

ORAL ARGUMENT NOT YET SCHEDULED

Case No. 22-1031

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

STATE OF TEXAS, et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY and MICHAEL S. REGAN,
Respondents.

On Petition for Review of Action by the U.S. Environmental Protection Agency

**BRIEF OF CONSERVAMERICA AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS AND REMAND TO THE AGENCY**

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASE

ConservAmerica respectfully submit this Certificate as to Parties, Rulings, and Related Cases.

A. Parties. All parties, intervenors, and amici appearing in this Court are listed in the brief of the State petitioners and private petitioners.

B. Rulings Under Review. Under review is the final action of the Administrator of the United States Environmental Protection Agency entitled *Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards*, published in the Federal Register at 86 Fed. Reg. 74,434 (Dec. 30, 2021).

C. Related Cases. Seven consolidated cases in the U.S. Court of Appeals for the District of Columbia Circuit involve challenges to the agency action challenged here: *Texas v. EPA*, No. 22-1031; *Competitive Enterprise Institute v. EPA*, No. 22-1032; *Illinois Soybean Ass'n. v. EPA*, No. 22-1033; *American Fuel & Petrochemical Manufacturers v. EPA*, No. 22-1034; *Arizona v. EPA*, No. 22-1035; *Clean Fuels Development Coalition v. EPA*, No. 22-1036; and *Energy Marketers of America v. EPA*, No. 22-1038. Three related cases challenge a related rule promulgated by the National Highway Traffic Safety Administration: *Natural Resources Defense Council v. NHTSA*, No. 22-1080; *Texas v. NHTSA*, No.

22-1144; and *American Fuel & Petrochemical Manufacturers v. NHTSA*, No. 22-1145.

CORPORATE DISCLOSURE STATEMENT OF CONSERVAMERICA

ConservAmerica Inc. is a 501(c)(3) organization focused on addressing conservation, environmental, and energy challenges through market-based solutions. ConservAmerica's mission is to advocate for sound laws and public policies that produce clean air, clean and safe water, and healthy public lands. ConservAmerica has no parent companies and no publicly traded corporation has a 10% of greater share in the ownership of ConservAmerica.

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GLOSSARY

EPA United States Environmental Protection Agency

NHTSA National Highway Traffic Safety Administration

**STATEMENT OF IDENTITY, INTEREST IN CASE, AND
SOURCE OF AUTHORITY TO FILE**

ConservAmerica is the party that has authorized the preparation and filing of this brief and its interest in this case is with the environmental impacts of a ruling and on supporting a decision that recognizes the proper role of states

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

ConservAmerica states, in compliance with Fed. R. App. P. 29 (a)(4)(E), that counsel for ConservAmerica has authored the brief in whole, no party to the case contributed to funding the brief and no persons other than those listed on the brief and no other party contributed to the funding of the brief.

INTEREST OF AMICUS CURIAE

ConservAmerica Inc. is a 501(c)(3) organization focused on addressing conservation, environmental, and energy challenges through market-based solutions. Our core mission is to advocate for sound laws and public policies that produce clean air, clean and safe water, and healthy public lands. ConservAmerica promotes wise management of our nation's public lands and resources through responsible stewardship and the rule of law.

ConservAmerica promotes energy policies based on sound science and an understanding that policies that too narrowly focus on one goal or one market may not make sense or may be counterproductive when viewed and analyzed from a holistic environmental perspective. The most efficient way to achieve the nation's environmental goals is through policies that encourage competitive technologies, private investment, and expanded trade. ConservAmerica opposes policies that impose regulations that burden the economy without delivering measurable environmental benefits.

SUMMARY OF ARGUMENT

Petitioners in this case seek the review of another segment of a coordinated plan by United States Environmental Protection Agency (“EPA”), the National Highway Traffic Safety Administration (“NHTSA”) and the State of California to engineer a wholesale shift in the nation’s vehicle fleet from traditional gas-powered vehicles to electric vehicles. This segment of the plan – a final rule by EPA choosing to treat electric vehicles as “zero-emission” vehicles while ignoring the upstream emission that accompany electrification – must be set aside because EPA arbitrarily and capriciously formulated a rule while failing to address key relevant information.

ConservAmerica submits this *amicus curiae* brief to alert the Court to the fact that the coordinated approach endorsed by EPA, NHTSA and the State of California has serious and widespread implications for energy policy, the environment, and the economy. While EPA, NHTSA and California have endorsed a policy based on the belief that requiring the rapid escalation in the use of electric vehicles is the best approach to meeting climate change goals, this policy does not account for the fact that when the full lifecycle of a vehicle and its energy sources are taken into account – including greenhouse gas emissions from fuel production, manufacturing, operation, and disposal stages – advanced internal combustion engine vehicles and hybrid electric vehicles are capable of achieving

comparable or better reductions in greenhouse gas emissions as similarly equipped, full battery electric vehicles. The policy in favor of a swift conversion to electric vehicles also discourages the development of new technologies which could reduce emissions. Because EPA's final rule is based upon the assumption that the rapid move to electric vehicles will result in greater emission reductions and that assumption is not supported by the record, it is arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

In addition to its concerns about the impacts to the environment and energy policy of the decision by EPA's final rule revising greenhouse gas emissions standards for certain vehicle classes, ConservAmerica urges the Court to set aside EPA's final rule and remand it to the agency because the rule is not based on reasoned decision-making on a record developed by the agency. Instead, the President, in Executive Order 14037, specifically directed EPA to set a standard based on electric vehicles being 50 percent of the automotive fleet by 2030. This targeted directive from the President – directing the agency to reach a specific outcome by way of an Executive Order – interfered with the administrative process and the rulemaking function delegated to the agency by Congress.

ARGUMENT

I. EPA ARBITRARILY CHOSE TO CONSIDER ONLY TAILPIPE EMISSIONS FROM ELECTRIC VEHICLES WHEN SETTING NEW STANDARDS AND EXPLICITLY REJECTED ACCOUNTING FOR UPSTREAM EMISSIONS.

A. Electric Vehicles Are Not Zero-Emission Vehicles.

EPA’s decision to “use tailpipe-only values” to determine vehicle greenhouse gas emissions from electric vehicles when setting revised standards “*without accounting for upstream emissions*” is arbitrary and capricious because, as EPA acknowledges, a greater number of electric vehicles in use will mean that other energy sources that provide power to electric vehicles will, to supply more energy, create more emissions. 86 Fed. Reg. 74,446. Those emissions cannot simply be cast aside and not be accounted for. EPA treats electric vehicles as “zero-emission vehicles.” This terminology has been criticized by many including the National Academy of Sciences as “incentivizing the deployment of zero-emission vehicles but misrepresenting the actual carbon emissions.”¹ Indeed, electric vehicles may have zero tailpipe emissions but in fact generate significant greenhouse gas emissions over their full lifecycle – meaning the emissions generated from mining and refining metal ores to make batteries and through the

¹ See, National Academy of Sciences (NAS), *Assessment of Technologies for Improving Light-Duty Vehicle Fuel Economy—2025-2035* (2021 publication copy), NAS p. 13-416.

generation of electricity to power them.² EPA erroneously decided not to consider full life cycle emissions when setting new vehicle standards.

Not only are electric vehicles not “zero emissions vehicles” but the findings of multiple lifecycle analyses by the International Energy Association, Argonne National Labs and Massachusetts Institute of Technology among others have found that vehicles powered partially or fully by gasoline internal combustion engines emit about the same or lower levels of carbon dioxide than electric vehicles. These important studies by unbiased experts comparing the full environmental profile of electric vehicles versus advanced hybrids are not adequately considered in the record before the agency.

In fact, based on the greenhouse gas intensity of today’s electric grid, hybrid vehicles often outperform all other vehicle types – including electric vehicles.³ Research into alternative fuels suggests that gasoline internal combustion engines have the potential for even greater reductions in greenhouse gas emissions.⁴ The

² See *Id*; Heywood, J., MacKenzie, D. (2015). “*On the Road Toward 2050: Potential for Substantial Reduction in Light-Duty Vehicle Energy Use and Greenhouse Gas Emissions*,” Massachusetts Institute of Technology. <http://web.mit.edu/sloan-auto-lab/research/beforeh2/files/On-the-Road-toward-2050.pdf>.

³ See Todd Johnston, “Slow Down: The Case for Technology Neutral Transportation Policy”, ConservAmerica (Dec. 10, 2020). <https://static1.squarespace.com/static/5d0c9cc5b4fb470001e12e6d/t/5fd1580999fe644e8a504a54/1607555090612/CA+Tech+Neutral+Paper++12.20+%281%29.pdf>

⁴ See Mueller. Finding that under the current electric grid infrastructure, ethanol-based fuels outperform electric vehicles throughout the Midwest.

studies show a variety of automotive technologies and powertrains deliver comparable emission reductions and demonstrate the importance of taking a technology-neutral approach in setting transportation policies to obtain the most efficient reductions in greenhouse gas emissions.

Finally, a full lifecycle emissions-based approach requires reframing the comparison between gasoline and electric vehicles. *See*, National Academy of Sciences report, p. 12-385. As renewable resources currently supply only 20 percent of the country's electricity needs and the remaining 80 percent are generated by fossil fuels such as coal and natural gas, the comparison is really between burning gasoline or a mix of coal and natural gas to move the vehicle. (*See* Mueller; Mackenzie). Such a comparison reveals that the proposed rapid electrification of the transportation sector would be a deeply flawed approach to reducing greenhouse gas emissions while, as discussed below, shifting and imposing significant costs and impacts to other sources.

B. EPA's Goal Of A Rapid Wholesale Shift To Electric Vehicles Will Not Meaningfully Impact Greenhouse Gas Emissions.

ConservAmerica recognizes that fully electric vehicles will likely play an important role in reducing emissions and fighting climate change, but cautions that a rapid, wholesale move away from gasoline powered vehicles to fully electric

vehicles may not achieve the benefits currently being touted.⁵ In the short and medium term, gasoline powered vehicles achieve similar reductions to electric vehicles when the impacts of the lifecycle emissions that occur in the production of electric vehicles is considered.

Another key reason against the swift, mandated move to electric vehicles is that picking one technology now over all other technologies forecloses the possibility of more technological breakthroughs – through efficiency and fuels – that could have significant long-term impacts. Thus, EPA’s approach is unreasonable because it endorses electric vehicles by assuming that they produce less emissions than gasoline powered vehicles when, at the present time, that is not the case.

C. EPA Did Not Fully Consider That A Rapid Switch To Electric Vehicles May Cause Other Serious Detrimental Environmental Impacts.

EPA’s rule mandating a rapid adoption of electric vehicles would have detrimental environmental implications that must also be fully vetted. An electric vehicle mandate would require sharply increasing the demand for the raw materials needed in their production which could have detrimental environmental impacts.

⁵ See Todd Johnston, “Slow Down: The Case for Technology Neutral Transportation Policy”, ConservAmerica (Dec. 10, 2020), <https://static1.squarespace.com/static/5d0c9cc5b4fb470001e12e6d/t/5fd1580999fe644e8a504a54/1607555090612/CA+Tech+Neutral+Paper+-+12.20+%281%29.pdf> (reviewing multiple studies).

Lithium and cobalt, two minerals essential for the manufacture of these batteries, are found in only a limited number of locations globally.⁶ More than 65 percent of global production of cobalt is concentrated in the Democratic Republic of the Congo. However, less than 10 percent of cobalt supply occurs as a primary product, with the remainder produced as a by-product of mining primarily copper and nickel. Countries that produce the materials without environmental protections are more likely to experience water pollution, contaminated crops and loss of soil fertility, and increased risks of cancer.⁷

The policy mandating the rapid switch to electric vehicles will likely result in a shift of emissions from the United States to China. While the reduction of tailpipe emissions in the United States may make it appear that the United States is making progress toward meeting its international commitments, there will be significant offsetting increases in emissions from the processing and manufacturing processes, largely in China. Consequently, there is little, if any, benefit in meeting worldwide climate targets.

⁶ See McKinsey Consulting “Lithium and cobalt: A tale of two commodities”; June 2018 Report <https://www.mckinsey.com/industries/metals-and-mining/our-insights/lithium-and-cobalt-a-tale-of-two-commodities>.

⁷ See, The Guardian Wed 18 Dec 2019 03.00 EST ‘How the race for cobalt risks turning it from miracle metal to deadly chemical’.

The full lifecycle environmental impacts from electric vehicle production must be considered, especially when EPA justifies its final emissions standards on environmental grounds. The court should remand the matter to EPA for a full consideration of all the environmental impacts of a rapid increase in production of the number of electric vehicles.

II. THE PRESIDENT CANNOT BY EXECUTIVE ORDER DIRECT AN AGENCY TO TAKE A SPECIFIC ACTION ON A PARTICULAR MATTER WHEN CONGRESS HAS GIVEN PRIMARY CONTROL TO AN AGENCY.

EPA's final rule under review in this case is part of the current administration's policy decision to rapidly convert the nations' automotive fleet to electric vehicles. President Biden set forth this approach – mandating that 50 percent of new passenger cars and light trucks be electric vehicles by 2030 – in an Executive Order titled “Strengthening American Leadership in Clean Cars and Trucks.” (86 Fed. Reg. 43583, Aug. 5, 2021, “Executive Order 14037”). Over a year later, EPA issued a final rule adopting the approach stated in the Executive Order. By issuing Executive Order 14037, President Biden interfered with an executive agency carrying out duties delegated to the agency by Congress by directing the agency to take a specific action on a matter delegated to it by statute.

Here, by ordering the EPA to revise the greenhouse gas emissions standards with a specific directive that "50 percent of all new passenger cars and light trucks sold in 2030 be zero-emission vehicles," the Executive Order essentially tells the

agencies (EPA and NHTSA) what the outcomes of their rulemakings should be before the agencies conducted their administrative processes and before they collected information and decided on a course of action.

The United States Constitution provides that the President has no authority to control executive agencies carrying out legislative duties delegated to the agencies by Congress. (U.S. Const. Art. I). Courts have recognized that the President "lacks day-to-day control over large swaths of regulatory policy and enforcement in the Executive Branch." *In re Aiken County*, 645 F.3d 428, 442 (D.C. Cir. 2011). One commentator concluded that: "[t]he Chief Executive's power to supervise and guide his subordinates in the conduct of ordinary duties prescribed by statute does not extend to the rulemaking and adjudicatory functions committed by law to the subordinate's discretion."⁸

This issue of the power of the President over decisions by executive branch agencies acting under a delegation of authority from Congress has been controversial among scholars and commentators. One recent view is that the President cannot exert authority over agencies, the agency head retains the ultimate authority for regulatory decisions entrusted to them by law, and the President may

⁸ Morton, Rosenberg, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues that May be Raised by Executive Order 12291*, 35 (1981) (interpreting *Myers v. United States*, 272 U.S. 52, 135 (1926)).

not decide what the decision of the agency will be.⁹ Another commentator suggests that the President should operate as an overseer rather than a decider in the administrative state.¹⁰ A decider is another way of saying unitary executive; the President must at all times be in charge and make decisions. But this commentator proposes that agencies as creatures of Congress that must adhere to the law and nothing but the law while the President is merely the overseer and coordinator who ensures agencies do not go way off track.¹¹ Others have concluded that a President's attempt to occupy the administrative space not delegated to the Executive by Congress is inconsistent with a fundamental design principle reflected in the United States Constitution, as Congress has the sole authority to enact laws.¹² This aggrandizement of presidential power is contrary to fundamental constitutional principles because it "undermines the role of Congress in allocating power among governmental institutions."¹³ Similarly, it is also argued

⁹ Robert V. Percival, Presidential Management of the Administrative State: The Not-So-Unitary Executive, 51 *Duke Law Journal* 963-1013 (2001)

¹⁰ Peter L. Strauss, Overseer, or "The Decider"? The President in Administrative Law, 75 *GEO. WASH. L. REV.* 696, 753-54 (2007).

¹¹ *Id.*

¹² Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 *Colul. L. REV.* 1953, 1980 (2015).

¹³ *Id.* at 1979.

that overt presidential influence over agencies poses risks to agency integrity and the rule of law.¹⁴

It is unnecessary to decide these difficult issues of constitutional law in this proceeding, but rather the court should avoid them by holding that the rule is arbitrary and capricious on other grounds. *See DeBartolo Corp. v. Gulf Coast Trades Counc.*, 485 U.S. 568 (1988).

Respectfully submitted,

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¹⁴ Daniel A. Farber, Presidential Administration Under Trump 5 (U.C. Berkeley L., Public Law Research Paper, 2017), <https://ssrn.com/abstract=3015591>.

CERTIFICATE OF COMPLIANCE WITH WORD COUNT

This brief complies with the Federal Rule of Appellate Procedure 32(g) along with the Court's scheduling Order because it contains 3391 words and was prepared using 14 point font using a proportionally spaced typeface.

/s/ John A. Sheehan
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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2022, I electronically filed the foregoing Brief of ConservAmerica as Amicus Curiae with the Clerk of the Court of the U.S. Court of Appeals for the D.C. Circuit by using the CM/ECF system.

All participants in this case that are registered CM/ECF users will be served by the CM/ECF system.

/s/ John A. Sheehan

John A. Sheehan