthrough opportunities with all-electric pickup trucks, including the GMC/Hummer EV, the Ford F-150 Electric, and the Tesla Cybertruck.⁴³

That the industry is gravitating toward these larger-bodied EVs is not surprising, given the huge benefits these vehicles deliver when compared to their internal-combustion engine counterparts: lower fuel costs, cheaper maintenance, and quicker acceleration thanks to the instant availability of torque from an electric motor.⁴⁴ According to a Consumer Reports analysis, “After seven years of ownership, an EV in the car category will save its owner \$4,700, while overall

⁴¹ Nick Yekikian, *Every 2021 Ford Mustang Mach-E First Edition Has Sold Out*, MOTOR TREND <https://www.motortrend.com/news/every-2021-ford-mustang-mach-e-first-edition-sold/>, (Dec 30, 2019).

⁴² Benjamin Preston, Consumer Reports, *EVs Offer Big Savings Over Traditional Gas-Powered Cars*, <https://www.consumerreports.org/hybrids-evs/evs-offer-big-savings-over-traditional-gas-powered-cars/>, (Oct. 8, 2020).

⁴³ Benjamin Preston, Consumer Reports, *Hot New Electric Cars are Coming Soon*, <https://www.consumerreports.org/hybrids-evs/hot-new-electric-cars-are-coming-soon/>, (Nov. 12, 2020).

⁴⁴ Consumer Reports, *Electric Cars 101: The Answers to All Your EV Questions*, <https://www.consumerreports.org/hybrids-evs/electric-cars-101-the-answers-to-all-your-ev-questions/>, (Nov. 5, 2020).

savings for electric pickup owners balloons to almost \$9,000.”⁴⁵ By ignoring these trends, the Agencies have adopted a rollback of the Prior Rule that is arbitrary, capricious, and not supported by the record.⁴⁶ *See American Wild Horse Preservation Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017) (explaining that the Administrative Procedure Act “obligates the agency to examine all relevant factors and record evidence, and to articulate a reasoned explanation for its decision.”); *see also Mashpee Wampanoag Tribe v. Bernhardt*, 466 F. Supp. 3d 199, 213-14 (D.D.C. 2020) (“Under the APA, a reviewing court shall ‘hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’ 5 U.S.C. § 706(2)(A).”).

C. The Agencies’ Analysis of the “Rebound” Effect on Vehicle Safety is Illogical.

There are a multitude of vehicle safety improvements that NHTSA could promote via regulation: everything from rear-seatbelt reminders⁴⁷ to automatic

⁴⁵ Benjamin Preston, Consumer Reports, *EVs Offer Big Savings Over Traditional Gas-Powered Cars*, <https://www.consumerreports.org/hybrids-evs/evs-offer-big-savings-over-traditional-gas-powered-cars/>, (Oct. 8, 2020).

⁴⁶ *See* Veronica Penney, *Electric Cars Better for the Planet – and Often Your Budget, Too*, NEW YORK TIMES, <https://www.nytimes.com/interactive/2021/01/15/climate/electric-car-cost.html>, (Jan. 15, 2021).

⁴⁷ Insurance Institute for Highway Safety, *NHTSA urged to require rear seat belt warning systems*, <https://www.iihs.org/news/detail/nhtsa-urged-to-require-rear-seat-belt-warning-systems>, (Dec. 5, 2019).

emergency braking systems⁴⁸ to on-board systems that detect drunk drivers.⁴⁹ Instead of prioritizing these common-sense technological improvements, the Agencies have taken the unprecedented step of trying to address vehicle safety by hoping Americans will simply drive less. *See* 85 Fed. Reg. at 24,742.

The Agencies arrive at this approach through an illogical application of the “rebound” effect. Fuel-efficiency improvements under the Prior Rule lower costs for consumers, allowing them to save money. Those savings could be spent on automobile trips or other activities. For the Agencies, the possibility of more driving is treated as a *safety cost* to society. A better, more fuel-efficient car is labeled by the Agencies as a worse car—not because it is less safe, but because it is driven more often and thereby exposes a driver to more opportunities for being involved in a traffic accident. Any vehicle, no matter how fuel efficient or safe, is more likely to be involved in a traffic fatality the more it is driven. That simple truism, however, cannot justify confusing vehicle-miles-traveled (“VMT”) with engineering factors (*e.g.*, lightweighting) that can be assessed for their impacts on safety.

⁴⁸ Consumer Reports, *Consumer Reports calls on Congress to stop federal rollbacks of fuel economy standards*, https://advocacy.consumerreports.org/press_release/consumer-reports-calls-on-congress-to-stop-federal-rollbacks-of-fuel-economy-standards/, (June 21, 2019).

⁴⁹ Benjamin Preston, Consumer Reports, *Alcohol Detection Systems in Cars Could Prevent Thousands of Deaths Each Year*, <https://www.consumerreports.org/car-safety/alcohol-detection-systems-in-cars-could-prevent-many-deaths/> (July 23, 2020).

In the Prior Rule, the Agencies had continued with the longstanding practice of measuring the safety-related impacts of any change to fuel economy standards by analyzing the number of fatalities *per* VMT. *See* 77 Fed. Reg. at 62,746 (2012 regulation that provided a VMT-neutral analysis of safety). *See also* 75 Fed. Reg. at, 25,490 (2010 regulation that accounted for VMT when modeling tailpipe emissions, but not treating VMT as part of design safety); The reliance on a VMT-neutral perspective allowed the Agencies to control for other factors unrelated to safety and isolate the role that any technological changes might play in affecting the safety of vehicle design. The 2020 Rule rejects this historically accepted boundary. As such, the Agencies' approach to use the rebound effect to assess the relative safety of light-duty vehicles is irrational.

The Agencies acknowledge that "increased driving associated with the rebound effect is a consumer choice that reveals the benefit of additional travel." 85 Fed. Reg. at 24,742. In plain language, the Agencies recognize that more fuel-efficient cars are cheaper to operate. They consume less fuel, saving consumers money that can be spent on other activities, including automobile travel. That additional travel, of course, does not have any relation to whether the vehicle's construction is safe. Reliance on the rebound effect to evaluate safety must be considered arbitrary and capricious, as the Agencies are unable to articulate a

“rational explanation for [their] actions.” *Carus Chemical Co. v. EPA*, 395 F.3d 434, 441 (D.C. Cir. 2005).

The error in the Agencies’ analysis of the rebound metric is made plain when applied to other government actions. Under the Agencies’ approach, any program that saves consumers’ money would leave Americans with more money to spend on travel, resulting in more on-road fatalities that would be tracked as a “cost.” For example, it is claimed that the 2018 Tax Cuts and Jobs Act could save a typical family of four “over \$2,000.”⁵⁰ A portion of those savings naturally would be spent on additional travel. Following the Agencies’ logic, that travel would have to be tracked as a “cost” to the typical family since more mobility would lead to more deaths. Of course, this is not how the U.S. Department of Transportation analyzes safety-related impacts in other contexts. In implementing grants for highway improvements under the Fixing America’s Surface Transportation (“FAST”) Act, 42 U.S.C. § 4370m *et seq.*, the Federal Highway Administration observed that the law “improves mobility on America’s highways, creates jobs and supports economic growth....”⁵¹ The Administration did not account for improvements to “mobility on

⁵⁰ U.S. Dep’t of the Treasury, *Tax Cuts for the American Family*, <https://home.treasury.gov/policy-issues/top-priorities/tax-cuts-and-jobs-act/tax-cuts-for-the-american-family> (last visited Jan. 5, 2021).

⁵¹ U.S. Dep’t of Transportation, *Fixing America’s Surface Transportation Act or “FAST Act*, <https://www.fhwa.dot.gov/fastact/milestones.cfm> (last visited Jan. 16, 2021).

America's highways" as a safety-related cost, nor should it have. Yet that is precisely the error the Agencies make in the 2020 Rule.

Despite NHTSA's assertion to the contrary, *see* 85 Fed. Reg. at 25,119, its analysis is premised on rolling back CAFE standards and air-pollution regulations for mobile sources in ways that will decrease driving—not make cars safer. Basic principles of administrative law prohibit the Agencies from pursuing such a path. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (explaining that a court must determine whether Agencies "examined 'the relevant data' and articulated 'a satisfactory explanation' for [their] decision, 'including a rational connection between the facts found and the choice made.'" (quoting *Motor Vehicle Mfrs. Ass'n. of U.S., Inc.*, 463 U.S. at 43)).

D. The Agencies' Analysis of Vehicle Mass is Wrong.

In addition to an illogical argument on the rebound effect, the Agencies also misapprehend the relationship between mass reduction in vehicles and traffic fatalities. The Agencies admit that "none of the estimated effects [from vehicle mass reduction] have 95-percent confidence bounds that exclude zero and thus are not statistically significant at the 95-percent confidence level." *See* 85 Fed. Reg. at 24,750. Instead of following the data and retaining the Prior Rule, the Agencies

abandoned the analytical rigor on which they had historically relied.⁵² Thus, they went forward with the rollback *despite* the lack of statistically significant data to support that decision. NHTSA cannot justify the rollback of the Prior Rule when the data fails to identify a statistically significant relationship between mass reduction and vehicle safety. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 52; *see also Burlington Truck Lines*, 371 U.S. at 168 (stating that agency must offer a “rational connection between the facts found and the choice made.”).

E. The Agencies Unlawfully Fail to Evaluate the Role of Marketing.

Finally, the Agencies err by ignoring the fact that consumer preference is not static. In doing so, they misconstrue “economic practicability” and the lead time required for compliance with the CAA standards. *See* 49 U.S.C. § 32902(f); 42 U.S.C § 7521(a)(2). Advertising can mold consumer preferences rather than simply fulfilling them, as illustrated by Consumer Reports’ analysis of advertisements from automobile manufacturers.⁵³ As Amicus Curiae explained to the Agencies, the automobile industry spends \$14 billion a year attempting to shape consumer

⁵² *See, e.g.*, NHTSA, *Final Report: Relationships Between Fatality Risk, Mass, and Footprint in Model Year 2000-2007 Passenger Cars and LTVs*, at I, <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/811665> (relying exclusively on 95% confidence bounds to identify “statistically significant” correlations) (Aug. 2012).

⁵³ Gwen Arnold et al., Consumers Union, *Content Analysis of Unique Auto Ads in the United States: 2005, 2012, 2015, and 2017*, <https://advocacy.consumerreports.org/wp-content/uploads/2018/10/Final-Report-Auto-Ad-Content-Analysis-080318-1-1-1.pdf>, (Oct. 19, 2018).

preferences.⁵⁴ Yet improvements in fuel economy and options for EVs and PHEVs rarely show up in manufacturers' advertising, highlighting the market failure that the Prior Rule had sought to correct.⁵⁵ *See* 77 Fed. Reg. at 63,105 (“If manufacturers assume that consumers value fuel economy less than consumers actually value fuel economy, there will be a demand pull for better fuel economy vehicles into the market, and by virtue of the final standards forcing manufacturers to increase better fuel economy product offerings; it is possible that sales could increase as a result.”).

In short, what consumers want is influenced to a great degree by consumer education, and the Agencies have a statutory obligation to educate consumers on fuel-efficient technologies. NHTSA is directed to “develop and implement by rule a consumer education program to improve consumer understanding of automobile performance,” regarding “fuel economy and greenhouse gas and other emissions over the useful life of the automobile.” *See* 49 U.S.C. § 32908(g)(1)(A)(i). The Agencies justify the rollback of the Prior Rule by leaning on the “realities of the marketplace.” 85 Fed. Reg. at 24,174. Yet in tasking NHTSA with consumer education, Congress explicitly recognized that marketplace preferences can and do change.

⁵⁴ *Id.* at 22, Fig. 21. *See also* *See* Consumers Union, *supra* note 9 at Attachment 5.

⁵⁵ *See* Chris Harto, Consumer Reports, *Electric Vehicle Ownership Costs: Today's Electric Vehicles Offer Big Savings for Consumers*, at 24 <https://advocacy.consumerreports.org/wp-content/uploads/2020/10/EV-Ownership-Cost-Final-Report-1.pdf>, (Oct. 2020).

Under the statute, the Secretary of Transportation was obligated to issue a final rule establishing the consumer education campaign “not later than 42 months after the date of the enactment of the Ten-in-Ten Fuel Economy Act,” which became law on Dec. 19, 2007. 49 U.S.C. § 32908(g)(4). NHTSA has abdicated this responsibility for more than twelve years. NHTSA’s refusal to implement this congressional directive has compounded its error in rolling back the Prior Rule. The Agencies cannot conclude that customers will reject EVs, PHEVs, and other fuel-efficient vehicles when NHTSA has failed in its initial obligation to promote consumer understanding of those vehicles.

IV. CONCLUSION

For the foregoing reasons, Amicus Curiae Consumer Reports supports Coordinating Petitioners and asks the Court to invalidate the 2020 Rule. Based on decades of experience working with consumers on these very issues, Consumer Reports maintains that the Agencies’ actions unlawfully ignore statutory mandates and rely on fundamental misunderstandings about consumer interests and safety impacts.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of this Court's order dated October 19, 2020 because it contains 6,114 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. Rule 32(e)(1), as determined by the word-counting feature of Microsoft Word.

This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of the Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, including serifs, using Microsoft Word 2016 in Times New Roman, 14-point font.

Dated: January 21, 2021

/s/ Cale Jaffe
Cale Jaffe

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system.

I certify that for all participants in these consolidated cases that are registered as CM/ECF users service will be accomplished by the CM/ECF system.

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