ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1230

Consolidated with Nos. 19-1239, 19-1241, 19-1242, 19-1243,
19-1245, 19-1246, 19-1249, 20-1175, and 20-1178

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

UNION OF CONCERNED SCIENTISTS, *ET AL.*,
Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,
Respondent,

COALITION FOR SUSTAINABLE AUTOMOTIVE REGULATION, *ET AL.*,
Respondent-Intervenors.

On Petitions for Review of Final Agency Action by the National Highway Traffic Safety Administration and the U.S. Environmental Protection Agency

BRIEF OF *AMICI CURIAE* MEMBERS OF CONGRESS IN SUPPORT OF PETITIONERS

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July 6, 2020

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*

All parties, intervenors, and *amici* appearing before this Court are listed or referenced in the Initial Briefs of Petitioners, with the exception of *Amici* members of Congress and any other *amici* who had not yet entered an appearance as of the filing of Petitioners' Initial Briefs.

B. Rulings Under Review

References to the rulings at issue appear in Petitioners' Initial Briefs.

C. Related Cases

References to related cases appear in Petitioners' Initial Briefs.

D. Corporate Disclosure Statement

Pursuant to Fed. R. App. P. 26.1 and 29(a)(4)(A), *Amici* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

/s/ Cara Horowitz
CARA A. HOROWITZ
JULY 6, 2020

RULE 29 STATEMENTS

All parties in the consolidated action have indicated their consent to the filing of this brief. *See* Case No. 19-1230, ECF No. 1844268 (May 26, 2020). All remaining parties do not oppose or take no position on the filing of this brief.

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

Pursuant to D.C. Cir. R. 29(d), undersigned counsel for *Amici* states that a separate brief is necessary due to *Amici*'s distinct expertise and interests. *Amici* are members of Congress with personal experience and expertise regarding the enactment of key legislation relied upon by Respondents in support of the actions challenged by Petitioners, including some *Amici* who were in office and centrally involved in the enactment of the 2007 legislative amendments to the Energy Policy and Conservation Act of 1975. *Amici* are in a unique capacity to aid the Court in understanding the legislative intent behind statutory provisions at the center of the issues in this case. No other *amici* of which we are aware share this perspective or

address these specific issues. Accordingly, *Amici*, through counsel, certify that filing a joint brief would not be practicable.

/s/ Cara Horowitz
CARA A. HOROWITZ
JULY 6, 2020

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GLOSSARY OF ABBREVIATIONS

CAA	Clean Air Act of 1970
EISA	Energy Independence and Security Act of 2007
EPA	U.S. Environmental Protection Agency
EPCA	Energy Policy and Conservation Act of 1975
JA	Joint Appendix
NHTSA	National Highway Traffic Safety Administration

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in Petitioners' Initial Briefs.

SUMMARY OF ARGUMENT AND *AMICI CURIAE*'S STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

In September 2019, the National Highway Traffic Safety Administration ("NHTSA") and the U.S. Environmental Protection Agency ("EPA") jointly issued "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program," 84 Fed. Reg. 51,310 (Sept. 27, 2019) (JA__-__[84Fed.Reg.51310-63]) (the "Rule"). In the Rule, NHTSA finalizes regulations purporting to establish that the Energy Policy and Conservation Act of 1975 ("EPCA") preempts state greenhouse gas emission and zero-emission vehicle standards, while EPA, in part relying on NHTSA's rationale, takes adjudicatory action to withdraw portions of a 2013 preemption waiver previously granted to California under Section 209(b) of the Clean Air Act of 1970 (the "CAA"), 42 U.S.C. § 7543(b), and purports to determine that other states cannot adopt California's vehicle emissions standards through Section 177 of the CAA, 42 U.S.C. § 7507. *See* JA__-__[84Fed.Reg.51311-28]; 49 U.S.C. § 32919(a); JA__-__[84Fed.Reg.51328-52].

The agencies' conclusions directly conflict with the letter of EPCA, Congress's intent in enacting it, and more than forty years of implementation. As the Supreme Court acknowledged in *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPCA's fuel economy mandates and the CAA's vehicle emissions requirements are independent statutory enactments that may be administered in tandem. Indeed, Congress established from the outset that fuel economy standards do not interfere with state or federal authority to set vehicle emissions standards under the CAA, and that vehicle manufacturers must meet these obligations simultaneously. In cases where emissions standards may affect a vehicle's fuel economy, fuel economy standards must yield, if necessary. Congress reiterated that intent 30 years later in the Energy Independence and Security Act of 2007 ("EISA"), a set of amendments to EPCA in part designed to preserve state authority to adopt emissions standards.

Amici Curiae are members of Congress—each of whom is listed in the attached Addendum—with an interest in the preservation and interpretation of the statutory scheme at issue in this case. To aid the Court's understanding of the relevant statutory context, and based on *Amici*'s unique experience with and understanding of Congress's intent, this brief examines the statutory and legislative history of EPCA and EISA's amendments to EPCA. Each demonstrates that the Rule directly conflicts with Congress's intent regarding EPCA's preemptive scope.

First, in 1975, Congress crafted EPCA's fuel economy mandates to accommodate federal and state vehicle emissions standards, not to preempt them. Congress understood that emissions standards might sometimes affect a vehicle's fuel economy, and in those cases it consistently struck the balance in favor of environmental and health protection by favoring emissions standards. Congress required the U.S. Department of Transportation to take federal and state emissions standards into account when setting "maximum feasible" fuel economy standards, where they might affect fuel economy. That obligation would not exist, of course, if such state standards were preempted. Indeed, during EPCA's drafting, Congress rejected proposals that would have frozen emissions standards to prioritize energy efficiency improvements, instead opting to prioritize emissions standards where they might interact with fuel economy standards. Accordingly, for over 40 years, NHTSA has consistently considered the impact of state emissions standards when setting fuel economy standards and has never before concluded that state emissions standards are preempted.

Second, EISA's amendments to EPCA confirm Congress's understanding that vehicle emissions standards have never been preempted by EPCA—and underscore its intent to preserve state authority to enact vehicle emissions standards, regardless of how those emissions standards might affect fuel economy. Congress

enacted EISA shortly after the Supreme Court decided *Massachusetts v. EPA*, which held that fuel economy standards under EPCA do not preclude EPA's regulation of vehicle greenhouse gas emissions. Following and consistent with this landmark decision, Congress reaffirmed EPCA's existing statutory scheme preserving emissions standards—including state emissions standards—notwithstanding fuel economy standards.

EISA's savings clause expressly preserves existing regulatory authority over environmental matters, including vehicle emissions under the CAA. *See* 42 U.S.C. § 17002. Congress understood and intended for this savings clause to preserve both EPA's and California's authority to regulate vehicle greenhouse gas emissions. Unsuccessful proposals designed to overturn *Massachusetts v. EPA* or curtail authority over greenhouse gas emissions demonstrate Congress's awareness that a change to the existing scheme would be needed to effect preemption. Congress declined to make any such change. Moreover, EISA's provisions related to federal vehicle fleets further demonstrate Congressional intent to preserve state authority over vehicle emissions. Those provisions require federal agencies to acquire low greenhouse gas-emitting vehicles, tasking EPA to identify such vehicles considering "the most stringent standards for vehicle greenhouse gas emissions" sold anywhere in the country. 42 U.S.C. § 13212(f)(3). With this language, Congress affirmatively

anticipated and endorsed the potential for state-promulgated greenhouse gas emissions standards that are "more stringent" than federal standards. Congress could not have incorporated state greenhouse gas emissions standards into federal fleet requirements while simultaneously intending to preempt those same standards.

In drafting and passing both EPCA and EISA, Congress never wavered in its directive that emissions standards operate alongside and, where necessary, take precedence over fuel economy standards. NHTSA's conclusion that state greenhouse gas emission and zero-emission vehicle standards are preempted by EPCA—and EPA's decision to revoke California's waiver, founded in part on that faulty determination—conflict with Congress's express and consistent intent to ensure that states maintain the authority to regulate vehicle emissions to protect air quality and public health.

ARGUMENT

Contrary to the letter and intent of EPCA, the Rule concludes that state greenhouse gas emission and zero-emission vehicle standards are preempted by federal fuel economy standards and withdraws portions of EPA's previously-granted 2013 preemption waiver pursuant to CAA Section 209(b). *See* JA__[84Fed.Reg.51317-18]; *see also* 49 C.F.R. §§ 531.7, 533.7; *id.* § 531 Appx. B; *id.* § 533 Appx. B; JA__[84Fed.Reg.51328].

As an initial matter, Congress never authorized NHTSA to determine EPCA's preemptive scope, and NHTSA has no authority to promulgate a regulation purporting to do so. Executive agencies "have no special authority to pronounce on pre-emption absent delegation by Congress." *Wyeth v. Levine*, 555 U.S. 555, 577 (2009); *see also La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it."). Congress leaves no question when it does delegate such interpretive authority: These instances are rare, and explicit. *See, e.g.*, 47 U.S.C. § 253(d) (authorizing the Federal Communications Commission to make determinations about state laws applicable to providers of telecommunications services and to "preempt the enforcement of such [state laws] to the extent necessary . . ."); 29 U.S.C. §§ 655, 667(b) (authorizing the Occupational Health and Safety Administration to promulgate occupational safety or health standards as a "national consensus standard" with preemptive effect); *cf.* 21 U.S.C. § 360k(b) (authorizing the Federal Drug Administration to exempt from preemption state laws regarding marketing of medical devices). By contrast, EPCA contains no language authorizing NHTSA to undertake rulemaking concerning the preemptive scope of EPCA's fuel economy standards. *See* 49 U.S.C. § 32919(a); 49 U.S.C. §§ 32901-03. Absent an express Congressional grant of such

authority, NHTSA cannot validly issue the Rule. *See Mozilla Corp. v. FCC*, 940 F.3d 1, 74-76 (D.C. Cir. 2019) (holding that the Federal Communications Commission lacked statutory authority to preempt states from regulating net neutrality more stringently).

Even if NHTSA had authority to determine the preemptive scope of EPCA, the agencies' conclusions in the Rule directly conflict with statutory directives. Congress consistently intended for EPCA to preserve EPA's and states' authority to regulate vehicle emissions under the CAA, including greenhouse gas emissions. Based on *Amici*'s unique understanding of the relevant statutory history of EPCA, and some *Amici*'s personal experience participating in the legislative process for the 2007 EISA amendments to EPCA, *Amici* make the following points in support of Petitioners:

(1) the Rule conflicts with both the statutory text and legislative history of EPCA, which demonstrate that Congress affirmatively intended for vehicle manufacturers to meet both fuel economy standards and emissions standards, and for fuel economy standards to yield to emissions standards when necessary—not preempt them; and

(2) the Rule conflicts with both the statutory text and legislative history of EISA's amendments to EPCA, which show that Congress adopted a savings clause

preserving both EPA's and California's authority to regulate vehicle emissions—and in so doing rejected proposals to curtail that authority—and further specifically endorsed California's greenhouse gas emissions standards by incorporating them into requirements for federal vehicle fleets.

I. In EPCA, Congress Intended to Prioritize, Rather Than Preempt, Vehicle Emissions Standards That May Affect Fuel Economy.

In the Rule, NHTSA determines—incorrectly—that state greenhouse gas emission and zero-emission vehicle standards are preempted by EPCA because they could interfere with federal fuel economy standards. *See* JA__[84Fed.Reg.51314] (citing 49 U.S.C. § 32902(a), (f)). EPCA's statutory and legislative history tells another story. Congress understood potential interactions between emissions controls and fuel economy, and it struck the balance decidedly in favor of environmental and health protections. It provided for fuel economy mandates that are separate from vehicle emissions controls and that shield emissions standards where the two schemes interact, even where such interaction might make fuel economy improvements harder to achieve. In the process, Congress rejected legislative proposals to prioritize EPCA's energy efficiency goals by freezing emissions standards. NHTSA's conclusions controvert Congressional intent to preserve vehicle emissions standards—particularly here, where the emissions

standards in question are, if anything, wholly in line with EPCA's energy efficiency goals.

EPCA was enacted in the wake of the 1973 petroleum crisis. *See* Greg Dotson, *State Authority to Regulate Mobile Source Greenhouse Gas Emissions, Part 2: A Legislative and Statutory History Assessment*, 32 Georgetown Envtl. L. Rev. (Forthcoming 2020) [hereinafter *Dotson Article*], at 11.[1] Presidents Nixon and Ford repeatedly called for Congress to move forward with legislation to improve energy efficiency and reduce the United States' dependence on petroleum imports, with the primary purpose of reducing the country's vulnerability to future energy shortages. *Id.* at 11-15. But even as it passed EPCA to achieve these objectives, Congress opted against improving energy efficiency at the expense of environmental and public health protection.

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[1] Much of the statutory and legislative history recited in this brief is definitively detailed in several analyses published by Professor Dotson. *See generally Dotson Article*; *see also* Greg Dotson, *State Authority to Regulate Mobile Source Greenhouse Gas Emissions, Part 1: History and Current Challenge*, 49 Envtl. L. Rep. 11,037 (2019) [*Dotson Article Part 1*]; Greg Dotson, *Comments to The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule* (October 26, 2018). *Amici* thank Professor Dotson for his efforts to compile the relevant primary materials supporting this brief, and for his assistance in preparing this brief.

Throughout EPCA's drafting, Congress understood and considered the possibility that emissions standards could affect fuel economy. During the petroleum crisis, efforts to comply with carbon monoxide and hydrocarbon emissions standards had resulted in a fuel economy penalty of as much as 10 percent. *See Dotson Article* at 15-17. With the country's broader energy efficiency goals in mind, President Ford transmitted two early legislative proposals to Congress seeking to freeze emissions standards in order to prioritize fuel economy improvements. *See id.* at 18-22 (describing the proposed Energy Independence Act of 1975); *id.* at 24-26 (describing a subsequent proposal to freeze federal emissions standards through model year 1981). But Congress rejected these proposals, signaling its intent to preserve vehicle emissions standards even if altering or abandoning them would improve fuel economy. *See id.* at 23, 26.

Congress did not just decline to freeze emissions standards; it affirmatively prioritized them. For the first three vehicle model years affected by EPCA's fuel mandates, model years 1978-1980, Congress set fuel economy standards directly by statute. *See* Pub. L. No. 94-163, § 301, 89 Stat. 871, 902 (1975) (adding § 502(a)(1) to the Motor Vehicle Information and Cost Savings Act). In doing so, Congress specifically accounted for interactions with emissions standards, and indeed directed that its fuel economy standards would yield to both federal and state emissions

standards that affect fuel economy. It did so by crafting an adjustment mechanism to modify its fuel economy standards when a "fuel economy reduction" resulted from the application of a "Federal standard." *Id.* § 301, 89 Stat. at 905 (adding § 502(d)(2)(A)). Notably, Congress expressly defined "Federal standards" to include *both* emissions standards set by EPA and those set by states with a CAA waiver. *Id.* (adding § 502(d)(3)(D)(i)) (defining "Federal standards" to include "emissions standards applicable by reason of section 209(b) of such Act").

The inclusion of this adjustment mechanism demonstrates that (1) Congress did not intend for EPCA to preempt state emissions standards, and (2) Congress understood that state emissions standards could negatively affect fuel economy such that it might be appropriate to adjust fuel economy standards. *See also Dotson Article* at 17. No such mechanism to alter fuel economy standards to accommodate vehicle emissions standards would be necessary if EPCA preempted those standards.[2]

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[2] NHTSA argues that Section 502(d)'s petition mechanism was a temporary and limited exception to EPCA's preemption provision, which "became obsolete" after model year 1980, once NHTSA assumed the task of setting fuel economy standards. *See* 83 Fed. Reg. 42,986, 43,237 (proposed Aug. 24, 2018) (JA__[83Fed.Reg.43237]). But as explained further below, Congress had no need to extend this individual adjustment authority beyond model year 1980, precisely because Congress incorporated into Section 502(e) a requirement for NHTSA to consider effects on fuel economy from state emissions standards when setting future

When NHTSA took over the task of setting fuel economy standards for model years beyond 1980, Congress continued to require the agency to account for federal and state vehicle emissions standards that may affect fuel economy. Section 502(e) of EPCA enumerates criteria for NHTSA to consider when determining the "maximum achievable average fuel economy" for future model years and requires NHTSA to consider "the effect of other Federal motor vehicle standards," including emissions standards, on fuel economy. Pub. L. No. 94-163, § 301, 89 Stat. at 905 (adding § 502(e)(3)).[3] With this provision, Congress continued to conform fuel economy mandates to emissions standards after model year 1980, just as it had done in the first three years of the statute's operation. There is no indication in the statute or legislative record that Congress intended to accommodate state emissions

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fuel economy standards. As discussed in footnote 5 below, NHTSA consistently took this approach for decades, until promulgating this Rule.

[3] Congress recodified EPCA in 1994, amending the language in Section 502(e)(3) to require consideration of "the effect of other motor vehicle standards of the Government on fuel economy." Pub. L. No. 103-272, 108 Stat. 745, 1060 (1994); 49 U.S.C. § 32902(f). The accompanying House and Senate reports each explain that the recodification was meant to occur "without substantive change" to the recodified provisions, meaning that the new language in Section 502(e)(3) retains the same meaning as EPCA's original language. *See* H.R. Rep. No. 103-180, at 1 (1993); S. Rep. No. 103-265, at 1 (1994); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 346 (D. Vt. 2007).

standards when defining "Federal standards" with respect to model years 1978-1980, but reversed course and intended to preempt those same standards when referring to "Federal motor vehicle standards" for later model years.[4]

For 44 years—until this Rule—NHTSA has correctly read Section 502(e) to require the consideration of state, as well as federal, emissions standards when setting fuel economy standards. NHTSA has properly "considered" state standards under Section 502(e)(3) when they receive a waiver from EPA pursuant to Section 209(b); and under Section 502(e)(1)-(2) when determining fuel economy standards.[5]

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[4] Congress had consistently prioritized emissions standards over fuel economy standards throughout the legislative process. Drafts of EPCA included provisions adapting fuel economy standards to account for energy efficiency impacts from emissions standards. *See, e.g.*, S. 1883, 94th Cong. § 504(b) (1975) (proposing broad authority to modify fuel economy standards to reflect the maximum feasible fuel economy); H.R. 7014, 94th Cong. § 502(a)(5)(C), (d)(1) (1975) (proposing to require consideration of the "relationship to other Federal motor vehicle standards" when setting fuel economy standards and authorizing adjustment of fuel economy standards); S. 622, 94th Cong. § 502(a)(5), (d)(4) (1975) (preserving the same scheme as H.R. 7014 but expanding authority to adjust fuel economy standards, which ultimately became EPCA's final text); S. Rep. No. 94-516, at 38 (1975) (Conf. Rep.) (defining "other Federal motor vehicle standards" to expressly include federal and state emissions standards under sections 202 and 209(b) of the CAA).

[5] *See, e.g.*, 43 Fed. Reg. 11,995, 12,009-10 (Mar. 23, 1978) (considering the fuel economy effects of California emissions standards under the header "The Effect of Other Federal Motor Vehicle Standards" and assessing those standards under Section 502(e)(1)-(2) when establishing fuel economy standards for light trucks for model years 1980-1981); 68 Fed. Reg. 16,868, 16,895-96 (Apr. 7, 2003) (considering the fuel economy effects of California's emissions standards under the

NHTSA had never before determined that state emissions standards were preempted by EPCA; instead, it repeatedly treated state emissions standards as consistent with NHTSA's authority to set fuel economy standards at the "maximum achievable" level, as Congress intended, even when state emissions standards had a significant effect on fuel economy.[6]

Other Congressional statements during EPCA's drafting confirm that Congress consistently intended to prioritize environmental regulation, including emissions standards. *See, e.g.*, S. 1883, 94th Cong. § 502(b)(1) (1975) (identifying the objective to reduce fuel consumption "to the maximum extent practicable . . . without reducing standards for . . . environmental quality"); S. Rep. No. 94-179, at 6 (1975) (clarifying that fuel economy standards were intended to create "the most

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header "Federal Motor Vehicle Emissions Standards" when establishing fuel economy standards for light trucks for model years 2005-2007, even when acknowledging EPCA's preemption clause); 71 Fed. Reg. 17,566, 17,643 (Apr. 6, 2006) (considering California emissions standards and California's zero emission vehicle program under the header "Federal Motor Vehicle Emissions Standards" when establishing fuel economy standards for light trucks for model years 2008-2011, even when acknowledging EPCA's preemption clause).

[6] *See Dotson Article Part 1*, at 11,049-50 (describing NHTSA adjusting fuel economy standards for individual manufacturers where NHTSA determined that California's emissions standards reduced the fuel economy that was technologically feasible and economically practicable).

fuel-efficient new car fleets compatible with safety, damageability, and emission standards"); H.R. Rep. No. 94-340, at 90 (1975) (noting the "current uncertainty as to the level of future emissions standards and their effects on fuel economy" and requiring that fuel economy standards "take account of" possible future fuel economy penalties from emissions standards). By contrast, EPCA's legislative history contains no indication that Congress intended for fuel economy standards to preclude or preempt vehicle emissions standards that may affect fuel economy.[7]

NHTSA's preemption findings are additionally inconsistent with Congressional intent because the vehicle emissions standards at issue, if anything, accord with EPCA's energy efficiency goals. *See* Pub. L. No. 94-163, § 2(5), 89 Stat. at 874 (codified at 42 U.S.C. § 6201(5)) (identifying the purpose "to provide for improved energy efficiency of motor vehicles"). Congress has repeatedly indicated its intent to protect all vehicle emissions standards, even where those standards undercut fuel economy and potentially run counter to EPCA's purpose. But unlike

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[7] Nor does subsequent statutory history. In the 1990 amendments to the CAA, Congress required EPA to establish clean-fuel programs for states with air quality concerns, explicitly referencing California's standards for zero-emission vehicles as a model. *See* 42 U.S.C. § 7586(f)(4) (requiring EPA to establish zero-emission vehicle standards that "conform as closely as possible to standards which are established by the State of California" for the same class of vehicles). It could not have done so if these standards were preempted by EPCA.

the carbon monoxide and hydrocarbon emissions standards that result in fuel economy penalties, greenhouse gas emissions standards—to the extent that they interact with fuel economy standards at all—have been demonstrated to result in improved energy efficiency. In this case, Congress's direction to prioritize emissions standards is wholly in line with EPCA's statutory purpose.

In sum, Congress drafted and passed EPCA with the express intent to preserve federal and state vehicle emissions standards, even those that—unlike the standards at issue here—negatively affect fuel economy. NHTSA's conclusion that EPCA preempts state emissions standards contravenes Congress's dual statutory scheme of fuel economy regulation under EPCA and public health protection under the CAA.

II. In EISA's Amendments to EPCA, Congress Reaffirmed and Preserved Federal and State Authority to Regulate Vehicle Emissions.

Over 30 years after EPCA was passed, Congress amended EPCA's fuel economy provisions as part of EISA's comprehensive energy legislation, reinforcing Congress's original intent to establish a statutory regime that both protects public health and advances fuel economy. During this process, Congress acknowledged that EPCA's fuel economy scheme has never infringed upon state or federal regulatory authority over vehicle emissions, including greenhouse gas emissions, and that legislation would be necessary to change that status quo. Congress made clear that California's greenhouse gas emissions standards under Section 209(b) of the CAA—

and those of other states that adopt California's standards pursuant to Section 177—are not preempted by NHTSA's fuel economy standards, and Congress rejected proposals to alter the relationship between fuel economy and vehicle emissions standards.

Prior to EISA's enactment, three important court decisions captured Congress's attention. First, the Supreme Court issued its landmark decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), holding that EPCA's fuel economy standards do not limit EPA's mandate to regulate greenhouse gas emissions from new motor vehicles under the CAA. Second, following *Massachusetts v. EPA*, two federal district courts issued opinions rejecting the argument that EPCA preempts state greenhouse gas emissions standards for which EPA has granted a waiver under the CAA. *See Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d. 295 (D. Vt. 2007) (*Green Mountain*); *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007) (*Central Valley Chrysler-Jeep*). Taken together, these decisions confirmed the validity of vehicle greenhouse gas emissions standards set by both EPA and California, under authority of the CAA and unaffected by EPCA's fuel economy requirements.

To reaffirm EPCA's limited preemptive scope and in light of these recent judicial opinions, Congress added a savings clause in EISA that, among other things,

preserves state authority to issue emissions standards. The savings clause became the latest in an unbroken line of Congressional expressions of intent that fuel economy standards do not, and should not, preempt vehicle emissions standards. Going even further, Congress acknowledged and endorsed the possibility of state greenhouse gas emissions standards more stringent than federal standards, by ensuring that any such state standards—far from being preempted—would be incorporated into the requirements for federal vehicle fleets.

A. EISA's Savings Clause Affirmatively Preserves State Authority to Issue Vehicle Emissions Standards.

EISA's text affirms Congress's intent, consistent with EPCA, not to preempt state emissions standards that receive a CAA waiver. In Section 3 of EISA, Congress added a savings clause that provides:

> Except to the extent expressly provided in this Act or an amendment made by this Act, nothing in this Act or an amendment made by this Act supersedes, limits the authority provided or responsibility conferred by, or authorizes any violation of any provision of law (including a regulation), including any energy or environmental law or regulation.

Pub. L. No. 110-140, § 3, 121 Stat. 1492, 1498 (2007); 42 U.S.C. § 17002. This savings clause reaffirms Congress's intent, as codified in EPCA, for fuel economy mandates to sit alongside, rather than supplant, environmental protections, including state and federal authority to regulate vehicle greenhouse gas emissions under the

CAA. During Senate floor debates prior to a final vote approving EISA, Senator Dianne Feinstein—the lead Senate author for EISA's amendments to EPCA's fuel economy provisions—explained that EPA's authority to regulate greenhouse gas emissions was "in no manner affected by this legislation, as plainly provided for in section 3 of the bill addressing the relationship . . . to other laws." 153 Cong. Rec. 15,386 (2007). In floor debates the day Congress voted in favor of EISA, Representative Edward Markey—then a member of the Committee on Energy and Commerce, and the lead House author for EISA's amendments to EPCA's fuel economy provisions—unequivocally confirmed that "[t]he laws and regulations referred to in section 3 include, but are not limited to, the [CAA] and any regulations promulgated under [CAA] authority. *It is the intent of Congress to fully preserve existing federal and State authority under the [CAA]*." 153 Cong. Rec. 16,750 (2007) (emphasis added).

Congress's awareness of key legal developments prior to the enactment of EISA's savings clause confirms this intent. Congress is presumed to understand existing law, including judicial decisions, at the time it legislates. *See Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169 (2014) (quoting *Hall v. United States*, 566 U.S. 506, 516 (2012)). Congress drafted EISA's savings clause in the wake of the Supreme Court's landmark April 2007 decision in *Massachusetts v.*

EPA, holding that EPA's obligation to regulate greenhouse gas emissions from new motor vehicles under the CAA is unaffected by NHTSA's fuel economy mandates under EPCA. 549 U.S. at 532 ("The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency."). Then, during EISA's negotiation process, two federal district courts issued opinions holding that state greenhouse gas emissions standards promulgated under Section 209(b) of the CAA are not preempted by EPCA. *See Green Mountain*, 508 F. Supp. 2d. at 353-54 (decided September 12, 2007); *Central Valley Chrysler-Jeep*, 529 F. Supp. 2d at 1163 (decided December 11, 2007). Presuming Congress's awareness of these judicial decisions, the savings clause must be read to ratify them.

Beyond this presumption, the record shows these cases were top of mind when EISA was drafted and that Congress meant to affirm them. *Massachusetts v. EPA* generated significant debate, and the subsequent introduction and rejection of proposals to curtail regulatory authority over greenhouse gas emissions from vehicles highlights Congressional awareness that EPCA does not preempt such authority, and that new laws or legislative amendments would be required to achieve

that result.[8] In early December 2007, several months after the *Green Mountain* decision, Congress reached an agreement on a near-final version of EISA, titled H.R. 6. *See* Congressional Research Serv., *Energy Independence and Security Act of 2007: A Summary of Major Provisions*, CRS-3–CRS-4 (Dec. 21, 2007); *see also Dotson Article* at 64. Representative Henry Waxman explained that the proposal "won't diminish the EPA's authority to address global warming, which the Supreme Court has recognized [in *Massachusetts v. EPA*]. It won't seize authority from the

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[8] Congress declined to pursue a legislative proposal from early June 2007 to revoke both EPA and state authority to regulate vehicle greenhouse gas emissions. *See* Discussion Draft, Subcomm. on Energy & Air Quality, H. Energy & Commerce Comm., 110th Cong., at 29 (June 1, 2007). The proposal was roundly rejected and was not introduced to either house of Congress as a formal bill. *See* Memorandum from John D. Dingell & Rick Boucher to the Comm. on Energy and Commerce (June 18, 2007) (noting that the Committee on Energy and Commerce would not alter authority over vehicle greenhouse gas emissions as part of EISA's amendments to EPCA); *Dotson Article* at 45-51. Subsequently, Congress declined to amend EPCA's fuel economy standards to require NHTSA to define fuel economy standards "in terms of average grams per mile of carbon dioxide emissions." H.R. 2927, 110th Cong. § 1(a) (2007); *Dotson Article* at 51-55. This legislative proposal was designed to preempt California's greenhouse gas emissions standards, which were also defined in those units. *See Dotson Article* at 51.

Even after the passage of EISA, Congress rejected other legislative proposals to amend Section 209(b) of the CAA to foreclose state regulation of vehicle emissions, reiterating its bicameral understanding that such authority existed unless and until Congress eliminated that authority through new legislation. *See Dotson Article* at 77-82 (describing the 2011 proposal and rejection of H.R. 910, titled the "Energy Tax Prevention Act," which would have prohibited EPA from granting preemption waivers for state greenhouse gas emissions standards).

States to act on global warming." 153 Cong. Rec. 14,430 (2007). Then, less than two weeks later and shortly after publication of the *Central Valley Chrysler-Jeep* decision, Senator Carl Levin proposed to add language to EISA requiring EPA's greenhouse gas regulations to be consistent with fuel economy standards under EPCA. *See* Ben Geman & Alex Kaplun, *Senate Energy Showdown on Tap This Morning*, E&E Daily (Dec. 13, 2007). But Congress declined this proposal to alter EPCA's statutory scheme, instead opting to continue prioritizing emissions standards over fuel economy standards as EPCA had for the previous 32 years. *See Dotson Article* at 57.

Senator Levin ultimately signed onto EISA's amendments to EPCA; on the Senate floor, he confirmed that EPA's authority to regulate greenhouse gas emissions "was recently upheld by the U.S. Supreme Court, and it is not our purpose today to attempt to change that authority or to undercut the decision of the Supreme Court." 153 Cong. Rec. 15,385-86 (2007). In response, Senator Daniel Inouye reaffirmed Congress's intent for EISA's amendments to acknowledge the separate obligations of EPA and NHTSA under each respective statute, as originally established by EPCA. *Id.* at 15,386. Senator Feinstein then reiterated that EISA

> does not impact the authority to regulate tailpipe emissions of the EPA, California, or other States, under the Clean Air Act . . . There was no intent in any way, shape, or form to negatively affect, or otherwise restrain, California or any

> other State's existing or future tailpipe emissions laws, or any future EPA authority on tailpipe emissions. The two issues are separate and distinct. . . . The U.S. District Court for the Eastern District of California in [*Central Valley Chrysler-Jeep*] has reiterated this point in finding that if approved by EPA, California's standards are not preempted by [EPCA].

Id. The Senate's deliberations establish unequivocal intent for EISA to preserve state authority to adopt greenhouse gas emissions standards, consistent with the recently issued *Central Valley Chrysler-Jeep* decision.

Congress similarly declined to amend EPCA's fuel economy scheme in response to calls from other stakeholders around the same time. Congress refused to incorporate proposed legislative language from Chrysler's counsel in November 2007 designed to eliminate state authority over vehicle greenhouse gas emissions. *See* Letter from Sens. Tom Carper, Dianne Feinstein, & Edward J. Markey to Sec'y Elaine L. Chao & Acting Admin'r Andrew Wheeler (Oct. 25, 2018) [hereinafter Carper, Feinstein, & Markey Letter]; Attachment to Carper, Feinstein, & Markey Letter, at 1-6. And Congress pushed forward with EISA's savings clause despite contemporaneous threats from the Bush Administration to veto EISA unless Congress mandated a single national regulatory standard for both fuel economy requirements and vehicle greenhouse gas emissions. *See* Attachment to Carper, Feinstein, & Markey Letter, at 11-13, 19. These actions show that stakeholders—

and, consequently, Congress—understood that, as explained by *Green Mountain* and *Central Valley Chrysler-Jeep,* EPCA preserves state authority over vehicle emissions standards unless and until Congress alters that status quo.

Lastly, prior to a House vote on EISA, Representative Markey confirmed that "Congress does not intend . . . to in any way supersede or limit the authority and/or responsibility conferred by sections 177, 202, and 209 of the [CAA]." 153 Cong. Rec. 16,750 (2007). Representative Markey clarified that authority under Sections 177 and 209 "includes but is not limited to the authority affirmed by [*Green Mountain*] and [*Central Valley Chrysler-Jeep*]," *id.*, indicating the House's understanding that EISA—via the savings clause—does not affect the conclusions in those opinions.

NHTSA attempts to discount this evidence of Congressional intent by asserting that EPCA's preemption provision has always applied to emissions standards that are "related to" fuel economy—which, in NHTSA's view, includes state greenhouse gas emissions standards—and therefore Congress would have had to expressly include state greenhouse gas emissions standards in EISA's savings clause in order to overcome EPCA preemption. *See* JA__[84Fed.Reg.51321]. While NHTSA acknowledges Congressional statements explaining the intent of EISA's savings clause to include state vehicle emissions standards, NHTSA downplays

them as "lack[ing] authority" by arguing that individual Congresspersons "cannot speak for the body of Congress as a whole." *Id.*

NHTSA's characterization of Congress's actions and intent is incorrect. NHTSA's interpretation of EISA's savings clause depends on its inaccurate belief that EPCA, as originally drafted, preempts emissions standards under the CAA when those standards affect fuel economy. As explained above, this conclusion is contrary to the statute, to Congress's intent in enacting EPCA, and to NHTSA's decades-long implementation of that statute. *See supra* Section I. Far from preempting emissions standards that affect fuel economy, EPCA calls for agencies to accommodate them when setting federal fuel economy standards. *Id.* But just as importantly, it is the text of EISA itself, and the full context of its enactment, that belie NHTSA's cramped interpretation of the savings clause—not simply the words of individual Congresspersons, as NHTSA asserts.[9]

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[9] NHTSA dismisses the relevance of *Green Mountain* and *Central Valley Chrysler-Jeep*, labeling them as "[w]rongly decided" and "legally flawed." JA__, __[84Fed.Reg.51314, 17]. But the effect of these cases on EISA's legislative process, as described above, cannot be sidelined. NHTSA's judgment about these cases is further evidence of NHTSA's usurpation of the role of courts; absent an affirmative grant from Congress, NHTSA has no authority to interpret EPCA's preemption provision and reject judicial determinations to the contrary. *See Wyeth*, 555 U.S. at 577; *La. Pub. Serv. Comm'n*, 476 U.S. at 374.

In sum, Congress affirmatively intended for EISA's savings clause to preserve state authority over vehicle emissions, confirming Congress's understanding that EPCA never preempted such state standards. Congress adopted EISA's savings clause with full awareness of—and with the affirmative intent to ratify—the Supreme Court's holding in *Massachusetts v. EPA* and the courts' rejection of EPCA preemption of state greenhouse gas emissions standards in *Green Mountain* and *Central Valley Chrysler-Jeep*. And Congress declined multiple efforts during the legislative process to restrict EPA's and states' authority to regulate vehicle greenhouse gas emissions, implicitly acknowledging that EPCA does not preempt such regulation.

B. Congress Incorporated California's Greenhouse Gas Emissions Standards into EISA's Requirements for Federal Vehicle Fleets.

Finally, Congress not only enacted a savings clause to preserve state authority to set emissions standards, but Congress also incorporated California's greenhouse gas emissions standards into EISA's statutory scheme, endorsing California's authority to issue such standards.

To help green the federal fleet of vehicles, EISA amended the Energy Policy Act of 1992 to provide that "no Federal agency shall acquire a light duty motor vehicle or medium duty passenger vehicle that is not a low greenhouse gas emitting vehicle." Pub. L. No. 110-140, § 141, 121 Stat. at 1517; 42 U.S.C. § 13212(f)(2)(A).

The term "low greenhouse gas emitting vehicle" was not defined in the statute, and Congress left it to EPA to determine which vehicles meet that description. *See* 42 U.S.C. § 13212(f)(3)(A). However, Congress required EPA, when identifying these vehicles, to "take into account the most stringent standards for vehicle greenhouse gas emissions applicable to and enforceable against motor vehicle manufacturers for vehicles sold anywhere in the United States." *Id.* § 13212(f)(3)(B).

The language "sold anywhere in the United States" was a clear reference to California's greenhouse gas emissions standards. *See Dotson Article* at 58-63. Representative Waxman, as the Chair of the House Committee on Oversight and Government Reform, first introduced this provision in June 2007 as part of H.R. 2635, titled the Carbon-Neutral Government Act. *See* H.R. 2635, 110th Cong. (2007). At a hearing a month earlier, Representative Waxman characterized his proposed federal vehicle fleet standards as "requiring Government vehicles to meet the California standards for motor vehicle greenhouse gas emissions." *H.R. 2635, the Carbon-Neutral Government Act of 2007: Hearing Before the Subcomm. on Gov't Mgmt., Org., & Procurement of the H. Comm. on Oversight & Gov't Reform*, 110th Cong. 2 (2007). The committee report accompanying H.R. 2635 confirmed that "[c]urrently, the only applicable greenhouse gas emissions standards are those adopted by California and other states. Those standards will be enforceable if and

when EPA grants the waiver requested by the state of California under the [CAA]." H.R. Rep. No. 110-297, at 17 (2007).

This provision was incorporated into EISA without controversy. *Dotson Article* at 63. Thus, not only did Congress clearly intend to preserve California's regulatory authority over greenhouse gas emissions, but it also intended to hold federal vehicle fleets to California's stringent standards. The inclusion and adoption of California's greenhouse gas emissions standards into EISA's requirements for federal fleets necessarily forecloses preemption of those same standards.

In the Rule, NHTSA acknowledges that the language "most stringent standards for vehicle greenhouse gas emissions" in the federal-fleet provision would be rendered superfluous if only EPA could set those standards, but NHTSA argues that the statutory language directs EPA to consider only "enforceable" standards, which excludes state emissions standards that are preempted by EPCA. JA__[84Fed.Reg.51322]. NHTSA instead characterizes the provision as referencing state or local authority to impose fuel economy requirements on vehicles obtained through procurement contracts. *Id.* (citing 49 U.S.C. § 32919(c)). NHTSA reasons that "[i]t is not plausible that Congress intended this limited provision concerning guidance on Federal government procurement to disrupt the longstanding express preemption provision in EPCA." *Id.*

NHTSA's interpretation gets it backwards. Congress did not intend for the federal fleet provision to alter EPCA's preemptive scope. Rather, the federal fleet provision reflects and reaffirms Congress's general intent and understanding that EPCA does not preempt, and *never has* preempted, state emissions standards under the CAA. This general intent and understanding is evidenced by EPCA's prioritization of emissions standards over fuel economy standards in all aspects, as well as by Congress's steadfast and longstanding rejection of all attempts to reverse or provide exceptions to that priority. Congress's affirmative incorporation of California's greenhouse gas emissions standards into EISA's requirements for federal vehicle fleets is but more evidence of that priority. *See Dotson Article* at 95. And NHTSA's conclusion that Congress intended to refer to state or local procurement requirements is nonsensical on its face. The statute expressly notes that the "most stringent" greenhouse gas standards must be "applicable to and enforceable *against motor vehicle manufacturers*." 42 U.S.C. § 13212(f)(3)(B) (emphasis added). Contracts for procurement of government vehicles cannot be considered a "standard" that binds automakers' manufacturing decisions; rather, the statutory language evinces Congress's intent to reference California's authority to set emissions standards under the CAA. NHTSA's determination regarding EISA's federal fleet provision is inconsistent with Congress's intent not to preempt state

greenhouse gas emissions standards and instead to apply those standards to federal vehicle fleets.

CONCLUSION

For reasons stated herein, the Court should grant the Petitions for Review.

Respectfully submitted,

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July 6, 2020

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I hereby certify that the foregoing brief complies with the type-volume limitations set forth in D.C. Cir. R. 32(e)(3) and Fed. R. App. P. 29(a)(5) because this brief contains 6,490 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1). The foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman font.

/s/ Cara Horowitz
CARA A. HOROWITZ

July 6, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of July, 2020, I caused to be electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system, which will send notice of such filing to all counsel who are CM/ECF registered users.

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July 6, 2020