CHESAPEAKE BAY FOUNDATION
Saving a National Treasure

November 8, 2019

Via Hand Delivery and Email

James C. Owens
Acting Administrator
National Highway Traffic Safety Administration
400 Seventh Street, SW
Washington, D.C. 20590

Docket No. NHTSA-2018-0067

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

The Chesapeake Bay Foundation, Inc. ("CBF" or "Petitioner") hereby requests that the National Highway Traffic Safety Administration ("NHTSA") reconsider the final rule 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 Rule" or "Final Rule").

CBF is a non-profit, non-partisan organization founded in 1967 with the mission to restore and protect the ecological health of the Chesapeake Bay, the nation's largest estuary. CBF represents more than 300,000 members and electronic subscribers nationwide and—from offices in Maryland, Virginia, Pennsylvania, and the District of Columbia—works to restore the Chesapeake Bay and its tributary rivers and streams through education, advocacy, restoration, and litigation. In recognition of the interconnection between healthy water and healthy communities, CBF also works to make the watershed and its natural resources safe for the people who earn a living from the Bay and those who live and recreate in and around the Bay.

CBF is dedicated to the success of the Chesapeake Bay Total Maximum Daily Load ("Bay TMDL"), a federal-state partnership designed to reduce the nitrogen, phosphorus, and sediment pollution contributing to dead zones in the Bay.[1] Atmospheric deposition of nitrogen contributes about one-third of the total nitrogen load to the Bay watershed and fossil fuel-powered vehicles are a main source of the atmospheric nitrogen pollution.[2] The Bay and Bay states are already suffering from the impacts of climate change, which will also interfere with the goals of the Bay TMDL.[3] The Part One Final Rule threatens the progress of the Bay TMDL and the health of the Bay watershed by undermining programs that reduce nitrogen oxides and greenhouse gases from motor vehicles.

[1] *See* U.S. EPA, Chesapeake Bay Total Maximum Daily load for Nitrogen, Phosphorus, and Sediment (Dec. 2010) ("Chesapeake Bay TMDL"), available at https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document.
[2] Chesapeake Bay TMDL, Section 4.6.2 at 4-33.
[3] *See* CBF Comments on Proposed Rule, Docket #EPA-HQ-OAR-2018-0283-5701, at 3–5.

In the Part One Final Rule, issued jointly by NHTSA and the Environmental Protection Agency ("EPA"), 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. Also in the Final Rule, NHTSA states that it is codifying its interpretation of preemption under the Energy Policy and Conservation Act (EPCA). *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.

We submit this petition pursuant to 49 C.F.R. § 553.35. For the reasons set out in the attached Appendix, among others, the Part One Final Rule 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 and the attached Appendix:

- NHTSA failed to respond to key comments submitted after the close of the formal comment period that demonstrate these shortcomings, including that NHTSA's actions are arbitrary and capricious, exceed the agency's statutory authority, and are not in accordance with law;
- NHTSA violated public notice and comment legal requirements by including in the Part One Final Rule actions that were not "logical outgrowths" of the Proposed Rule; and
- NHTSA relied on improper considerations in its decision-making, and its asserted rationale for its actions is pretextual, making the Part One Final Rule legally indefensible.

As a result of the foregoing, compliance with the rule would be unreasonable and not in the public interest. *See* 49 C.F.R. § 553.35(a).

We note that there is some uncertainty whether a particular issue, fact, or objection included in this petition will be deemed subject to the exhaustion requirements that apply to NHTSA's action and/or whether a court might require exhaustion, *see, e.g., CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076 (D.C. Cir. 2009), and that definitive judicial resolution of that uncertainty may come after the time for submitting the objection in a petition for reconsideration has expired. As a result, we are submitting this petition in an abundance of caution. Our submission does not diminish the availability of the issues, facts, and objections presented herein to be raised immediately in judicial challenges. In addition, the scope of any judicial review that we may seek shall not be limited to the issues raised here, but may include challenges to any part of the Part One Final Rule. *Bellsouth Corp. v. FCC*, 17 F.3d 1487, 1490 (D.C. Cir. 1994).

NHTSA 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 NHTSA's reasoning and analysis for the Part One Final Rule and the legal deficiencies of NHTSA's rulemaking.

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 Rule, NHTSA should act on this petition expeditiously, grant reconsideration on the following issues, and withdraw the Part One Final Rule.

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

Respectfully submitted,

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Appendix to Chesapeake Bay Foundation's Petition for Reconsideration to NHTSA regarding the Part One Final Rule, 84 Fed. Reg. 51310 (Sept. 27, 2019)

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

NHTSA's regulations require that if, in a petition for reconsideration, "the petitioner requests the consideration of additional facts, he must state the reason they were not presented to the Administrator within the prescribed time." 49 C.F.R. § 553.35(b). With respect to the comments described below, and any additional facts they include, these were submitted within the "prescribed time," and 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 Rule. NHTSA's regulations provide that "[l]ate filed comments will be considered to the extent practicable," 49 C.F.R. § 553.23, and NHTSA reiterated this obligation in the Proposed Rule, 83 Fed. Reg. at 43471 ("To the extent practicable, we will also consider comments received after" the formal comment period closing date).

All of the letters described here were submitted in time for NHTSA's review of them to have been "practicable."[1] To the extent these comments were not submitted within "the time prescribed" and/or without sufficient time for NHTSA'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 #NHTSA-2018-0067-12000, as corrected Docket #NHTSA-2018-0067-12368, Appendix A ("NGO Joint Legal Comments") at 200-213. 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 proposal to revoke existing state authority to regulate greenhouse gas emissions from motor vehicles, and two highly 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 #NHTSA-2018-0067-12371, severely restricted the public's ability to comment on the Proposed Rule. We also note that the

[1] 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 #NHTSA-2018-0067-12432, at 4. Accordingly, supplemental comments that were submitted on the Proposed Rule up to at least June 20, 2019, were "practicable" for NHTSA to have considered and must be properly considered as part of the agencies' administrative record. In addition, in the Final Rule, NHTSA expressly addressed a comment submitted on April 10, 2019, showing that all comments submitted up to that date were "practicable" for NHTSA to have considered and properly part of the agencies' administrative record. *See* 84 Fed. Reg. at 51357 & n.323.

formal comment period lasted only 63 days,[2] and the agencies denied requests – including requests from automakers – for an additional 57 days, citing a purported need for automakers to have "maximum lead time to respond to the final rule."[3] Yet it took EPA and NHTSA 11 months to finalize the actions in the Part One Final Rule; 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 process demonstrates just how complex the Proposed Rule was, and how unreasonable the arbitrarily short comment period was.

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 #NHTSA-2018-0067-12415).

During the formal comment period, numerous commenters rejected 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; Comments of the California Air Resources Board, Docket #NHTSA-2018-0067-11873, Analysis in Support of Comments ("CARB Comments") at 404-06. This 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 related is factually and legally incorrect.

Despite this comment and others like it, NHTSA claimed in the final rule that no commenters disputed or otherwise specifically commented on NHTSA's statement that "[a]utomobile fuel economy is directly and substantially related to automobile tailpipe emissions of carbon dioxide." 83 Fed. Reg. at 51315. NHTSA must reconsider its final actions in the Part One Final Rule in light of these comments, including the MCC technology described. 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

[2] *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).
[3] *Id*. at 48581.

result in fuel economy improvements, and thus undermine the central premise upon which the Part One Final Rule is based.

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 #NHTSA-2018-0067-12417) ("CARB Conformity Comment").

CARB's letter identified several "serious consequences" that might result from finalization of NHTSA's preemption proposals.[4] CARB Conformity Comment at 1. CARB describes how such a final action would "destabilize key 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 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 NHTSA'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*. NHTSA does not sufficiently respond to this issue in the Part One Final Rule, cursorily and incorrectly claiming that its actions are exempt from the Clean Air Act's conformity requirements. *See* 84 Fed. Reg. at 51355.

Moreover, NHTSA's action will significantly disrupt numerous planned transportation projects, because the conformity analysis that was done for those projects relied on current modeling that includes California's ZEV program. As CARB explains in the letter, this is because the air quality model that is used for analyzing transportation projects in the states—the California Emissions FACtor (EMFAC) model—reflects CARB's Advanced Clean Car (ACC) regulation including the ZEV mandate. CARB Conformity Comment at 3. As a result, eliminating California's ZEV mandate would undermine the modeling for transportation projects, threatening the viability of those projects, including their funding and timing. *Id*. This has 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 also require model updates and potential SIP revisions, which are "complex, and may take years to complete," *id*., and 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

[4] 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.

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; nor did the National Environmental Policy Act (NEPA) documents despite the environmental impacts of changes to major transportation projects; 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 NHTSA ignores. During the formal comment period, California and others described the critical role the ZEV program plays in achieving improved air quality and criteria air pollutant reductions. *See, e.g.*, CARB Comment at 406; States and Cities Comments, Docket #NHTSA-2018-0067-11735, at 115; South Coast Air Quality Management District Comment on the Draft Environmental Impact Statement for the Proposed Rule, Docket #NHTSA-2018-0067-5666, 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.

NHTSA must reconsider its final actions in the Part One Final Rule in light of CARB's additional comments on NHTSA's disregard of the Clean Air Act's conformity requirements and the implications of NHTSA's actions for state air quality planning. Specifically, NHTSA's actions in the Part One Final Rule 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, NHTSA 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 NHTSA's unfounded assertion that the ZEV mandate is a de facto GHG standard, which was central to NHTSA's reasoning in including such mandates in the scope of its preemption regulations.

C. Letters from the California Association of Councils of Government, dated June 14, 2019 (Docket #EPA-HQ-OAR-2018-0283-7581[5]); 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 NHTSA finalizing its Proposed Rule. These comments alerted NHTSA 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.

NHTSA must reconsider its final actions in the Part One Final Rule in light of these comments. Specifically, in failing to respond to these comments regarding the significant and serious consequences of its action on the transportation projects identified, as well as the follow-on adverse impacts to public health, jobs, and other issues, NHTSA failed to fulfill its obligation under the APA to address all relevant considerations; NHTSA's failure also demonstrates the arbitrary and capricious nature of the agency's decision-making. NHTSA must also reconsider its final actions in the Part One Final Rule in light of the evidence these comments provide regarding the critical role that the ZEV mandate plays in achieving compliance with criteria pollutant standards—a fact that undermines NHTSA's unfounded assertion that the ZEV

[5] 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 NHTSA did not docket comments referenced herein, we refer to the EPA 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, NHTSA is obligated to consider submissions to the EPA docket.

mandate is a de facto GHG standard, which was central to NHTSA's reasoning in including such mandates in the scope of its preemption regulations.

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, "Contrary 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 had 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, NHTSA failed to fulfill its obligation under the APA to address all relevant considerations. It must reconsider the Part One Final Rule 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, submitted after the close of the formal comment period, support the overwhelming scientific consensus regarding the imminent and catastrophic consequences of unabated carbon emissions. These comments, described below, demonstrate that NHTSA's preemption action—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 EPCA, it is also wholly unreasonable. The agency's transgression is all the more egregious when viewed in the context of the Proposed Rule, in which NHTSA joined with EPA 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.

NHTSA must reconsider its final actions in the Part One Final Rule in light of these additional climate studies, as well as the comments submitted during the formal comment period, as they evidence how NHTSA's interpretation of EPCA's preemption provision is contrary to the statutory language and also unreasonable. NHTSA must address these studies and reconcile its actions with the extensive, detailed record regarding the catastrophic effects of global climate change.

i. Letter from NGOs on the National Climate Assessment, dated December 14, 2018 (Docket #NHTSA-2018-0067-12356, #NHTSA-2017-0069-0695 to -0701[6]) ("NGO NCA Comment").

This letter presented NHTSA 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 NHTSA 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 #NHTSA-2018-0067-12361) ("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, "Under 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 some physical and ecological impacts will be irreversible for thousands of years, while others will be permanent." *Id*. at 8. Thus, the States

[6] 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.

and Cities argue, "In the face of such evidence, the Agencies cannot simply throw up their hands or, worse, take steps to *increase* emissions." *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, 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," the letter describes that "[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 Rule is designed to impede state action to mitigate the climate crisis, yet NHTSA did not so much as 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 #NHTSA-2018-0067-12377) ("NGO Climate Studies Comment").

This letter notifies NHTSA 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 #NHTSA-2018-0067-12408) ("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*.

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 NHTSA of a study by Northcott D., et. al., which documented, "for the first time, that CO2 concentrations over ocean waters ebb and flow throughout the day, often peaking in the early morning — showing that a previously common scientific assumption that CO2 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 CO2 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 CO2 that coastal waters are absorbing by about 20 percent." *Id*. The more CO2 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. The agencies 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. 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. *Id*.

vii. Letter from NGOs, dated August 14, 2019, regarding new climate change reports (Docket #NHTSA-2018-0067-12436) ("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 NHTSA 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, NHTSA failed to so much as acknowledge this comment or these studies' grave findings in the Final Rule.

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*.

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 #NHTSA-2018-0067-12416).

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 how, "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 NHTSA's decision-making, which requires that the agency reconsider and withdraw the Part One Final Rule.

> 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 #NHTSA-2018-0067-12435).

This issue is discussed more fully below, at Section III, 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.'"[7] 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 Rule has been highly irregular, improper, and unlawful. EDF highlights that, during the period in which NHTSA was working with EPA on the agencies' Final Rule, 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

[7] 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.

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 NHTSA's rulemaking relied on improper factors and considerations, *see 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" 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, NHTSA must reconsider and withdraw the Part One Final Rule.

II. NHTSA takes several substantive actions in the Part One Final Rule that were not part of the Proposed Rule. As a result, NHTSA did not provide adequate notice of these actions, nor an opportunity to comment on them. NHTSA must reconsider the Part One Final Rule and provide such notice and opportunity for public comment.

The Administrative Procedure Act, which governs NHTSA's actions in this rulemaking, requires that an agency's final rule be a "logical outgrowth" of the rule the agency initially proposed. *See, e.g., Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 950-51 (D.C. Cir. 2004) (citing 5 U.S.C. § 553(b)). There are several instances in which NHTSA's actions in the Part One Final Rule were not substantively included in the Proposed Rule, such that their inclusion in the Final Rule is not a logical outgrowth of the proposal. In such instances, NHTSA has not provided adequate opportunity for public review and comment, nor a sufficient basis for its actions. As a result, NHTSA must reconsider and withdraw the Part One Final Rule. If NHTSA wishes to pursue these actions, it must issue a new proposed rule to develop a basis for these actions and provide adequate notice and opportunity for public comment on them.

As noted above, NHTSA's regulations require that if, in a petition for reconsideration, "the petitioner requests the consideration of additional facts, he must state the reason they were not presented to the Administrator within the prescribed time." 49 C.F.R. § 553.35(b). The facts and issues described in this section were not presented to the Administrator during the "prescribed time" because Petitioner had no notice of them during that time as they specifically arose in the Final Rule.

A. In the Final Rule, NHTSA splits the final actions into two phases—issuing its preemption regulation now and promising CAFE standards at some unspecified future time.

NHTSA has not adequately explained its reasons for separating what it proposed as a single set of joint actions into two sets of joint actions and rushing to take action on EPCA preemption while waiting to take action on Corporate Average Fuel Economy (CAFE) standards. The decision to do so is all the more nonsensical given that NHTSA justifies its decision on EPCA preemption by invoking conflict preemption. Having failed to finalize its CAFE standards, NHTSA cannot satisfy the fact-intensive inquiry necessary to establish conflict preemption by those CAFE standards.

NHTSA contends that the split was necessitated by a need for "regulatory certainty" and the "prospect of disharmony," apparently referring to a change in California's "deemed to comply" regulations. 84 Fed. Reg. at 51313. But it is NHTSA's actions here that have created regulatory uncertainty and the prospect of disharmony by purporting to invalidate long-standing programs that California and other states have relied on for decades—and have planned to rely on—to protect their residents and natural resources. The uncertainty and disharmony sown by NHTSA's decision is all the more arbitrary given that NHTSA's interpretation of EPCA is contrary to several court decisions and NHTSA's own prior position on preemption going back for several years.

NHTSA must reconsider and withdraw the Part One Final Rule and provide adequate notice and opportunity for public comment on its reasoning for splitting the Proposed Rule into two separate actions.

B. In the Final Rule, NHTSA states that EPCA preempts future regulations, even for years where a NHTSA standard is not in effect; this is completely inconsistent with the plain language of the statute and was not discussed in the Proposal.

The EPCA statutory preemption language clearly limits its preemptive effect as follows: "*When an average fuel economy standard prescribed under this chapter is in effect*, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter." 49 U.S.C. § 32919(a) (emphasis added). NHTSA does not discuss the implications of this time limitation anywhere in the Proposed Rule, nor does the Proposed Rule discuss preemption of state standards for future years for which NHTSA has not yet "prescribed" fuel economy standards.

In contrast, in the Part One Final Rule, NHTSA asserts that: "State and local requirements that address automobiles beyond model year 2026 are therefore preempted if they relate to 'fuel economy standards' that NHTSA is required to establish in the future. To conclude otherwise would be to make the impermissible assumption that NHTSA will not carry out Congress's command." 84 Fed. Reg. at 51319.

NHTSA's justification for preempting standards beyond model years for which NHTSA has prescribed CAFE standards has no grounding in the statute.

In addition, the Proposed Rule did not give adequate notice of, nor an opportunity to comment on, the position NHTSA adopted in the Part One Final Rule. The preamble of the Part One Final Rule cites to the Proposed Rule to suggest that NHTSA is only "confirm[ing] its view" offered there. 84 Fed. Reg. at 51314 (citing 83 Fed. Reg. at 43239). But that claim is belied by the relevant text at that citation, which made clear that NHTSA was only "solicit[ing] comment on the severability of … its proposed decision on the maximum feasible CAFE standards for MY 2021-2026 … from its decision on EPCA preemption." 83 Fed. Reg. 43239.

NHTSA must reconsider and withdraw the Part One Final Rule and provide adequate notice and opportunity for public comment on this aspect of the Rule.

C. In the Final Rule, NHTSA asserts for the first time that EPCA preempts regulations related to in-use vehicles.

In the Part One Final Rule, NHTSA asserts for the first time that EPCA's preemption provision includes within its scope regulations related to in-use vehicles. NHTSA states as follows: "South Coast [Air Quality Management District] argued that EPCA preemption would not reach possible State and local requirements concerning lease arrangements or requirements for used vehicles. NHTSA does not agree. EPCA preempts requirements related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under EPCA. If a State requirement falls within this scope, it is preempted. For example, a State could not prohibit dealers from leasing automobiles or selling used automobiles unless they meet a fuel economy standard." 84 Fed. Reg. at 51318, n.96 (citation omitted).

The agency does not provide a clear basis for its interpretation. NHTSA announces for the first time in the Part One Final Rule that it reads EPCA as "preempt[ing] State and local laws and regulations that relate to: (1) Fuel economy standards, *or* (2) average fuel economy standards for automobiles covered by an average fuel economy standard under 49 U.S.C. Chapter 329." 84 Fed. Reg. at 51318 (emphasis in original). In other words, NHTSA reads the phrase "for automobiles covered by an average fuel economy standard under [EPCA]" as modifying only "average fuel economy standards." 49 U.S.C. § 32919(a). NHTSA thus reads the statute as preempting state and local laws regardless of whether those laws are applicable to automobiles covered by a CAFE standard. It is possible that this unannounced and unreasonable reading of the statute is the basis for its sweeping and surprising claim that state laws applicable only to used vehicles may be expressly preempted, but it is not clear. As a result, not only has the agency deprived the public of notice and the opportunity to comment on this interpretation by not including it in the Proposed Rule, but it has not even articulated a clear basis for this interpretation in the Final Rule.

Moreover, NHTSA's failure to provide notice of, an opportunity to comment on, or an explanation for this new interpretation is particularly significant in light of NHTSA's assurance that states and localities can "encourage ZEVs in many different ways, such as through investments in infrastructure and appropriately tailored incentives." 84 Fed. Reg. at 51321. Together, these statements contradict NHTSA's claim that it is not "difficult for States or local governments" to determine which laws will be preempted by the Part One Final Rule. 84 Fed. Reg. at 51318. Instead, NHTSA's new interpretation creates uncertainty for states and cities as to whether NHTSA intends the Part One Final Rule to preempt other in-use laws, such as congestion pricing, designated lanes for high-occupancy vehicles, or other measures to reduce emissions.

The Proposed Rule did not give adequate notice of or an opportunity to comment on this position NHTSA adopted for the first time in the Part One Final Rule. NHTSA must reconsider and withdraw the Part One Final Rule and provide such notice and opportunity for public comment.

D. In the Final Rule, NHTSA asserts preemption of all state or local laws that have a "direct or substantial effect" of regulating or prohibiting tailpipe GHG emissions, whereas in the Proposal, NHTSA asserted preemption only of state and local laws that have a "direct effect" of doing so.

As a result, the Proposed Rule did not give adequate notice of or an opportunity to comment on the position NHTSA adopted in the Part One Final Rule—including the meaning of the amorphous and undefined term "substantial." NHTSA must reconsider and withdraw the Part One Final Rule and provide such notice and opportunity for public comment.

III. Further statements and actions by Administration officials strongly suggest that NHTSA's rationale for its actions in the Part One Final Rule is a pretext and the rule 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, including NHTSA's preemption actions in the Part One Final Rule, 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 Rule 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).

As noted above, NHTSA's regulations require that if, in a petition for reconsideration, "the petitioner requests the consideration of additional facts, he must state the reason they were not presented to the Administrator within the prescribed time." 49 C.F.R. § 553.35(b). The facts and issues described in this section were not presented to the Administrator within the "prescribed time" because they 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, as discussed above.

NHTSA and EPA are undertaking 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 Rule, including NHTSA's preemption actions—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.[8]

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."[9] It further notes how the Administration responded to the voluntary agreement between California and four automakers, 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."[10]

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![11] 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![12] 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

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[8] 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.

[9] *Id*. When several automakers joined the Administration's side of the Part One Final Rule 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.

[10] *Id*.

[11] Donald Trump (@realDonaldTrump), Twitter (Aug. 21, 2019, 6:38 AM), https://twitter.com/realDonaldTrump/status/1164169890917433346?s=20.

[12] Donald Trump (@realDonaldTrump), Twitter (Aug 21, 2019, 4:50 PM), https://twitter.com/realDonaldTrump/status/1164308814759260161.

> regulators. Car companies should know[13] 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![14]

Additionally, the day before the Part One Final Rule 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[15] 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. Standard, but the cars will be[16] 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.[17]

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 #NHTSA-2018-0067-12137, 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 #NHTSA-2018-0067-11873, 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 #NHTSA-2018-0067-12213, Appendix ("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 #NHTSA-2018-0067-12439. 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

[13] Donald Trump (@realDonaldTrump), Twitter (Aug 21, 2019, 5:01 PM), https://twitter.com/realDonaldTrump/status/1164311594081247233.
[14] Donald Trump (@realDonaldTrump), Twitter (Aug 21, 2019, 5:01 PM), https://twitter.com/realDonaldTrump/status/1164311597587685376.
[15] Donald Trump (@realDonaldTrump), Twitter (Sept. 18, 2019, 8:19 AM), https://twitter.com/realDonaldTrump/status/1174342163141812224.
[16] Donald Trump (@realDonaldTrump), Twitter (Sept. 18, 2019, 8:19 AM), https://twitter.com/realDonaldTrump/status/1174342164039401472.
[17] Donald Trump (@realDonaldTrump), Twitter (Sept. 18, 2019, 8:19 AM), https://twitter.com/realDonaldTrump/status/1174342164983107584.

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 #NHTSA-2018-0067-12039, Technical Appendix at 1-46; Comments of the International Council on Clean Transportation, Docket #NHTSA-2018-0067-11741, 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 #NHTSA-2018-0067-11731, 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 Rule, 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 Rule 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 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!"[18] 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.[19] With these tweets, among others,[20] 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 Rule was signed,

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

[19] *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).

[20] *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, N.Y. 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.

which underscore that the Part One Final Rule is based 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."[21] Administrator Wheeler expanded on this topic with comments criticizing California: "CAFE does not stand for California Assumes Federal Empowerment."[22] 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 economy standards for the entire country."[23]

The Administration's improper motives for the Part One Final Rule 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."[24] 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."[25] Hal Singer, an adjunct professor at the Georgetown University McDonough School of Business, called DOJ's theory of antitrust violations a "complete falsehood."[26] 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."[27]

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."[28] The letter concluded by threatening "legal consequences given the limits placed in Federal law on California's authority."[29]

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[21] 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.
[22] 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.
[23] 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.
[24] 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.
[25] 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.
[26] 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.
[27] Tim Brennan, *When Politics Meets Antitrust*, Milken Institute Review (Sept. 9, 2019), http://www.milkenreview.org/articles/when-politics-meets-antitrust.
[28] 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.
[29] *Id.*

On September 24, 2019—less than a week after the Part One Final Rule'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."[30] 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."[31]

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.[32] Approximately thirty-six other states have also failed to meet their federal clean water benchmarks; none of them received letters from the EPA.[33, 34]

Most recently, on October 23, 2019, the Department of Justice sued California for its 2013 carbon cap-and-trade agreement with Quebec.[35] The Trump Administration did not even try to come up with a non-political reason for why—six years after the agreement was reached and nearly three years after President Trump took office—the lawsuit was needed now.

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 #NHTSA-2018-0067-11970, at 1 (upon the election of

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[30] 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.

[31] Letter from Mary Nichols, Chair, Cal. Air Res. Bd., to Andrew R. Wheeler, Admin. of EPA (Oct. 9, 2019), https://ww2.arb.ca.gov/sites/default/files/2019-10/10918_MDN_EPA_SIP%20response.pdf.

[32] 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.

[33] *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.

[34] 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.

[35] 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.

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).[36] 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."[37] 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. NHTSA's actions in the Part One Final Rule 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 NHTSA 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.[38] Courts are "not 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

[36] *Redefining Air: Industry's Pipeline to Power at EPA's Office of Air and Radiation*, 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 #NHTSA-2018-0067-12435, Attachment A.

[37] 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.

[38] *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. 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).

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 NHTSA grant administrative reconsideration and withdraw the Part One Final Rule.