November 25, 2019

VIA ELECTRONIC SUBMISSION AND HAND DELIVERY

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Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attn: Docket No. EPA-HQ-OAR-2018-0283

Re: Petition for Reconsideration of EPA's Final Action—The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program

Center for Biological Diversity, Chesapeake Bay Foundation, Environment America, Environmental Defense Fund, Environmental Law & Policy Center, Natural Resources Defense Council, Public Citizen, Inc., Sierra Club, and the Union of Concerned Scientists ("Petitioners") hereby request that the Environmental Protection Agency ("EPA") reconsider the final action titled "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program," published at 84 Fed. Reg. 51310 (Sept. 27, 2019) ("Part One Final Action" or "Final Action").

In the Part One Final Action, issued jointly by EPA and the National Highway Traffic Safety Administration ("NHTSA"), the agencies state they are finalizing certain proposals set forth in their joint notice of proposed rulemaking entitled, "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks," 83 Fed. Reg. 42986 (Aug. 24, 2018) ("Proposed Rule"). 84 Fed. Reg. at 51310. In particular, EPA states that it is "finalizing its August 2018 proposal to withdraw aspects of its January 2013 waiver of Clean Air Act (CAA) section 209 preemption of the State of California's Advanced Clean Car (ACC) program." *Id*. at 51328. EPA purports to withdraw aspects of that waiver for two reasons. First, EPA states that "in light of NHTSA's determinations finalized elsewhere in [the Final Action] regarding the preemptive effect of EPCA on state GHG and ZEV programs" it is withdrawing the waiver for the "GHG and ZEV program[] . . . provisions of California's program." *Id*.[1] Second, EPA states that "separate and apart from the determinations . . . with regard to the effect of EPCA preemption on the January 2013 waiver, [the Final Action] finalizes EPA's reconsideration of, and its proposed determination that it is appropriate to withdraw, its January 2013 grant of a waiver of CAA preemption for the GHG and ZEV standards in California's ACC program for model years 2021 through 2025, based on a determination that California 'does not need [those] standards to meet

[1] Elsewhere in the Final Action, NHTSA states that it is codifying its interpretation of preemption under the Energy Policy and Conservation Act (EPCA) ("NHTSA's Preemption Rule"). *See, e.g.*, 84 Fed. Reg. at 51310-15, 51361-63. Specifically, NHTSA says that its regulations make "explicit that State programs to limit or prohibit tailpipe GHG [greenhouse gas] emissions or establish ZEV [zero-emission vehicle] mandates are preempted" by EPCA. *Id*. at 51310.

compelling and extraordinary conditions' within the meaning of CAA section 209(b)(1)(B)." *Id*.

In addition to the waiver withdrawal, EPA states that the Final Action "finalizes EPA's proposed determination that, separate and apart from the findings and determinations [regarding withdrawal of aspects of the ACC waiver], states other than California cannot use CAA section 177 to adopt California's GHG standards." *Id*.

Although the exhaustion requirements of Clean Air Act Section 307(d)(7) do not apply to EPA's actions in the Final Action, Section 307(b) indicates that EPA must consider petitions for reconsideration of "any . . . final . . . action" taken under the Clean Air Act. 42 U.S.C. § 7607(b)(1). For the reasons set forth in this petition, among others, the Part One Final Action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, 5 U.S.C. § 706(2)(A); in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, 5 U.S.C. § 706(2)(C); and without observance of procedure required by law, 5 U.S.C. § 706(2)(D). As described in this petition:

- EPA failed to respond to key comments submitted after the close of the formal comment period that demonstrate these shortcomings, including that EPA's actions are arbitrary and capricious, exceed the agency's statutory authority, and are not in accordance with law; and
- EPA relied on improper considerations in its decision-making, and its asserted rationale for its actions is pretextual, making the Part One Final Action legally indefensible.

Our submission does not and cannot diminish the availability of any issues, facts, and objections to be raised immediately in judicial challenges to the Final Action. *See* 42 U.S.C. § 7607(b) ("The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.").

EPA must grant this petition for reconsideration, as it is based on new evidence and changed circumstances, and a failure to grant reconsideration would be arbitrary, capricious or an abuse of discretion given the central relevance of the issues noted herein to EPA's reasoning and analysis for the Part One Final Action and the legal deficiencies of EPA's actions. *Interstate Commerce Comm'n v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 278 (1987); *United States Postal Serv. v. Postal Regulatory Comm'n*, 841 F.3d 509, 512-13 (D.C. Cir. 2016). To promote efficient resolution of disputes over the Part One Final Action, EPA should act on this petition expeditiously, grant reconsideration on the following issues, and withdraw the Part One Final Action.

All cited materials that are not already in the dockets for the Proposed Rule (as well as some docketed materials) are appended in the "Appendix of Exhibits" submitted with the petition.

I. Numerous comment letters submitted after the close of the formal comment period for the Proposed Rule demonstrate that the Part One Final Action is arbitrary and capricious. EPA failed to respond to these comments and now must reconsider its actions in the Part One Final Action in light of these comments.

EPA bound itself, wherever practicable, to consider comments submitted after the close of the formal comment period. *See* 83 Fed. Reg. at 43471 ("To the extent practicable, we will also consider comments received after" the formal comment period closing date). Each of the comments described below, and the additional facts they include, were submitted to EPA with sufficient time remaining before the Final Action for EPA to have practicably considered them.[2] They are thus already available for judicial review and properly part of the administrative record for an immediate judicial challenge to the Part One Final Action.

To the extent EPA could credibly contend that these comments were submitted without sufficient time for EPA's review to have been "practicable," that is because the facts arose after that time or only became known publicly after that time, and/or because the comment period for the Proposed Rule was wholly inadequate. *See, e.g.*, Comments of the Center for Biological Diversity, et al., Docket #EPA-HQ-OAR-2018-0283-5070, as corrected Docket #NHTSA-2018-0067-12368, Appendix A ("NGO Joint Legal Comments") at 200-213.[3] Specifically, the comment period did not allow the public sufficient time to provide comment on the extensive actions proposed—including NHTSA's preemption regulations, EPA's novel proposals to revoke existing state authority to regulate greenhouse gas emissions from motor vehicles, and two highly

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[2] In particular, we note that at a June 20, 2019 hearing of the House of Representatives Committee on Energy and Commerce ("Driving in Reverse: The Administration's Rollback of Fuel Economy and Clean Car Standards"), then-Assistant Administrator of EPA for Air and Radiation William Wehrum and then-acting Administrator of NHTSA Heidi King asserted that no final decisions on the Proposed Rule had been made, and Ms. King stated that the agencies "are reading the public comments" and "are considering all public comments we receive before [we] make decisions in the final rulemaking." Hearing Transcript at 144, lines 3332-34, available at: https://docs.house.gov/meetings/IF/IF17/20190620/109670/HHRG-116-IF17-Transcript-20190620.pdf; *see also* Letter from Environmental Defense Fund, et al., dated July 18, 2019, Docket #EPA-HQ-OAR-2018-0283-7587, at 4. Accordingly, supplemental comments that were submitted on the Proposed Rule up to at least June 20, 2019, were clearly "practicable" for the agencies to have considered and must be properly considered as part of the agencies' administrative record. In addition, in the Final Action, EPA expressly addressed a comment submitted on April 10, 2019, showing that all comments submitted up to that date were "practicable" for the agencies to have considered and properly part of the agencies' administrative records. *See* 84 Fed. Reg. at 51,357 & n.323.

[3] Certain public submissions on the Proposed Rule appear to have been docketed on regulations.gov by one agency but not the other, even though they were submitted to both dockets. Thus, where EPA did not docket comments referenced herein, we refer to the NHTSA docket identification number. We further note that in the Proposed Rule the agencies directed that "comments submitted to the NHTSA docket will be considered comments to the EPA docket and vice versa . . . Therefore, commenters only need to submit comments to either one of the two agency dockets, although they may submit comments to both if they so choose." 83 Fed. Reg. at 43470. Thus, EPA is obligated to consider submissions to the NHTSA docket.

complex, technical rules on fuel economy and GHG standards for light-duty vehicles. *See id*. at 206-213. The breadth of these proposals, combined with the agencies' pervasive lack of clarity and failure to provide centrally relevant information, *see, e.g.*, Letter from Center for Biological Diversity, et al., dated December 20, 2018, Docket #EPA-HQ-OAR-2018-0283-7443, severely restricted the public's ability to comment on the Proposed Rule. We also note that the formal comment period lasted only 63 days,[4] and the agencies denied requests – including requests from the regulated industry – for an additional 57 days, citing a purported need for that same industry to have "maximum lead time to respond to the final rule."[5] Yet it took EPA and NHTSA 11 months to finalize the actions in the Part One Final Action; and now, more than a year after the close of the formal comment period, the agencies still have not finalized the complex, technical rulemakings on fuel economy and GHG standards for light-duty vehicles. The agencies' protracted internal process demonstrates just how complex the Proposed Rule was, and how unreasonable the arbitrarily short formal comment period was. Because the comments described below, and the additional facts they include, could not have been raised during the formal comment period, they are available immediately in judicial review, *see*, *e.g.*, *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076 (D.C. Cir. 2009), and in any event form a basis to require EPA to grant this petition for reconsideration.

We hereby incorporate all of these comments, including their attachments, into this petition.

A. Letter from Union of Concerned Scientists (UCS) and Public Citizen, dated June 13, 2019, regarding mobile carbon capture technology (Docket #EPA-HQ-OAR-2018-0283-7570).

As noted above, in the Final Action EPA purports to withdraw the waiver for California's ACC GHG and ZEV standards based on NHTSA's conclusion that those standards are preempted by EPCA. *See* 84 Fed. Reg. at 51328. But NHTSA's conclusion is unfounded and unlawful, and EPA's reliance on that conclusion is arbitrary and capricious. In particular, NHTSA rested its preemption analysis principally on its bare assertion that "technology cannot reduce the amount of carbon dioxide produced by combusting one gallon of gas. Instead, 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 51315. And NHTSA suggests that "[c]ommenters did not and cannot dispute the direct scientific link between tailpipe carbon dioxide emissions from automobiles and fuel economy." *Id*.

But, during the formal comment period, numerous commenters did reject NHTSA's assertion that GHG emissions standards are the "functional equivalent" of fuel economy standards, 83 Fed. Reg. at 43236. *See, e.g.*, NGO Joint Legal Comments at 164-66;

[4] See EPA and NHTSA, *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks; Extension of Comment Period*, 83 Fed. Reg. 48578 (Sept. 26, 2018) (extending the initial 60-day comment period set out in the Proposed Rule by 3 days).
[5] *Id*. at 48581.

Comments of the California Air Resources Board, Docket #EPA-HQ-OAR-2018-0283-5054, Analysis in Support of Comments ("CARB Comments") at 404-06. And the June 13 letter from UCS and Public Citizen provides further evidence of the distinction between motor vehicle GHG emission standards and fuel economy standards—specifically, the comment demonstrates continued development of mobile carbon capture (MCC) technology that does not improve fuel economy but does reduce GHG emissions. The letter cites a March 2019 Reuters article that describes MCC technology that Saudi Aramco, the Saudi Arabian state oil company, is now developing, "'which could be built into next generation passenger cars for around $1,400 per vehicle, and help to cut carbon dioxide emissions.'" It further describes how Saudi Aramco "has already successfully demonstrated MCC technology in a Ford F-250 pickup truck (showing 10% CO_2 capture) and a midsize Toyota Camry passenger vehicle (showing 25% CO_2 capture)."

The letter explains that these "advances in MCC technology underscore the ephemeral nature of any technological overlap between fuel economy enhancements and greenhouse gas emission abatement from vehicles upon which the Proposed Rule's preemption arguments rest," and thus demonstrates that NHTSA's assertion that GHG standards and fuel economy standards are directly and inexorably related is factually and legally incorrect.

The June 13 letter from UCS and Public Citizen demonstrates that NHTSA's determination regarding EPCA preemption is fundamentally incorrect and unlawful. The comments provide further, clear-cut evidence of the distinction between motor vehicle GHG emission standards and fuel economy standards by demonstrating that GHG emissions reductions need not result in any fuel economy improvements, and thus undermine the central premise upon which NHTSA's actions are based – and, by extension, demonstrates that it is arbitrary and unlawful for EPA to rely on NHTSA's actions as a basis for withdrawing the waiver for California's ACC GHG and ZEV standards. EPA must reconsider and withdraw the Final Action on this basis.

B. Letter from the California Air Resources Board (CARB), dated June 17, 2019, regarding transportation conformity implications of finalizing the Proposed Rule, including the preemption provisions (Docket #EPA-HQ-OAR-2018-0283-7573) ("CARB Conformity Comment").

CARB's letter identified several consequences that might result from finalization of EPA's proposal to revoke the waiver for California's ACC GHG and ZEV standards.[6] CARB Conformity Comment at 1. CARB describes how such a final action would impact transportation and public health planning activities. *Id*. at 2. In particular, CARB noted the key role ZEVs play in California's State Implementation Plans (SIPs) under the Clean Air Act, which set out the state's plans for complying with future air quality standards. As the letter states: "Emissions from transportation dominate California's air

[6] CARB noted that although it had identified many of these issues in its prior comments on the Proposed Rule, *see* CARB Comments, "the initial comment period was inadequately short, and many critical analyses were not provided to the public." CARB Conformity Comment at 2.

pollution mix, so addressing these emissions without the current ZEV rules will raise long-lasting challenges to conformity and SIP planning. Because transportation projects can last decades, marked changes in ZEV penetration rates resulting from [finalization of the Proposed Rule] may result in very different emissions impacts from these projects than forecasted earlier in the planning process, especially in later years when ZEV penetration was projected to further increase." *Id*. at 3.

CARB's letter describes how EPA's action violates the Clean Air Act "conformity" rules—requirements that federal actions conform with state-level SIPs so that federal actions do not undermine states' air quality plans—by illustrating how "U.S. EPA and NHTSA's proposal to preempt CARB's GHG and ZEV regulations jeopardizes attainment of the SIP and conformity for critical transportation projects." *Id*. EPA does not respond to this issue or make any general conformity determination in the Final Action.

Moreover, eliminating California's ZEV mandate in the near term increases criteria emissions, requires CARB to address the modeling for transportation projects, makes it difficult to reach or maintain attainment in a way that worsens over time, and threatens the viability of transportation projects, including their funding and timing. *Id*. This can have ripple effects for numerous vital infrastructure projects that are already "in the pipeline" or planned for the future, as well as for jobs and overall air quality compliance. *Id*. Eliminating the ZEV mandate will "put substantial pressure on attainment of air quality standards," *id*. at 4, and likely require new measures to achieve air quality standards, *id*. As the letter states, "Placing this burden upon the states is in conflict with the Clean Air Act's cooperative federalism framework (see 42 U.S.C. § 7401) and further demonstrates the irrationality of the SAFE proposal." *Id*. The letter further notes how, "[t]he Regulatory Impact Analysis for SAFE did not consider these impacts . . . and the agencies did not conduct a federalism consultation with the states per Executive Order 13132 to consider the impacts of affecting critical state/federal transportation projects." *Id*.

CARB's letter also makes clear the significant role that the ZEV program plays in the control and reduction of criteria pollutants—a role which EPA, in the Final Action, dismisses as irrelevant. *See* 84 Fed. Reg. at 51349-50 n.284. During the formal comment period, California and others described the critical role the ZEV program is expressly intended to play, and does play, in achieving improved air quality and criteria air pollutant reductions. *See, e.g.*, CARB Comments at 406; States and Cities Comments, Docket #EPA-HQ-OAR-2018-0283-5481, at 115; South Coast Air Quality Management District Comment on the Draft Environmental Impact Statement for the Proposed Rule, Docket #EPA-HQ-OAR-2018-0283-1060, at 3-4 ("If ZEV standards cannot be imposed, SCAQMD will be unable to attain the federal clean air standards for ozone."); NGO Joint Legal Comments at 127-29. CARB's June 17, 2019 letter further evidences these points, noting: "[A]s CARB discussed in its initial comments at length, ZEVs provide meaningful reductions in criteria pollutants, beyond Low Emission Vehicle (LEV) standards, which should be accounted for in emissions and transportation planning . . . Transportation conformity analyses also are rooted in the growing share of

ZEVs within the fleet; without increased ZEV penetration, transportation projects may have greater air pollution impacts than currently modeled." CARB Conformity Comment at 2; *see also* CARB Comment Regarding NOx Emission Regional Impacts, dated November 6, 2019 (Docket # NHTSA-2018-0067-12447) (clarifying and "confirm[ing that] the proposal would have a significant adverse impact on NOx emissions" and describing impacts of ZEV standards on criteria pollution).

EPA must reconsider its final actions in the Part One Final Action in light of CARB's additional comments on EPA's disregard of the Clean Air Act's conformity requirements and the implications of EPA's actions for state air quality planning. Specifically, EPA's actions in the Part One Final Action violate its general conformity obligations under the Clean Air Act to not take actions that undermine states' ability to comply with SIPs. 42 U.S.C. § 7506; *see also* 40 C.F.R. Part 93, subpart B. In addition, in failing to respond to CARB's comments regarding the significant and serious consequences of its action on critical state transportation projects and air quality planning, EPA failed to fulfill its obligation under the APA to address all relevant considerations; this also demonstrates the arbitrary and capricious nature of the agency's decision-making.

Finally, CARB's comments further document the critical role that the ZEV mandate plays in achieving compliance with criteria pollutant standards—a fact that undermines EPA's unfounded assertion that the ZEV mandate is a de facto GHG standard, and thus is not needed to meet compelling and extraordinary conditions pursuant to EPA's contorted and incorrect reading of Clean Air Act Section 209(b)(1)(B). *See* 84 Fed. Reg. at 51349-50 n.284. California's ZEV standards are, and have always been, designed and adopted to reduce criteria emissions. Because EPA's entire justification for revoking the waiver for the ZEV standards relies on the fundamental, incorrect, and unsupported assertion to the contrary, EPA's actions in the Final Action are arbitrary and unlawful.

EPA must reconsider and withdraw the Final Action on the bases provided in the CARB Conformity Comment.

C. Letters from the California Association of Councils of Government, dated June 14, 2019 (Docket #EPA-HQ-OAR-2018-0283-7581); California Transportation Commission, dated June 26, 2019 (Docket #EPA-HQ-OAR-2018-0283-7585); Stanislaus Council of Governments, dated August 22, 2019 (Docket #NHTSA-2018-0067-12438); San Luis Obispo Council of Governments, dated June 19, 2019 (Docket #EPA-HQ-OAR-2018-0283-7579); Butte County Association of Governments, dated June 14, 2019 (Docket #EPA-HQ-OAR-2018-0283-7580).

Consistent with CARB's June 17, 2019 letter described above, these letters identify numerous transportation infrastructure projects that would be at risk due to EPA finalizing its Proposed Rule. These comments alerted EPA to the fact that its proposal would "hamper[] the ability of California's transportation agencies to deliver approximately 2,000 projects totaling more than $130 billion" and that "[o]ther important

goals—such as congestion relief, transportation system reliability, public health, housing, environmental sustainability, and equity—also would be significantly compromised for as much as 93 percent of the state's population." *See* Comment of California Association of Councils of Government, dated June 14, 2019 (Docket #EPA-HQ-OAR-2018-0283-7581) at 1. Specifically, the comments demonstrate that "[t]he proposed rule threatens the ability of 14 of the state's 18 MPOs [Metropolitan Planning Organizations] and eight rural non-attainment counties' [sic] to obtain federal approval for any of the following actions: (1) adoption of a new Regional Transportation Plan (RTP), (2) adoption of a new Federal State Transportation Improvement Program (FSTIP); (3) amendments to projects listed in the RTP or FSTIP not exempt from transportation conformity; and, (4) NEPA approval for projects not exempt from transportation conformity." *Id*. at 3 (footnotes omitted). Further, these comments provided a detailed list of each of the $130 billion worth of transportation projects that would be affected. *See id*. at 4 to 164. The California Transportation Commission notes that, "Tens of thousands of jobs in California and hundreds of thousands of jobs throughout the nation would be impacted should this rule be finalized (based on the Federal Highway Administration's calculation that every billion dollars invested in transportation infrastructure supports 13,000 jobs)." Comment of the California Transportation Commission, dated June 26, 2019 (Docket #EPA-HQ-OAR-2018-0283-7585) at 1.

EPA must reconsider its final actions in the Part One Final Action in light of these comments. Specifically, in failing to respond to these comments regarding the significant and serious consequences of its action for the transportation projects identified, as well as the follow-on adverse impacts to public health, jobs, and other issues, EPA failed to fulfill its obligation under the APA to address all relevant considerations; EPA's failure also demonstrates the arbitrary and capricious nature of the agency's decision-making. EPA must also reconsider its final actions in the Part One Final Action in light of the evidence these comments provide regarding the critical role that the ZEV mandate is intended to play, and does play, in achieving compliance with criteria pollutant standards—a fact that undermines EPA's unfounded assertion that the ZEV mandate is a de facto GHG standard, and thus is not needed to meet compelling and extraordinary conditions, which assertion is the centerpiece of EPA's effort to revoke the waiver for California's ZEV standards. *See* 84 Fed. Reg. at 51349-50 & n.284.

D. Letter and Request for Correction from the Attorneys General of New York, Colorado, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, Oregon, Pennsylvania, Vermont, and Washington, dated July 23, 2019, regarding NHTSA's failure to comply with Executive Order (E.O.) 13132 regarding policies that have federalism implications (Docket #EPA-HQ-OAR-2018-0283-7589) ("Attorneys General Comment").

In this letter, New York and other states describe how, "[c]ontrary to the statement in the proposal that '[t]he agencies complied with Order's requirements' (83 Fed. Reg. at 43476)," recent responses to Freedom of Information Act requests confirmed that the

agencies had not in fact complied with the Executive Order. Attorneys General Comment at 1. (NHTSA provided its FOIA response on May 29, 2019, while EPA provided its response on July 9, 2019, which prevented the states from filing this comment sooner. *Id*. at 2.) The letter cites Section 6(c)(1) of the E.O., *id*. at 1, which provides: "To the extent practicable and permitted by law, no agency shall promulgate any regulation that has federalism implications and that preempts State law, unless the agency, prior to the formal promulgation of the regulation, consulted with State and local officials early in the process of developing the proposed regulation." The letter asserts that this "requirement for consultation with state officials 'early in the process of developing the proposed regulation' . . . is over and above the minimum due process mandated by the Administrative Procedure Act." *Id*. at 4. The states requested that the agencies withdraw the Proposed Rule and fully comply with the Executive Order's consultation requirement before issuing any further proposed rule(s) of a similar effect. *Id*. at 2. The letter also included a request for correction under the Information Quality Act and the agencies' respective guidelines for information quality and corrections because EPA and NHTSA were unable to substantiate the claim, in the Proposed Rule, that they consulted with the states about their preemption proposals. *Id.* at 5.

In failing to respond to comments regarding E.O. 13132 and the agency's compliance with it, EPA failed to fulfill its obligation under the APA to address all relevant considerations. It must reconsider the Part One Final Action and address this failure.

E. Letters related to reports and studies evidencing the increasingly imminent and catastrophic effects of climate change.

"Since the agencies provide no basis to reject the overwhelming scientific consensus, the policy changes the agencies propose are completely arbitrary, as well as in direct conflict with their statutory obligations to protect the public." NGO Joint Legal Comments at 7-8. Additional studies, published and submitted to the agencies after the close of the formal comment period, support the overwhelming scientific consensus regarding the imminent and catastrophic consequences of unabated carbon emissions. These studies, and the comments described below, demonstrate that EPA's revocation of California's waiver for the ACC GHG and ZEV standards—intended to eliminate the important role of state and local regulations in the development of incremental emissions control technologies and other measures, in the midst of an environmental crisis that gravely and imminently imperils human health, the economy, and the natural resources on which human survival depends—is not only contrary to Section 209(b) of the Clean Air Act, it is also wholly unreasonable. The studies underscore the "compelling and extraordinary" threat that climate change poses; they also provide further evidence of "compelling and extraordinary" impacts specific to California that amply fulfill even EPA's incorrectly narrow interpretation of Section 209(b). This compelling further evidence of the gravity and urgency of climate hazards again demonstrates EPA's heedlessness toward the public health and welfare consequences of its actions. The agency's transgression is all the more egregious when viewed in the context of the Proposed Rule, in which EPA joined with NHTSA in proposing not only to

eliminate state authority to address the climate crisis, but to simultaneously abdicate their own legal obligations to address that crisis as well.

EPA must reconsider its final actions in the Part One Final Action in light of these additional climate studies, as well as the comments submitted during the formal comment period. These studies evidence that EPA's interpretation of Clean Air Act section 209(b) is contrary to the statutory language and also unreasonable, as is EPA's unflinching deference to NHTSA's erroneous attempt to construe EPCA as preempting emissions regulations. EPA must address these studies and directly and expressly address this detailed record regarding the catastrophic effects of global climate change. Moreover, because these studies demonstrate that EPA's actions to *increase* emissions are wholly arbitrary and contrary to EPA's statutory obligations, EPA must reconsider and withdraw the Final Action.

i. Letter from NGOs on the National Climate Assessment, dated December 14, 2018 (Docket #EPA-HQ-OAR-2018-0283-7438, #NHTSA-2017-0069-0695 to -0701[7]) ("NGO NCA Comment").

This letter presented EPA with the United States Global Change Research Program's (USGCRP) Fourth National Climate Assessment, Volume II: Impacts, Risks, and Adaptation in the United States ("NCA4-II"), which was released on November 23, 2018, after the close of the formal comment period for the Proposed Rule. The letter observed that the NCA4-II compiles "compelling new evidence of the gravity and immense costs of the current impact of climate change and the hazards it poses, and details the multiple ways in which climate change now damages and continues to threaten public health, the economy, and natural resources throughout the United States." NGO NCA Comment at 2. And, the letter alerts EPA to the fact that the NCA4-II "emphasizes that the degree of harm society experiences now and in the future from climate change *depends upon* whether effective efforts are taken now–including efforts by the federal government itself--to mitigate emissions of climate-destabilizing greenhouse gases." *Id*. The agencies' failures to reconcile their actions with the NCA4-II's conclusions "is not just unconscionable; it is unlawful." *Id*.

ii. Letters from States and Cities on the NCA4-II, dated December 11, 2018 (Docket #EPA-HQ-OAR-2018-0283-7440) ("States and Cities First Comment") and December 21, 2018 (Docket #EPA-HQ-OAR-2018-0283-7447) ("States and Cities Second Comment").

These letters explain that "it remains EPA's and NHTSA's responsibility to take into account the full [NCA4-II] Assessment." States and Cities Second Comment at 4. The letters further observe the NCA4-II's conclusion that, "[u]nder scenarios with high emissions and limited or no adaptation, annual losses in some sectors are estimated to grow to hundreds of billions of dollars by the end of the century. It is very likely that

[7] NGOs submitted the full NCA4-II report to each of the NHTSA docket, the EPA docket, and the NHTSA DEIS docket. However, on regulations.gov the agencies uploaded the NGO's submission of the report only to the NHTSA DEIS docket. We thus include the NHTSA DEIS docket identification numbers here.

some physical and ecological impacts will be irreversible for thousands of years, while others will be permanent." *Id*. at 8. Thus, the States and Cities argue, "[i]n the face of such evidence, the Agencies cannot simply throw up their hands or, worse, take steps to *increase* emissions." *Id*.

Moreover, the letters notify EPA that the NCA4-II "Clearly Identifies Compelling and Extraordinary Conditions California Faces from Climate Change." *Id*. at 13. These conditions include unprecedented heat waves, increased wildfires that "could triple the burned area (in a 30-year period) in the Sierra Nevada by 2100," unprecedented forest mortality from beetle infestations, intensified droughts, increased flood risks, sea level rise, and ocean warming, acidification, and deoxygenation. *Id*. at 10-13.

Separately, the letters note that the NCA4-II "confirms that GHGs and the climate change they cause exacerbate local or regional pollution problems" and that "there is high confidence that climate change will increase ozone levels over most of the United States, particularly over already polluted areas, thereby worsening the detrimental health and environmental effects due to ozone." *Id*. at 13. Moreover, the NCA4-II notes that among the areas where ozone is often highest are Southern California and the Section 177 States in the Northeast. *Id*. Thus, the NCA4-II demonstrates that "GHG-reducing standards, such as California's GHG and ZEV standards, are also needed to address ozone-formation—the very kind of 'local' or 'regional' problem EPA asserts California may address" even under EPA's contorted and incorrect reading of Clean Air Act Section 209(b)(1)(B). *Id*.

iii. Pennsylvania Department of Environmental Protection (DEP) Supplemental Comment on the NCA4-II, dated January 29, 2019 (Docket #NHTSA-2018-0067-12370).

This letter describes the NCA4-II findings "regarding realized and projected effects of climate change on states and regions of the United States, and the existence of clear scientific evidence that the nation and states cannot afford to forego cost effective, technologically feasible emission reduction strategies for significant sources of GHGs." Pennsylvania DEP Comment at 9. But the letter explains that, contrary to the NCA4-II's findings that "[w]aiting to begin reducing emissions is likely to increase the damages from climate-related extreme events," "[t]he Proposed Rule, if finalized, would undermine the interests and efforts of state and local governments to avoid and minimize the effects of climate change." *Id*. Indeed, the Final Action is designed to impede state action to mitigate the climate crisis, yet EPA only acknowledged the NCA4-II in the Final Action in its effort to suggest that the catastrophic effects of climate change in California are not different enough from the catastrophic effects elsewhere in the country to demonstrate that California's conditions are compelling and extraordinary. 84 Fed. Reg. at 51342-43 & n.265. EPA made no other effort whatsoever to acknowledge the existence of the climate change problem—much less the dire findings in the NCA4-II.

iv. Letter from NGOs regarding additional climate studies, dated April 5, 2019 (Docket #EPA-HQ-OAR-2018-0283-7452) ("NGO Climate Studies Comment").

This letter notifies EPA of several additional climate studies and reports released after the close of the formal comment period on the Proposed Rule. In particular, the comment notes that "[e]ven while action to steeply reduce greenhouse gas emissions within the next decade is more urgently needed than ever, [a] report [by the Rhodium Group] notes that U.S. emissions of carbon dioxide (CO_2) 'rose sharply' last year, reversing a previous three-year decline. Rhodium estimates that emissions increased by 3.4% in 2018, marking 'the second largest annual gain in more than two decades—surpassed only by 2010 when the economy bounced back from the Great Recession.'" NGO Climate Studies Comment at 2. Rhodium concluded that current efforts to reduce GHG emissions from the fleet are "not nearly . . . big enough . . . to meet medium- and long-term US emissions targets." *Id*. at 3.

The NGOs also highlighted a study by Charles G. Gertler and Paul A. O'Gorman of the Massachusetts Institute of Technology, which found that climate change is altering the atmosphere's heat structure such that "dangerous pollution can remain in the ambient air over cities longer and storms can deliver 'more rainfall from short, intense bursts.'" *Id*. at 3-4.

Finally, the NGO letter highlighted a study by Patrick L. Barnard, et al., published in *Scientific Reports*, which found that the "the consequences of sea-level rise (SLR), storms, and flooding" due to climate change "have been underestimated in prior studies," and that fixing flaws in those prior studies "dramatically increases the number of people and the amount of property exposed to flooding impacts" from climate change. *Id*. at 4. Because of this, "the economic impacts of projected future coastal flooding in California are of the same order of magnitude as Hurricane Katrina ($127 billion), and an order of magnitude higher than the most costly natural disasters in California history, the 1989 Loma Prieta Earthquake ($10 billion) and the 2017 Wildfire Season ($18 billion), and conclude that the 'comparison suggests to policy makers that future coastal flooding due to storms and sea level rise must be considered an economic threat on par with the state's and the world's most costly historical natural disasters.'" *Id*. at 5.

v. NGO Comment on the IPBES Global Assessment Report on Biodiversity and Ecosystem Services, dated May 31, 2019 (Docket #EPA-HQ-OAR-2018-0283-7566) ("NGO IPBES Comment").

This letter describes that the IPBES Report "culminates a three-year assessment which draws on thousands of peer-reviewed sources and includes the work of experts from 50 countries" and "provides the ominous context of accelerating global environmental collapse in which NHTSA's and EPA's unprecedented proposal willfully to increase greenhouse gas pollution from the nation's light duty vehicle fleet over current levels must be evaluated." NGO IPBES Comment at 2. It highlights the IPBES Report's finding that "*one million species* are at risk of extinction in coming decades due to man-

made dangers, including climate change." *Id*. The letter also notes that the IPBES Chair summed up the report as follows: "The health of ecosystems on which we and all other species depend is deteriorating more rapidly than ever. We are eroding the very foundations of our economies, livelihoods, food security, health and quality of life worldwide." *Id*. at 3. The letter concludes "that the agencies' failure even to consider these crucial scientific facts would be plainly unlawful." *Id*.

Not only does this letter demonstrate the grave and catastrophic impacts facing myriad species from human-made dangers, including climate change, it also demonstrates that EPA's determinations that its Final Actions will have "no effect on listed species or critical habitat under the [Endangered Species Act] Section (7)(a)(2) implementing regulations" and that "no Section 7(a)(2) consultation is required" for EPA's Final Action, 84 Fed. Reg. at 51358, are arbitrary and unlawful.[8]

vi. CARB Comment on two new studies on climate and carbon pollution, dated May 31, 2019 (Docket #NHTSA-2018-0067-12411) ("CARB Carbon Comment").

This letter notifies EPA of a study by Northcott D., et al., which documented, "for the first time, that CO_2 concentrations over ocean waters ebb and flow throughout the day, often peaking in the early morning—showing that a previously common scientific assumption that CO_2 concentrations over ocean waters do not vary much over time and space does not always hold true." CARB Carbon Comment at 2. The study examined Monterey Bay, off the coast of California, and found that CO_2 from the Santa Clara and Salinas valleys was being concentrated over the bay in the early morning; it further found that this "previously undocumented process could increase the amount of CO_2 that coastal waters are absorbing by about 20 percent." *Id*. The more CO_2 that is dissolved into the ocean, the more acidic it becomes—leading to "harmful impacts" that "have already been extensively studied and are already being seen." *Id*. at 2-3. CARB noted that the study concluded that ocean acidification "impacts are likely to accrue faster than and not be as evenly distributed as previously anticipated." *Id*. at 3. In particular, this letter and the Northcott D., et al., study further demonstrate that EPA's effort to distinguish carbon emissions as having only evenly distributed, global impacts is incorrect. *See*, *e.g.*, 84 Fed. Reg. at 51348. To the contrary, carbon pollution emitted in California has immediate and particularized impacts in California. That fact undermines EPA's entire rationale for considering whether California needs separate carbon emissions standards—as distinct from whether it needs a separate motor vehicles program—and is itself sufficient to demonstrate that even if considered in isolation, California's GHG and ZEV standards satisfy even EPA's own contorted and incorrect reading of Section 209(b)(1)(B). *See*, *e.g.*, 84 Fed. Reg. at 51349 (asserting that "Congress's intent in the second waiver criterion, CAA section 209(b)(1)(B), was to allow California to adopt new motor vehicle standards because of compelling and extraordinary conditions in

[8] *See also* Letter from Center for Biological Diversity, Sierra Club, and Public Citizen Regarding Endangered Species Act Compliance, dated April 10, 2019 (Docket #EPA-HQ-OAR-2018-0283-7454).

California that were causally related to local or regional air pollution levels in California.").

This letter also highlights a study by Gleason, et. al., addressing a feedback loop in which wildfires expedite snowmelt, which then amplifies the frequency and magnitude of wildfires as the climate continues to change. CARB Carbon Comment at 3. The letter thus demonstrates that California is experiencing compelling and extraordinary conditions from climate change, and thus its GHG and ZEV standards satisfy the Section 209(b)(1)(B) test.

vii. Letter from NGOs, dated August 14, 2019, regarding new climate change reports (Docket #EPA-HQ-OAR-2018-0283-7591) ("NGO Reports Comment").

This letter notifies the agency of yet more new evidence "demonstrating that the climate crisis caused by anthropogenic emissions of carbon dioxide and other greenhouse gases is already upon us and will lead to catastrophic consequences unless emissions are steeply reduced within the next decade." NGO Reports Comment at 1. The NGOs note that "July 2019 appears to have been the Earth's hottest month on record"; they also point out the "massive melting of Greenland's ice-sheet, adding an estimated nearly two hundred billion tons of water into the Atlantic and causing a projected half-millimeter rise of the global sea level in a single month." *Id*. at 2. The NGOs also alerted EPA to a study published in the journal *Nature*, finding "strong evidence that anthropogenic global warming is not only unparalleled in terms of absolute temperatures, but also unprecedented in spatial consistency within the context of the past 2,000 years." *Id*. at 3. The NGOs also submitted written testimony of the Government Accountability Office to the House Budget Committee, which concludes that "the effects of climate change have already and will continue to cause fiscal exposure across the federal government and that exposure will continue to increase," *id*., as well as a research brief prepared by Climate Central that "documents the connection between a warming climate and increased numbers of 'stagnation events' in urban areas, creating conditions for high levels of harmful ground-level ozone pollution," *id*. Finally, the NGOs commented that the Intergovernmental Panel on Climate Change released in summary form a Special Report on climate change impacts. *Id*. That report concluded with "high confidence" that "[d]eferral of GHG emissions reductions from all sectors implies tradeoffs including irreversible loss in land ecosystem functions and services required for food, health, habitable settlements and production, leading to increasingly significant economic impacts on many countries in many regions of the world." *Id*. at 4. Yet, again, EPA failed to so much as acknowledge this comment or these studies' grave findings in the Final Action.

viii. CARB Comment on study connecting climate to California wildfires, dated August 21, 2019 (Docket #EPA-HQ-OAR-2018-0283-7594) ("CARB Wildfires Comment").

This comment submitted a new study by Williams, et al., which found that the area burned annually by wildfires in California increased by 405 percent during 1972 to 2018. CARB Wildfires Comment at 2. The study concluded that the "large increase in California's annual forest-fire area over the past several decades is very likely linked to anthropogenic warming." *Id*. at 3. And the study warns that "if greenhouse gas emissions are not curbed, the damage from wildfires in California will continue to magnify exponentially." *Id*. Thus, the study again demonstrates that California is experiencing compelling and extraordinary conditions from climate pollution.

F. Letter from several NGOs, dated June 14, 2019, regarding a letter from 17 automakers encouraging continued negotiations between the federal government and California (Docket #EPA-HQ-OAR-2018-0283-7574).

The NGOs submitted a letter from 17 automakers to President Trump, copying Secretary of Transportation Elaine Chao and EPA Administrator Andrew Wheeler, that indicated that the automakers did not support the Proposed Rule's preferred alternative, but rather "'support a unified standard that both achieves year-over-year improvements in fuel economy and facilitates the adoption of vehicles with alternative powertrains.'" NGO Comment on the Automakers' Letter at 2. The NGOs' letter describes how the automakers also "expressed concern that the Proposed Rule will usher in 'an extended period of litigation and instability.'" *Id*. The NGOs' letter notes that: "This coordinated industry effort nearly 8 months after the close of the formal comment period underscores the irregularity and inadequacy of EPA and NHTSA's rulemaking process." *Id*.

The letter highlights the arbitrary and capricious nature of EPA's decision-making, which requires that the agency reconsider and withdraw the Part One Final Action.

G. Letter from Environmental Defense Fund (EDF), dated September 11, 2019, regarding statements from White House officials, including official statements by President Trump, that provide evidence that the agencies considered improper factors and that the rationales offered in the Proposed Rule are pretextual (Docket #EPA-HQ-OAR-2018-0283-7601); Letter from EDF, dated August 7, 2019, regarding undisclosed meetings with the Alliance of Automobile Manufacturers (Docket #EPA-HQ-OAR-2018-0283-7592).

This issue is discussed more fully below, at Section II, but EDF's September letter contains critical evidence suggesting that the Administration's actions are motivated by political animus toward California and not by any reasoned policy rationales. In particular, EDF notes an August 20, 2019 *New York Times* article that describes President Trump's reaction to the voluntary framework California developed with several automakers to continue making meaningful progress in reducing greenhouse gas emissions from cars and light trucks. As EDF describes in its letter, the article, citing three sources, reported that President Trump "'went so far as to propose scrapping his own rollback plan [of federal fuel economy and GHG emission standards] and keeping the Obama regulations, while still revoking California's legal authority to set its own

standards,'" and that "'[t]he president framed it as a way to retaliate against both California and the four automakers in California's camp.'"[9] The same article reported that, according to sources, the president is "enraged by California's deal," and "has demanded that his staff members step up the pace to complete his plan."

As EDF's September letter states, with respect to "pretextual decision-making, the U.S. Supreme Court has recently made clear that 'an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process' cannot satisfy the reasoned decision-making requirements of federal administrative law." EDF Letter, dated September 11, 2019, at 3-4 (citing *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019)).

EDF's August letter further demonstrates that the procedure leading to the Final Action has been highly irregular, improper, and unlawful. EDF highlights that, during the period in which EPA was working with NHTSA on the agencies' Final Action, EPA unlawfully failed to disclose at least *six* meetings between then-EPA Assistant Administrator William Wehrum and the Alliance of Automobile Manufacturers—his former client. EDF Letter, dated August 7, 2019, at 2-3. As EDF's comment observed, failure to disclose those meetings violated both the Clean Air Act and the Administrative Procedure Act, and a report by Senators Carper and Whitehouse concluded that the meetings appear to have violated governing ethics requirements, including the Trump Administration's Ethics Pledge. *Id*. at 3-4. These undisclosed meetings are further evidence that the agencies' process was improper.

The facts described in these letters demonstrate that EPA's Final Action relied on improper factors and considerations, *see Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2867 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider" or "offered an explanation for its decision that runs counter to the evidence before the agency"), and that its stated rationale for the rulemaking was pretextual. As a result, EPA must reconsider and withdraw the Final Action.

II. Further statements and actions by Administration officials strongly suggest that EPA's rationale for its actions in the Part One Final Action is a pretext and the action is based upon improper considerations including political hostility toward California and oil industry influence, requiring reconsideration and withdrawal.

In light of the evidence presented in EDF's August 7 and September 11, 2019 supplemental comments, discussed above, as well as other comments submitted to the agencies, and continuing Administration statements and actions—including by the President himself—it is increasingly apparent that the actions in the Proposed Rule,

[9] Coral Davenport and Hiroko Tabuchi, *Trump's Rollback of Auto Pollution Rules Shows Signs of Disarray* (August 20, 2019), available at https://www.nytimes.com/2019/08/20/climate/trump-auto-emissions-rollback-disarray.html.

including EPA's purported withdrawal of portions of California's waiver and its attempt to limit the scope of Section 177 of the Clean Air Act in the Part One Final Action, are based on improper factors and considerations. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider"). In addition, the record and the Administration's actions and statements further reveal that the agencies' stated rationale for the Part One Final Action is pretextual, and the rule instead is the result of improper influence by the oil industry and the Administration's political animus toward California. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) ("an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process" cannot satisfy the reasoned decision-making requirements of federal administrative law).

NHTSA and EPA have undertaken an unprecedented attack on the cooperative federalism of the Clean Air Act, 42 U.S.C. § 7401(c), as well as the plain language and history of California's special role in motor vehicle emissions regulation. The agencies' actions are not supported by law or fact, but are instead improperly motivated by oil industry influence and hostility toward California, as the statements and actions described below make clear.

Most recently, an October 30, 2019 *New York Times* article described how Administration officials lobbied auto manufacturers to cajole them into joining the White House's side of the litigation over the Part One Final Action—in the context of fears of retaliation by the Administration should the companies not do so. As stated in the article:

> Andrew Olmem, a top policy aide to Mr. Trump, began calling car companies to push them to sign on to the administration's effort in the courts to eliminate California's right to set its own auto emissions rules on planet warming pollution, a power granted under the Clean Air Act of 1970. He was joined on the phone in some cases by Justice Department officials, according to a person familiar with the matter.[10]

The article goes on to describe how auto manufacturers have "long feared that Mr. Trump might retaliate, either with tariffs or trade restrictions, if they didn't support his effort to dismantle [California's] rules."[11] It further notes how the Administration responded to the voluntary agreement between California and four automakers,

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[10] Coral Davenport and Hiroko Tabuchi, *White House Pressed Car Makers to Join Its Fight Over California Emissions Rules*, N.Y. Times (Oct. 30, 2019), available at https://www.nytimes.com/2019/10/30/climate/general-motors-toyota-emissions-white-house.html.

[11] *Id*. When several automakers joined the Administration's side of the Part One Final Action litigation, President Trump tweeted to thank them, stating, "Thank you @GM, @FiatChrysler_NA, @Toyota, and @GloblAutomkrs for standing with us for Better, Cheaper, Safer Cars for Americans. California has treated the Auto Industry very poorly for many years, harming Workers and Consumers. We are fixing this problem!" Donald Trump (@realDonaldTrump), Twitter (Oct. 30, 2019, 10:19 AM), https://twitter.com/realDonaldTrump/status/1189592785311223815.

discussed above, with "a series of unusual legal and policy moves against the state and those companies — including an antitrust investigation — that were widely perceived as retaliatory."[12]

EDF's September 2019 comment letter included numerous other statements that show that the Administration is fixated on attacking California. The day after the August 20, 2019 *New York Times* article described in that letter ran, President Trump, in a series of tweets, attacked the state and automakers for working together constructively:

> My proposal to the politically correct Automobile Companies would lower the average price of a car to consumers by more than $3000, while at the same time making the cars substantially safer. Engines would run smoother. Very little impact on the environment! Foolish executives![13] The Legendary Henry Ford and Alfred P. Sloan, the Founders of Ford Motor Company and General Motors, are "rolling over" at the weakness of current car company executives willing to spend more money on a car that is not as safe or good, and cost $3,000 more to consumers. Crazy![14] Henry Ford would be very disappointed if he saw his modern-day descendants wanting to build a much more expensive car, that is far less safe and doesn't work as well, because execs don't want to fight California regulators. Car companies should know[15] that when this Administration's alternative is no longer available, California will squeeze them to a point of business ruin. Only reason California is now talking to them is because the Feds are giving a far better alternative, which is much better for consumers![16]

Additionally, the day before the Part One Final Action was released, President Trump tweeted:

> The Trump Administration is revoking California's Federal Waiver on emissions in order to produce far less expensive cars for the consumer, while at the same time making the cars substantially SAFER. This will lead to more production because of this pricing and safety[17] advantage, and also due to the fact that older, highly polluting cars, will be replaced by new, extremely environmentally friendly cars. There will be very little difference in emissions between the California Standard and the new U.S.

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[12] *Id*.
[13] Donald Trump (@realDonaldTrump), Twitter (Aug. 21, 2019, 7:38 AM), https://twitter.com/realDonaldTrump/status/1164169890917433346?s=20.
[14] Donald Trump (@realDonaldTrump), Twitter (Aug 21, 2019, 4:50 PM), https://twitter.com/realDonaldTrump/status/1164308814759260161.
[15] Donald Trump (@realDonaldTrump), Twitter (Aug 21, 2019, 5:01 PM), https://twitter.com/realDonaldTrump/status/1164311594081247233.
[16] Donald Trump (@realDonaldTrump), Twitter (Aug 21, 2019, 5:01 PM), https://twitter.com/realDonaldTrump/status/1164311597587685376.
[17] Donald Trump (@realDonaldTrump), Twitter (Sept. 18, 2019, 8:19 AM), https://twitter.com/realDonaldTrump/status/1174342163141812224.

> Standard, but the cars will be[18] far safer and much less expensive. Many more cars will be produced under the new and uniform standard, meaning significantly more JOBS, JOBS, JOBS! Automakers should seize this opportunity because without this alternative to California, you will be out of business.[19]

As comments on the Proposed Rule have made clear, the agencies' safety projections are without merit. *See, e.g.*, Comments of Environmental Defense Fund, Docket #EPA-HQ-OAR-2018-0283-5079, at 2-3 (noting that the agencies conceded in the Proposed Rule that their fatality projections due to possible mass reduction of vehicles are not statistically significant and also that, leaving those non-statistically significant projected fatalities aside, the fleet fatality rate is lower under the current standards than under the rollback); Comments of the California Air Resources Board, Docket #EPA-HQ-OAR-2018-0283-5054, Analysis in Support of Comments ("CARB Comments") at 258-82; Comments of the Institute for Policy Integrity at New York University School of Law, Docket #EPA-HQ-OAR-2018-0283-5083 ("Policy Integrity Comments") at 59-99. The agencies' safety projections are based on brand-new, deeply flawed models that have been universally criticized as unsound. *Id*. NHTSA's own peer review of those models (dated July 2019, about 11 months after release of the Proposed Rule) further documented the fundamental errors and unsubstantiated results of those models. NHTSA, *CAFE Model Peer Review* (July 2019 (Revised)), Docket #NHTSA-2018-0067-0055; *see also* Supplemental Comments of the Center for Biological Diversity, et al., dated August 23, 2019, Docket #EPA-HQ-OAR-2018-0283-7593. There are no credible safety concerns related to the current fuel economy and GHG emission standards. Moreover, the Proposed Rule itself estimates that the rollback would ***reduce*** jobs. 83 Fed. Reg. at 43436-37. Its findings are categorically the opposite of President Trump's false claim of "JOBS, JOBS, JOBS." The Proposed Rule's estimates of technology costs, price increases, and sales impacts are likewise without merit. *See, e.g.*, CARB Comments at 93-188, 190-226; Comments of the Union of Concerned Scientists, Docket #EPA-HQ-OAR-2018-0283-5840, Technical Appendix at 1-46; Comments of the International Council on Clean Transportation, Docket #EPA-HQ-OAR-2018-0283-5456, Appendix at I-1 to 93; Policy Integrity Comments at 13-32; Comments of Dr. James Stock, et al., Docket #EPA-HQ-OAR-2018-0283-6220; Comments of Consumers Union et al., Docket #EPA-HQ-OAR-2018-0283-6182, Attachment A at 3-13, 16-21.

And the agencies have not made *any* attempt to model the impacts of the actions in the Part One Final Action, either alone or in connection with the other elements of the Proposed Rule. The President's—and his agencies'—purported rationales for the Part One Final Action do not withstand scrutiny.

President Trump has continued to express political animosity toward California, tweeting on October 8, 2019: "Gasoline Prices in the State of California are MUCH HIGHER than

[18] Donald Trump (@realDonaldTrump), Twitter (Sept. 18, 2019, 8:19 AM), https://twitter.com/realDonaldTrump/status/1174342164039401472.
[19] Donald Trump (@realDonaldTrump), Twitter (Sept. 18, 2019, 8:19 AM), https://twitter.com/realDonaldTrump/status/1174342164983107584.

anywhere else in the Nation ($2.50 vs. $4.50). I guess those very expensive and unsafe cars that they are mandating just aren't doing the trick! Don't worry California, relief is on the way. The State doesn't get it!"[20] But at the time of the tweet, California's GHG emissions program was aligned with the federal government's and the ZEV mandate applied in nine other states, as well. Statements made by the President through his official Twitter account are official policy statements.[21] With these tweets, among others,[22] the President reveals that his Administration's policy is grounded in animus toward California rather than the law or the facts.

Likewise, both Department of Transportation Secretary Chao and EPA Administrator Wheeler delivered prepared remarks at a press conference on the date the Part One Final Action was signed, which underscore that the Part One Final Action is grounded in political animus. Secretary Chao singled out California's clean cars program and declared: "We won't let political agendas in a single state be forced onto the other forty-nine."[23] Administrator Wheeler expanded on this topic with comments criticizing California: "CAFE does not stand for California Assumes Federal Empowerment."[24] He later lectured California, saying: "California has the worst air quality in the United States . . . We hope that the State will focus on these issues, rather than trying to set fuel

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[20] Donald Trump (@realDonaldTrump), Twitter (Oct. 8, 2019, 6:57 PM), https://twitter.com/realDonaldTrump/status/1181750525596983296.

[21] *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018) (treating President Trump's tweets as official statements of the President); *see also Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 594 (4th Cir. 2017) (treating presidential tweets as appropriate records for judicial review).

[22] *See, e.g.*, Priya Krishnakumar, *Pelosi, Hollywood, and High Taxes: Here's Everything Trump has Tweeted About California*, L.A. Times (Sept. 17, 2019), https://www.latimes.com/projects/trump-california-tweets/ (documenting President Trump's more than 200 tweets about California since he took office); Miranda Green & Timothy Cama, *Trump attacks California over water, fire management*, The Hill (October 23, 2018), https://thehill.com/policy/energy-environment/412811-trump-attacks-california-over-water-firemanagement (reporting that President Trump attacked California's water practices and fire management, incorrectly attributing forest fires to state forest management, and threatening to withhold federal aid); Donald Trump (@realDonaldTrump), Twitter (Nov. 10, 2018, 1:08 AM), https://twitter.com/realdonaldtrump/status/1061168803218948096?lang=en (incorrectly characterizing a deadly California wildfire as being the result of poor forest management); Donald Trump (@realDonaldTrump), Twitter (Jan. 20, 2019, 6:35 AM), https://twitter.com/realdonaldtrump/status/1086980606955794433?lang=en (referring to San Francisco streets as "disgusting"). In November 2019, as California was suffering from multiple highly destructive wildfires, President Trump reprised his ridicule of the state, blamed its political leadership for the fires, and threatened to deny California disaster relief funds. *See* Associated Press, AP FACT CHECK: Trump's Wildfire Tweets Not Grounded in Facts, New York Times (Nov. 5, 2019), https://www.nytimes.com/aponline/2019/11/05/us/politics/ap-us-trump-wildfires-fact-check.html. Blake Dodge, Trump Slams California Governor over Wildfires: 'You Don't See Close to the Level of Burn in Other States,' Newsweek (Nov. 3, 2019), https://www.newsweek.com/trump-mocks-california-governors-fema-request-you-dont-see-level-burn-other-states-1469460.

[23] Prepared Remarks for U.S. Sec'y of Transp. Elaine L. Chao, "One National Program Rule" Press Conference (Sept. 19, 2019), https://www.transportation.gov/briefing-room/one-national-program-rule-press-conference.

[24] Andrew R. Wheeler, *News Conference on California Fuel Economy Standards*, CSPAN at 6:48-51, (Sept. 19, 2019), https://www.c-span.org/video/?464472-1/epa-administrator-wheeler-secretary-chao-hold-news-conference-california-fuel-standards.

economy standards for the entire country."[25] These statements reveal Administration positions rooted in fundamental inaccuracies – under the Clean Air Act, California sets standards *for California*, which other states may then voluntarily adopt. *See* 42 U.S.C. §§ 7543(b) & 7507. Moreover, the agencies' actions purporting to eliminate California's GHG and ZEV emissions regulations *undermine* California's ability to address air quality problems. Secretary Chao and Administrator Wheeler's remarks demonstrate a deliberate disregard for, and misreading of, the very statutes their Part One Final Action purports to implement. Rather than being guided by statute, their actions are driven by impermissible, extrinsic animus toward California.

The Administration's improper motives for the Part One Final Action are further evidenced by other examples of the Administration misusing its executive agencies for baseless attacks on California's environmental programs. On August 28, 2019, the Department of Justice's Antitrust Division Chief sent a letter to four automakers asserting that their framework agreement with California to reduce automobile emissions "may violate federal antitrust laws."[26] Antitrust experts slammed the probe as a political ploy aimed at intimidation. Nicholas S. Bryner, a professor at Louisiana State University, said "this case doesn't make any sense," but rather "seems designed to intimidate California and the automakers that signed onto the deal."[27] Hal Singer, an adjunct professor at the Georgetown University McDonough School of Business, called DOJ's theory of antitrust violations a "complete falsehood."[28] University of Maryland economics professor Tim Brennan agreed that the case "doesn't have a leg to stand on," and noted that the investigation is "especially egregious because it seems to be aimed at harming the president's political foes."[29]

On September 6, 2019, the Department of Transportation and EPA sent a letter to California Air Resources Board Chairwoman Mary Nichols "to put California on notice" that the agreement "appears to be inconsistent with Federal law."[30] The letter concluded by threatening "legal consequences given the limits placed in Federal law on California's authority."[31]

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[25] Andrew R. Wheeler, *News Conference on California Fuel Economy Standards*, CSPAN at 10:20-43 (Sept. 19, 2019), https://www.c-span.org/video/?464472-1/epa-administrator-wheeler-secretary-chao-hold-news-conference-california-fuel-standards.
[26] David Shepardson, *U.S. launches antitrust probe into California automaker agreement*, Reuters (Sept. 6, 2019), https://www.reuters.com/article/us-autos-emissions/u-s-launches-antitrust-probe-into-california-automaker-agreement-idUSKCN1VR1WG.
[27] Hiroko Tabuchi, *Justice Dept. Investigates California Emissions Pact That Embarrassed Trump*, N.Y. Times (Sept. 6, 2019), https://www.nytimes.com/2019/09/06/climate/automakers-california-emissions-antitrust.html.
[28] Antitrust Experts Say DOJ Probe Of Auto Deal Appears Aimed At Intimidation, InsideEPA (Sept. 11, 2019), https://insideepa.com/daily-news/antitrust-experts-say-doj-probe-auto-deal-appears-aimed-intimidation.
[29] Tim Brennan, *When Politics Meets Antitrust*, Milken Institute Review (Sept. 9, 2019), http://www.milkenreview.org/articles/when-politics-meets-antitrust.
[30] Letter from Steven G. Bradbury, Gen. Counsel, Dep't of Transp., and Matthew Z. Leopold, Gen. Counsel, EPA, to Mary Nichols, Chair, Cal. Air Res. Bd. (Sept. 6, 2019), https://www.documentcloud.org/documents/6385856-EPA-DOT-Puts-California-on-Notice.html.
[31] *Id*.

On September 24, 2019—less than a week after the Part One Final Action's release—Administrator Wheeler sent a letter to California threatening to withhold billions of dollars in federal highway funding from the state if it did not address its "SIP backlog."[32] As California explained in response, Administrator Wheeler's letter "contain[ed] many inaccuracies," including the fact that the "SIP backlog discussed . . . consists of SIPs awaiting action by Regional U.S. EPA staff, and . . . are the result of [EPA] staff shortages, competing administrative priorities, and a lack of clear guidelines emanating from headquarters bureaucracy."[33]

Two days later, on September 26, 2019, Administrator Wheeler sent another letter to California, this time accusing the state of failing to meet its obligations under federal clean water statutes in part because of alleged pollution from the homeless population in California, and demanding that the state develop a remedial plan to address the problem within 30 days.[34] Approximately thirty-six other states have also failed to meet their federal clean water benchmarks; none of them received letters from the EPA.[35, 36]

Most recently, on October 23, 2019, the Department of Justice sued California for its 2013 carbon cap-and-trade agreement with Quebec.[37] Despite bringing the case six years after the agreement was reached and nearly three years after President Trump took office, the administration did not provide any non-political reason why the lawsuit was needed now.

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[32] Letter from Andrew R. Wheeler, Admin. of EPA, to Mary Nichols, Chair, Cal. Air Res. Bd. (Sept. 24, 2019), https://www.epa.gov/sites/production/files/2019-09/documents/california_naaqs_sip.pdf.
[33] Letter from Mary Nichols, Chair, Cal. Air Res. Bd., to Andrew R. Wheeler, Admin. of EPA 1 (Oct. 9, 2019), https://ww2.arb.ca.gov/sites/default/files/2019-10/10918_MDN_EPA_SIP%20response.pdf.
[34] Letter from Andrew R. Wheeler, Admin. of EPA, to Gavin C. Newsom, Gov. of Cal. (Sept. 26, 2019), https://www.epa.gov/sites/production/files/2019-09/documents/9.26.19_letter-epa.pdf.
[35] *See* Juliet Eilperin, Brady Dennis, & Josh Dawsey, *EPA Tells California It Is 'Failing to Meet its Obligations' to Protect the Environment*, Wash. Post (Sept. 26, 2019), https://www.washingtonpost.com/climate-environment/epa-tells-california-it-is-failing-to-meet-its-obligations-to-stem-water-pollution/2019/09/26/b3ffca1e-dfac-11e9-8dc8-498eabc129a0_story.html.
[36] EPA's actions against California sparked a letter from the Environmental Council of the States ("ECOS") to EPA Administrator Andrew Wheeler, in which ECOS demanded an immediate meeting with the Administrator and stated: "ECOS is seriously concerned about a number of unilateral actions by U.S. EPA that run counter to the spirit of cooperative federalism and to the appropriate relationship between the federal government and the states who are delegated the authority to implement federal environmental statutes . . . We are concerned about the lack of advance consultation with states and the impact of these and several other actions on the ability of states to protect human health and the environment, and call on U.S. EPA to return to the appropriate relationship with the states as coregulators under our nation's environmental protection system." Letter from ECOS to EPA Administrator Wheeler, dated September 26, 2019, https://www.ecos.org/wp-content/uploads/2019/09/ECOS-Sept-26-2019-Letter-to-Adminstrator-Wheeler.pdf; see also Ariel Wittenberg, *State regulators, agency spar over Wheeler's Calif. threats,* E&E News (Sept. 26, 2019), https://www.eenews.net/greenwire/stories/1061175163.
[37] U.S. DOJ Office of Public Affairs, *United States Files Lawsuit Against State of California for Unlawful Cap and Trade Agreement with the Canadian Province of Quebec* (Oct. 23, 2019), https://www.justice.gov/opa/pr/united-states-files-lawsuit-against-state-california-unlawful-cap-and-trade-agreement.

In addition to all of this, improper oil industry influence in the SAFE Rulemaking process has been documented as well. *See, e.g.*, Comments of Senators Sheldon Whitehouse, Jeffrey A. Merkley, and Brian Schatz, Docket #EPA-HQ-OAR-2018-0283-5483, at 1 (upon the election of President Trump, "the oil industry, sensing an opportunity to reap hundreds of billions of dollars in future revenues, stepped in and orchestrated a lobbying campaign to freeze the standards and strip California of its ability under the Clean Air Act to set its own standards"); Senators Thomas R. Carper and Sheldon Whitehouse, *Redefining Air: Industry's Pipeline to Power at EPA's Office of Air and Radiation* (July 2019).[38] In addition, a December 13, 2018 article by the *New York Times* describes an investigation by the paper that revealed how Marathon Oil, "the country's largest refiner, worked with powerful oil-industry groups and a conservative policy network financed by the billionaire industrialist Charles G. Koch to run a stealth campaign to roll back car emissions standards."[39] The paper's investigation also found that an industry Facebook campaign, "covertly run by an oil-industry lobby representing Exxon Mobil, Chevron, Phillips 66 and other oil giants," led to more than a quarter of the public comments received by NHTSA on the Proposed Rule. The article further explained that "[t]he energy industry's efforts also help explain the Trump Administration's confrontational stance toward California, which, under federal law, has a unique authority to write its own clean-air rules and to mandate more zero-emissions vehicles."

Collectively, these actions reveal a President and an Administration focused on undermining California and restricting the State's longstanding legal authority, as well as improperly advancing the agenda of the oil industry. EPA's actions in the Part One Final Action further illustrate this capricious and statutorily unauthorized campaign, and reveal that the agency's purported rationale is a sham. The Administration's spate of actions against California and its core environmental policies is motivated by animosity toward the President's perceived political adversaries, as well as an interest in protecting and supporting the oil industry.

An agency action is "arbitrary and capricious" under the Administrative Procedure Act, *see* 5 U.S.C. 706(2)(A), if the agency "relied on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). None of the statutory provisions under which EPA professes to act here authorizes the agency to act based upon a desire to punish the Administration's political adversaries or protect the oil industry.[40] Courts are "not

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[38] The report, *Redefining Air: Industry's Pipeline to Power at EPA's Office of Air and Radiation*, is available at https://www.epw.senate.gov/public/_cache/files/2/d/2d7a4d97-5260-4be1-92bf-152ac5d7cd21/020F44F63FF7BAC62FBDC77C0C55D82F.epw-report-carper-whitehouse-redefining-air-wehrum-7-2019.pdf; *see also* Letter from EDF, dated August 7, 2019, Docket #EPA-HQ-OAR-2018-0283-7592), Attachment A.

[39] Hiroko Tabuchi, The Oil Industry's Covert Campaign to Rewrite American Car Emissions Rules, N.Y. Times (Dec. 13, 2018), https://www.nytimes.com/2018/12/13/climate/cafe-emissions-rollback-oil-industry.html; *see also* Comment from Dennis Wall, posted December 14, 2018, Docket #NHTSA-2018-0067-12352.

[40] *See also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (recognizing that showing of agency "bad faith" warrants judicial intervention); *Aera Energy LLC v. Salazar*, 691 F. Supp.

required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977)). On the contrary, the Supreme Court has recently made clear that "an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process" cannot satisfy the reasoned decision-making requirements of federal administrative law. *Dep't of Commerce,* 139 S.Ct. at 2575. The many indications that improper factors have, in fact, played a key role in the action at issue here, as well as the clearly pretextual rationale for that action, require that EPA grant administrative reconsideration and withdraw the Part One Final Action.

Respectfully submitted,

Center for Biological Diversity
Chesapeake Bay Foundation
Environment America
Environmental Defense Fund
Environmental Law & Policy Center
Natural Resources Defense Council
Public Citizen, Inc.
Sierra Club
Union of Concerned Scientists

2d 25, 33 (D.D.C. 2010) ("Agency action must be set aside, of course, if found to be motivated in whole or in part by political pressures. *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir.1972)," and "agencies must make their decisions 'based strictly on the merits and completely without regard to any considerations not made relevant by Congress in the applicable statutes.' *Volpe*, 459 F.2d at 1246"); *N. Cal. River Watch v. City of Healdsburg*, 2004 WL 201502, at *15-16 (N.D. Cal. 2004) (discussing and finding improper bias and animus by agency decisionmaker).