ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 19-1230, 19-1239, 19-1241,
19-1242, 19-1243, 19-1245, 19-1246,
19-1249, 20-1175, & 20-1178

UNION OF CONCERNED SCIENTISTS, *ET AL.*,

PETITIONERS

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,

RESPONDENT

PROOF AMICUS BRIEF OF LYFT, INC. IN SUPPORT OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), amicus Lyft, Inc. ("Lyft") certifies as follows:

Parties and Amici. Except for amici Climate Scientists, American Thoracic Society *et al.*, Professor Leah M. Litman, National Parks Conservation Association and Coalition to Protect America's National Parks, National League of Cities *et al.*, the Institute for Policy Integrity at New York University School of Law, the Edison Electric Institute, and Thomas C. Jorling *et al.*, all parties, intervenors, and amici appearing in this Court are listed in the Briefs for Petitioners.

Rulings Under Review. References to the ruling under review appear in the Briefs for Petitioners.

Related Cases. Other than the cases referenced in the Briefs for Petitioners, amicus is not aware of any related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Lyft, Inc. ("Lyft") certifies that Lyft, Inc. is a publicly-held corporation traded on the Nasdaq Global Select Market with no parent corporation. Based on Lyft's knowledge from publicly available U.S. Securities and Exchange Commission filings, Rakuten, Inc., a publicly held corporation traded on the Tokyo Stock Exchange, beneficially owns more than ten percent of Lyft's outstanding common stock.

July 6, 2020 /s/ Jared P. Marx

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GLOSSARY

EPA	Environmental Protection Agency
EPCA	Energy Policy and Conservation Act of 1975
GHG	Greenhouse Gas
LEV	Low-Emission Vehicle
NHTSA	National Highway Traffic Safety Administration
ZEV	Zero-Emission Vehicle

STATEMENT OF INTEREST, IDENTITY, AND AUTHORITY TO FILE

Lyft, Inc., is a company headquartered in San Francisco that offers users access to a variety of mobility options. Most prominently, Lyft provides an app-based rideshare platform that lets drivers and riders coordinate to offer and take car rides. The service is available to 95% of the people in the United States and also provides access to bicycles, electric scooters, rental cars, and mass transit. Lyft has made a unique commitment to environmental stewardship, and has committed to reach 100-percent electric vehicle usage on its ridesharing platform by 2030.

To reach that goal, Lyft needs zero-emission vehicles to be widely available and affordable, which is only possible with public policy support. Lyft is participating in this case because it believes that California must be able to maintain its leadership role in spurring environmental innovation through policies like its zero-emission vehicle mandate and greenhouse gas standards.

All parties in these consolidated cases have consented to the filing of amicus briefs in support of any party.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Lyft, Inc. states that its counsel at Harris, Wiltshire & Grannis LLP authored the following amicus brief. No party or their counsel contributed money with the intention of funding the preparation or submission of this brief. No person or entity other than Lyft, Inc. contributed money that was intended to fund the brief's preparation or submission.

ARGUMENT

I. California Should Remain Free to Unlock Private Sector Solutions to its Environmental Challenges.

Climate change is an existential threat that can no longer be ignored, and transportation is now the single largest source of planet-disrupting greenhouse gas pollution in the United States. It is also a major source of local air pollution that severely impacts the health of communities in California and across the nation. Lyft believes that ridesharing and other on-demand services—which have created tremendous value to the U.S. economy—can only continue to thrive if they are part of the solution to reducing emissions, not contributors to the problem. For this reason, Lyft has taken a bold leadership position in the industry and committed to transitioning 100% of the vehicles used by drivers on the Lyft platform to all-electric or other zero-emission technologies by 2030, as described below. But accelerating this transition—both for the cars that use the Lyft platform and across the transportation sector—requires strong government leadership to spur the widespread commercialization of new technologies. California has been the model of state leadership on environmental issues for decades, and it must be allowed to continue.

In 1979, this Court explained that when Congress enacted the Clean Air Act's motor vehicle provisions, Congress "intended [California] to continue and expand its pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program; in short, to act as a kind of laboratory for innovation." *Motor & Equip. Mfrs. Ass'n, Inc. v. E.P.A.*, 627 F.2d 1095, 1111 (D.C. Cir. 1979) ("*MEMA I*").

This is a role for which California is ideally suited. Anyone who has traveled to California understands two things about the State. One, it is a dynamic engine for technological innovation that drives economic growth. And, two, it is populated with metropolitan regions that, due to their geography and density, face competing challenges of mobility and air quality. For the past forty years, California has used the authority Congress gave it to attack this problem. It has served as a "laboratory for innovation" in environmental law and has driven technological change that has made cars cleaner, to the benefit of the nation as a whole. What is at stake in this case is whether California will remain free to play that indispensable role in protecting the

environment. This is important for Lyft and companies like it, because Lyft can't go it alone on environmental issues.

Lyft launched its ridesharing marketplace in California eight years ago with the goal of transforming the way people get around. By any measure, the experiment has succeeded: For example, in September 2018, it passed the one-billion-ride mark.[1] In 2015, only 15% of U.S. adults had ever used a service like Lyft, and one in three had never even heard of ridesharing.[2] Today, transportation network companies like Lyft are ubiquitous. To date, however, most of the vehicles that drivers operate while using the Lyft platform are gasoline-powered cars. Vehicles used for ridesharing are growing as a share of the total vehicle population, so even though vehicles that drivers use on the Lyft platform are newer and more efficient than average, efforts by forward-thinking companies like Lyft to reduce emissions can substantially impact greenhouse gas emissions and air quality conditions nationwide.

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[1] *See 2018 in Review: Putting Our Vision Into Action*, Lyft Blog (Jan. 3, 2019), https://blog.lyft.com/posts/2018/12/19/2018-year-in-review.

[2] Jingjing Jiang, *More Americans Are Using Ride-Hailing Apps*, Pew Research Center (Jan. 4, 2019), https://www.pewresearch.org/fact-tank/2019/01/04/more-americans-are-using-ride-hailing-apps/.

Lyft has recognized the importance of operating as an environmentally responsible company from its inception. Lyft has launched a product feature that enables eco-conscious riders in two pilot regions (Seattle and Portland, Oregon) to request that they be matched with a driver using an electric or hybrid vehicle—"Green Mode"—which riders have used over 300,000 times.[3] Lyft has also partnered with rental car companies who rent thousands of hybrid and electric vehicles to drivers through the "Express Drive" rental car program, and through that program also recently made the largest single deployment of electric vehicles in Colorado history.[4]

Most significantly, Lyft recently committed to transition *all* vehicles used on its platform to all-electric or other zero-emission technologies by 2030.[5] Lyft views this transition as an environmental

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[3] *See Making Cities More Livable with Electric Vehicles*, Lyft Blog (Feb. 6, 2019), https://blog.lyft.com/posts/2019/2/6/making-cities-more-liveable-with-electric-vehicles.

[4] *Working Toward a Fully Electric Future—and Challenging Partners to Do the Same*, Lyft Blog (Nov. 14, 2019), https://www.lyft.com/blog/posts/lyft-denver-ev-2019.

[5] Lyft, *The Path to Zero Emissions: 100% Electric Vehicles by 2030* (June 17, 2020), https://lyft-impact-assets.s3.amazonaws.com/images/path-to-zero-emissions.pdf.

and commercial imperative. The shift will achieve a reduction of an estimated 16 million metric tons of greenhouse gas emissions and savings of up to $10 billion for drivers and riders. The environmental and economic benefits will accrue to those in lower-income communities and communities of color in particular—66 percent of drivers on the Lyft platform self-identified as members of a minority group in 2018[6]—who both face a higher risk of harm from air pollution (particularly due to smog and asthma) and are underserved by other forms of affordable, reliable transportation.[7]

But Lyft and companies like it can't meet goals like this by themselves. Automobiles have run on gasoline for a hundred years, and leaving the internal combustion engine behind will require forward-thinking governments to generate sustained action from industry. That is why Lyft appears as amicus here.

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[6] Lyft, *Economic Impact Report* (2020), https://www.lyftimpact.com/impact/communities/expanded.

[7] *See* American Lung Association, *State of the Air* (2020), http://www.stateoftheair.org/key-findings/people-at-risk.html; Laura Bliss, *Lyft Is Reaching L.A. Neighborhoods Where Taxis Wouldn't*, Bloomberg CityLab (June 29, 2018), https://www.bloomberg.com/news/articles/2018-06-29/lyft-is-closing-mobility-gaps-for-low-income-users-in-l-a.

Lyft supports the Petitioners here. In light of Lyft's particular interest in zero-emission vehicles, however, we focus primarily on issues specific to California's zero-emissions vehicle mandate.

II. EPCA Does Not Preempt California's Zero-Emissions Vehicle Mandate.

NHTSA argues that the Energy Policy and Conservation Act (EPCA) preempts California's zero-emission vehicles standards both expressly and impliedly. *See The Safer and Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021—2026 Passenger Cars and Light Trucks,* 83 Fed. Reg. 42,986, 43,238 (Aug. 24, 2018) ("Proposal") (analysis incorporated by reference in final order). NHTSA is wrong.

A. Express Preemption Does Not Apply to the Zero-Emission Vehicle Mandate.

49 U.S.C. § 32919(a) expressly preempts only state laws "related to **fuel economy** standards." (emphasis added). NHTSA acknowledges, however, *The Safer and Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program*, 84 Fed. Reg. 51,310, 51,321 (Sep. 27, 2019) ("Order"), that:

- EPCA defines "**fuel economy**" as the "**average number of miles traveled by an automobile for each gallon of**

gasoline (or equivalent amount of other **fuel**) used." 49 U.S.C. § 32901(a)(11) (emphasis added).

- "**Fuel**" in turn means "(A) **gasoline**; (B) **diesel oil**; or (C) **other liquid or gaseous fuel** that the Secretary decides by regulation to include in this definition as consistent with the need of the United States to conserve energy." *Id.* at (a)(10) (emphasis added).
- By contrast, **electricity** and **hydrogen**, which power zero-emission vehicles, are defined as "**alternative fuel**," *id.* at (a)(1) (emphasis added), and have never been defined as "fuel" for purposes of the statute.

"Fuel economy" under EPCA thus refers only to the number of miles a vehicle will travel on a gallon of gasoline (or diesel), and does not apply to vehicles that run entirely on electricity or hydrogen fuel cells. California's zero-emission vehicle mandate therefore does not "relate to" any "fuel economy standards."

NHTSA does not argue that "fuel economy" means something other than this, but it does argue that the zero-emissions vehicle mandate nevertheless "*relate[s] to* fuel economy standards." Order at

51,321 (emphasis added). NHTSA provides literally no discussion of this in its Order, however, addressing it only by reference to its proposal. Order at 51,321 ("NHTSA explained the relationship between ZEV mandates and fuel economy standards in detail in the proposal and reiterates that discussion here." (footnote omitted)).

But NHTSA provides no valid explanation in the proposal, either. NHTSA first asserts that "ZEV mandates directly relate to fuel economy" because the zero-emission vehicle mandate requires "eliminating the use of petroleum fuel." Proposal at 43,238. But while the "eliminat[ion]" of petroleum fuel might "relate" to gasoline, it doesn't relate to the distance a vehicle will go on a gallon of it. "Fuel economy" is not how much gasoline America's cars use, it is the "average number of miles traveled by an automobile for each gallon of gasoline." 49 U.S.C. § 32901(a)(11). Said another way, NHTSA conflates the efficiency of gasoline-powered engines—which NHTSA does regulate—with overall gasoline consumption, which NHTSA does not regulate. A state law that promotes cars that run on electricity does not "relate to" the efficiency with which cars burn gasoline. Even less

does it relate to "fuel economy *standards*," which are a further step removed from the mandate to build zero-efficiency vehicles.

Second, NHTSA claims that the zero-emission vehicle mandate relates to fuel efficiency standards because "the purpose of the ZEV program is to affect fuel economy." Proposal at 43,238 (footnote omitted). That contention fails for the same reason. The purpose of the program is *not* to affect fuel economy, because the purpose of the program is not to affect the "average number of miles traveled by an automobile for each gallon of gasoline." 49 U.S.C. § 32901(a)(11). The purpose of the program is to encourage production of vehicles that use sources of energy other than gasoline.

NHTSA's argument for express preemption fails because NHTSA impermissibly expands the concept of "fuel economy," and the Court should reject it.

B. Implied Preemption Does Not Apply, Either.

Given that unfavorable plain language, NHTSA focuses its preemption argument primarily not on express preemption, but on implied preemption. But NHTSA's resort to implied preemption contradicts both its own statement that "conflict principles of implied

preemption do not apply in fields where Congress has enacted an express preemption provision," Proposal at 43,236; *see also* Order at 51,312 (stating that NHTSA "fully reaffirms the discussion of preemption set forth in the proposal"), as well as Supreme Court guidance. *See Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 594 (2011) ("When a federal law contains an express preemption clause, we 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.'" (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993))).

Nevertheless, under its implied preemption theory, NHTSA asserts that the zero-emission vehicle mandate improperly "forces investment in specific technology," which it claims "conflict[s] directly with Congress' intent that CAFE standards be performance-based rather than design mandates." Proposal at 43,239. NHTSA explains that this means that "manufacturers" must make more "expensive investments in fuel-saving technology" than NHTSA had "determined appropriate to require in setting fuel economy standards." *Id.* (footnote omitted).

As before, this argument fails because NHTSA continues to expand "fuel economy" beyond its statutory meaning. NHTSA's attempt to equate "fuel economy" with "fuel-saving" in its explanation illustrates the point well. EPCA sought to limit our dependence on petroleum, and it gave NHTSA a particular task in that effort: to regulate the efficiency of vehicles fueled with petroleum derivatives. Congress might have limited dependence on petroleum by directing NHTSA to also cap the number of cars on the road, to ration gasoline, or to close federal highways. But it didn't do that. Instead, it directed NHTSA to regulate "fuel economy," and left other "fuel-saving" efforts outside the purview of this statute. Zero-emissions vehicles may be "fuel-saving," but they have nothing to do with "fuel economy," and they, like myriad other "fuel-saving" technologies, fall outside NHTSA's jurisdiction to set "fuel economy standards."

NHTSA nevertheless tries to shoehorn the zero-emission vehicle mandate into the concept of "fuel economy." It asserts, for example, that requiring zero emissions is, in "fuel economy terms, [] akin to requiring a vehicle to having the maximum conceivable level of fuel economy." Order at 51,321. That is similarly confused. Congress

defined "fuel economy" as miles to a gallon of gasoline—i.e., it is a fraction where the numerator is miles traveled, and the denominator is a gallon of gasoline. Under EPCA, cars that use no gas at all do not have the "maximum conceivable" level of fuel economy; they do not have a "fuel economy" at all, because there is no denominator. Zero-emission vehicles are simply not captured by the statutory definition.

To be clear, EPCA does direct NHTSA to "count" electric vehicles for manufacturers toward meeting their federal fuel economy standards. 49 U.S.C. § 32904(a)(2). NHTSA argues that this means that, when California directs manufacturers to make zero-emission vehicles, California impermissibly affects what technology is used to meet the federal fuel efficiency standards. *See* Order at 51,321 (asserting that the zero-emission vehicle mandate "force[s] investment in specific technology . . . rather than allowing manufacturers to improve fuel economy by whatever technological path they choose"). But NHTSA conflates this statutory benefit conferred on manufacturers with a separate limitation on its own authority: although manufacturers may count zero-emission vehicles when evaluating whether their fleets meet federal standards, NHTSA may *not* count

zero-emission vehicles when it determines what the "maximum feasible" fuel economy should be for a given model year. *See* 49 U.S.C. § 32902(h) (providing that the § 32902(f) determination of "maximum feasible average fuel economy" excludes "dedicated automobiles," which are defined in § 32901(a)(8) to include electric and fuel cell vehicles). This makes sense—EPCA instead directs NHTSA to set a standard of fuel economy for each model year based on analyzing manufacturers' fleets of vehicles that *actually have* "fuel economy" as defined in the statute. The provisions of the statute that give manufacturers "fuel economy" credit for vehicles with no fuel economy at all don't actually affect the "fuel economy standards" that NHTSA sets. *See generally* 49 U.S.C. § 32904 (providing only how EPA is to "calculate" fuel economy for electric vehicles for purposes of giving manufacturers credit for those vehicles). They likewise do not modify the definition of "fuel economy," or, in turn, expand EPCA to preempt states from mandating zero-emission vehicles.

EPCA does not impliedly preempt California's zero-emission vehicles mandate for the same reason it does not expressly preempt it. Both the preemption statute and EPCA's general description of

NHTSA's role are tied to the term "fuel economy standards." And those standards do not implicate vehicles that use no gasoline. There is no basis to find preemption.

III. NHTSA's Preemption Theory Fails to Comprehensibly Account for Zero-Emission Vehicles.

NHTSA's improper broadening of "fuel economy" to capture zero-emissions vehicles undermines not only its claim to preempt the zero-emission vehicle mandate, but also its claim to preempt California's greenhouse gas standards more generally.

NHTSA asserts that the "scientific relationship" between tailpipe carbon dioxide emissions and fuel economy forms the "foundation" of EPCA's preemption of California's greenhouse gas standards. *See* Order at 51,315–16. According to NHTSA, "only technology that reduces the amount of gas needed to drive one mile (fuel economy) will reduce the amount of carbon dioxide generated per mile." *Id.* at 51,315. Therefore, concludes NHTSA, when California regulates greenhouse gas emissions, it effectively regulates fuel economy, and the relevant rule is preempted.

That argument is wrong for many reasons, as the Petitioners describe in detail. *See* Gov't. and Pub. Int. Pet. Br. at 84–108. The

discussion above, however, highlights one reason NHTSA is wrong that relates specifically to zero-emission vehicles: the incorporation of zero-emission vehicles into California's greenhouse gas program undermines the one-to-one relationship between miles-per-gallon and greenhouse gas emissions.

First, California permits automakers to satisfy their greenhouse gas emissions requirements by selling zero-emissions vehicles. An automaker that does this thereby reduces greenhouse gas emissions *without* affecting fuel economy. Moreover, even under NHTSA's atextual and nonsensical theory that zero-emissions vehicles have "fuel economy" for purposes of setting "fuel economy standards," their treatment under California's greenhouse gas program still breaks the supposed one-to-one relationship between greenhouse gases and fuel economy. That is because California's program requires manufacturers to count upstream emissions (i.e., power plant emissions) from zero-emission vehicles toward their light-duty vehicle greenhouse gas emissions targets.[8] 13 CA ADC § 1961.3(a)(4)(A). So under California's

[8] The Clean Air Act establishes that state regulations of emissions from stationary sources such as power plants are not preempted so

regime, even a vehicle misunderstood to have the "maximum conceivable level of fuel economy," Order at 51,321, still has greenhouse gas emissions. And those emissions may vary widely depending on the method of electricity production used. Again, then, NHTSA is wrong to conclude that there is a direct relationship between greenhouse gas emissions and fuel economy.

This error was at the "foundation" of NHTSA's analysis. EPCA does not preempt California's greenhouse gas standards, either.

IV. EPA Violated the Administrative Procedure Act by Revoking the Zero-Emission Vehicle Mandate Portion of California's Waiver.

Just as NHTSA is wrong on preemption, EPA is wrong that it has lawfully revoked California's waiver. As elsewhere, we support the Petitioners, but focus here only on EPA's error in revoking California's waiver with respect to zero-emission vehicles.

Setting aside EPA's reliance on NHTSA's incorrect preemption analysis, the only substantive basis EPA offers for withdrawing portions of California's waiver is that global climate change does not

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long as such regulations exceed minimum federal requirements. 42 U.S.C. § 7416.

specially affect California, so California may not regulate greenhouse gas emissions. There are many reasons that argument is wrong, but for California's zero-emission vehicle mandate, what is particularly problematic is that this is the *only* reason EPA offers for withdrawal of the waiver. EPA says this even though zero-emission vehicles obviously also emit no tailpipe criteria pollution—e.g., the kind of emissions that made Los Angeles's smog famous—and so improve air quality regardless of greenhouse gas concerns. *See, e.g.*, Gov't. and Pub. Int. Pet. Br. at 59–65. EPA casts this to the side, claiming that the mandate must go because it is "inextricably intertwined with the design and purpose of California's overall GHG reduction strategy"—it is, according to EPA, simply a greenhouse gas standard.

EPA recognizes the problem with this. It proposes to sever its withdrawal of the greenhouse gas portion of California's waiver from the zero-emission vehicle portion, because "EPA acknowledges that there are aspects to the analysis as it affects the state's ZEV program that are not applicable with respect to the state's GHG program." Order at 51,351. EPA likewise acknowledges that "California initially launched its ZEV mandate in 1990 to force the development and

deployment of ZEVs to reduce smog-forming emissions," and does not dispute that zero-emission vehicles have significant benefits in reducing criteria pollution. Proposal at 43,238. It even concedes that California's zero-emission vehicle mandate forms part of the state's EPA-approved State Implementation Plan to meet the National Ambient Air Quality Standards, while California's greenhouse gas provisions do not. Order at 51,337.

Given the obvious connection the zero-emission vehicle mandate has to criteria pollutants, EPA relies heavily for its waiver revocation on a claim that, in 2012, the California Air Resources Board disclaimed those criteria pollution benefits by "present[ing] its ZEV program to EPA solely as a GHG compliance strategy." Order at 51,337. But EPA has the facts wrong. EPA (twice) quotes the California Air Resources Board telling EPA in 2012 that "[t]here is no criteria emissions benefit from including the ZEV proposal in terms of vehicle (tank-to-wheel or TTW) emissions," because California's tailpipe criteria emission standards were so high already. Order at 51,330 n.213, 51,337. But EPA ignores what the California Air Resources Board said just two sentences later: that "since upstream criteria and [particulate matter]

emissions are not captured in the LEV III criteria pollutant standard, net upstream emissions are reduced through the increased use of electricity and concomitant reductions in fuel production." CARB ACC Waiver Request at 15 (May 2012), EPA-HQ-OAR- 2012-0562-0004. In other words, the California Air Resources Board *expressly called out* the upstream criteria emissions benefits of zero-emission vehicles in 2012. EPA's error cannot form the basis for reasoned decision making.

Moreover, even focusing narrowly on tailpipe emissions, the fact that California has tailpipe criteria emissions standards that operate alongside the zero-emission vehicle mandate does not make the zero-emission vehicle mandate irrelevant to criteria pollution control. What it means is that California has included a technology-forcing policy as a key method of meeting its long-term goals. Manufacturers might have chosen another way to meet criteria emissions standards today, but California decided that manufacturers must reduce criteria pollution through zero-emission vehicles. The purpose of that requirement—which EPA chooses to ignore—is to spur innovation that will lead to even greater reductions when new technology is commercialized. The

mandate as such plays a vital role in how California is addressing its criteria pollution challenges.

The only other explanation EPA gives for labeling the zero-emission vehicle mandate a greenhouse gas program is that the two programs have "complex" and "overlapping" compliance regimes. Order at 51,337. That may be true, but it is no basis to conclude they are one and the same. Virtually all vehicle regulations overlap, and manufacturers must make many tradeoffs to comply with those directives. The greenhouse gas effects of the mandate do not eliminate the criteria pollution effects, and they do not render it solely a greenhouse gas program.

EPA can only act through reasoned decision making, which means its conclusions must, at a minimum, be based in record fact. But EPA's claim that the zero-emission vehicle mandate effectively is a greenhouse gas program is baseless, and the revocation of California's waiver on this issue violates the Administrative Procedure Act.

V. EPA Fails to Reasonably Evaluate the Harmful Consequences of Eliminating the Zero-Emission Vehicle Mandate.

The record in this proceeding demonstrates that California's zero-emission vehicle standards advance two environmental goals: (1) reducing local air pollutants such as oxides of nitrogen (NOx), particulates, and carbon monoxide, and (2) advancing the market for technologies that will enable compliance with the State's 2050 zero-emission goals. The parties in this case developed a detailed record describing these benefits, which EPA has ignored in determining a lack of "need" for the waiver.

A. Created in 1990, the Zero-Emission Vehicle Standards Play a Vital Role in Commercializing Technologies that Reduce Local Air Pollution.

As EPA knows well, criteria pollutants emitted by gasoline- and diesel-powered vehicles severely harm public health, particularly for people who live near major roads. Vehicle pollution exacerbates asthma, impairs lung function, increases cardiovascular mortality, and increases rates of heart attacks, strokes, lung cancer, pre-term births, childhood obesity, autism and dementia. *See* Analysis in support of

comments of the California Air Resources Board on the SAFE Proposal, at 295 ("CARB Comment").[9]

The California zero-emission vehicle standard has, from its inception in 1990, aimed at commercializing technologies that eliminate emissions of these harmful local air pollutants. California made explicit the criteria pollutant-focus of the zero-emission vehicle program in numerous waiver petitions to EPA[10] and in the program's inclusion in California's State Implementation Plan. And, while California has made great progress in bringing pollution-reducing technologies to market, the need to spur continued development of technologies that

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[9] *See generally* Health Effects Institute, *Traffic-Related Air Pollution: A Critical Review of the Literature on Emissions, Exposure, and Health Effects* (Jan. 17, 2010), https://www.healtheffects.org/publication/traffic-related-air-pollution-critical-review-literature-emissions-exposure-and-health.

[10] *See, e.g.*, *Emission Standards for Clean-Fuel Vehicles and Engines, Requirements for Clean-Fuel Vehicle Conversions, and California Pilot Test Program*, 59 Fed. Reg. 50,042, 50,047 (Sept. 30, 1994) ("CARB defines a ZEV as: . . . any vehicle which is certified . . . to produce zero emissions of any criteria pollutants under any and all possible operational modes and conditions."); California Air Resources Board, Clean Air Act 209(b) Waiver Support Document Submitted by the California Air Resources Board (September 2009) at 24, https://www.regulations.gov/document?D=EPA-HQ-OAR-2009-0780-0002.

eliminate criteria pollutants remains acute. According to EPA, forty counties within California currently are out of attainment with national ambient air quality standards for particulate matter, ozone or both.[11]

The zero-emission vehicle standard is a critical tool for addressing California's air pollution problem because it hastens the development of technology that eliminates these pollutants altogether. As the percentage of zero-emission vehicles on the road increases, the reduction in criteria pollutants attributable to them will become profound. The California Air Resources Board projects that, by 2030, electric vehicles will displace over 1,200 tons per year of reactive organic gases and 720 tons per year of NOx by 2030 in California alone. Environmental NGOs Tech. Appx. at 63.

Were California to lose its authority to implement zero-emission vehicle standards, the State would see harmful impacts to public health, concentrated in already-disadvantaged communities. Rollback of the zero-emission vehicle standards would increase dangerous air

[11] EPA, *Current Nonattainment Counties for All Criteria Pollutants* (current as of June 30, 2020) https://www3.epa.gov/airquality/greenbook/ancl.html.

pollution exposures for people living within 500 meters of roadways, leading to increased levels of cancer, asthma, lung disease and other sources of increased mortality. The population living near roadways—estimated at a quarter of the State's overall population[12]—consists disproportionately of low-income communities[13] and communities of color.[14]

EPA never addresses the record evidence showing revocation will harm these disadvantaged communities, instead claiming California had represented that its criteria pollution standards alone will sufficiently protect those affected. Order at 51,337. As we discussed above, however, California never said that. *See supra* at 18–19. And more importantly, EPA ignores that California has concluded that the most effective way to limit criteria pollution in the future is not simply to impose limits, but to specifically drive commercial development of

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[12] The California Air Resources Board estimated that, based on the 2000 Census, "24 percent of all Californians live within 500 meters of a highway and 44 percent within 1000 meters of a highway. In Los Angeles, more than a third of the population lives within 300 meters of a major roadway." CARB Comment at 297 (footnotes omitted).

[13] *Id*. at 297 & n.603.

[14] *Id*. at 297 & n.602.

zero-emission vehicles. EPA never addresses why it may take this tool out of California's hands, or the harm that the record shows revocation will do.

Moreover, EPA nowhere addresses the obvious consequence that if California's authority to implement the zero-emission vehicle standards is taken away, the State would remain obligated to meet National Ambient Air Quality Standards requirements, but would be forced to rely on more expensive and less effective policy measures. As the California Air Resources Board explained in its comments, vehicle emissions are "low hanging fruit" in terms of cost-effectiveness. CARB Comment at 301. If the zero-emission vehicle regulation were removed, the State would be forced to rely on other measures to protect the public health for the sizable fraction of the State's population that lives near roadways. These measures might include reducing reliance on vehicles altogether, reducing vehicle miles traveled, and using land use authority to create more distance between communities and roadways. *Id.* at 301–02. While many of these measures have merit, the State observes that they cannot practicably be relied upon to offset reductions

in vehicle emissions without increasing costs and increasing burdens on local jurisdictions.[15]

B. Since 2009, the Zero-Emission Vehicle Standards Have Also Spurred Innovation to Meet Long-Term Climate Goals.

NHTSA and EPA also ignore that California's zero-emission vehicle standards have been remarkably successful in seeding the changes necessary to meet climate goals. Congress intended the motor vehicle provisions in the Clean Air Act to be technology-forcing. As this Court explained in *NRDC v. EPA*, "The legislative history of both the 1970 and the 1977 amendments [to the Clean Air Act] demonstrates that Congress intended the agency to project future advances in pollution control capability. It was 'expected to press for the development and application of improved technology rather than be limited by that which exists today.'" 655 F.2d 318, 328 (D.C. Cir. 1981)

[15] As the Board explained well: "Local jurisdictions are on the front lines of understanding what their communities need and how funding availability, population growth, new transportation services (such as ride-hailing companies), and housing availability affect the health, prosperity, and wellbeing of their residents. While their role is integral to shaping the low-pollution communities of the future, local jurisdictions should not be expected to use their authority to meet all GHG and pollution reduction goals, especially when ZEV technologies are available today." CARB Comment at 302.

(citing S. Rep. No. 1196, 91st Cong., 2d Sess. 24 (1970), and H.R. Rep. No. 294, 95th Cong., 1st Sess. 273 (1977)).

Since its inception, California has used the zero-emission vehicle standard to "press for the development and application of improved technology" that will reduce criteria pollutants. Then, in 2009, the California Air Resources Board staff determined that the zero-emission vehicle standard could also play a similar role for reducing greenhouse gas emissions. The staff determined that to meet the State's 2050 greenhouse gas reduction goals, zero-emission vehicles would "need to comprise nearly 100 percent of new vehicle sales between 2040 and 2050, and commercial markets for zero-emission vehicles would need to launch in the 2015 to 2020 timeframe." CARB Comment at 59.

The purpose of the zero-emission vehicle standard is to accelerate technology development through steadily increasing minimum sales. And, by all accounts, the California zero-emission vehicle program is working. Zero-emission vehicle sales continue to grow rapidly, costs are declining quickly, and many manufacturers have over-complied with the requirements. CARB Comment at 308 & n.622. Further, the zero-emission vehicle program has created momentum to develop the

infrastructure needed to support further growth in zero-emission vehicles. The State has seen rapid growth in public electric charging stations, which would not be possible without the demand from electric vehicles. At the time comments were submitted, the California Air Resources Board reported 17,000 electric vehicle charging ports in the State. CARB Comment at 385. As of this writing, the figure stands at 26,000,[16] with an expectation of reaching 80,000 by 2025. CARB Comment at 385. EPA never accounts for this in its analysis, instead treating a program that plainly supports the goals of the Clean Air Act as contrary to it.

CONCLUSION

NHTSA and EPA have acted outside the bounds of their authority and have misinterpreted EPCA and the Clean Air Act. The Court should vacate the challenged rulemaking.

[16] U.S. Department of Energy, *Electric Vehicle Charging Station Locations* (last visited July 1, 2020), https://afdc.energy.gov/fuels/electricity_locations.html#/analyze?region=US-CA&fuel=ELEC&ev_levels=all.

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Respectfully Submitted,

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July 6, 2020 /s/ Jared P. Marx

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