

ORAL ARGUMENT NOT YET SCHEDULED
No. 20-1145

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

COMPETITIVE ENTERPRISE INSTITUTE, ANTHONY KREUCHER,
WALTER M. KREUCHER, JAMES LEEDY, AND MARC SCRIBNER,
Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, JAMES C.
OWENS, IN HIS OFFICIAL CAPACITY;
ENVIRONMENTAL PROTECTION AGENCY; ANDREW R. WHEELER, IN
HIS OFFICIAL CAPACITY,
Respondents.

ON PETITION FOR REVIEW OF A JOINT FINAL ORDER OF THE
NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION AND THE
ENVIRONMENTAL PROTECTION AGENCY

PRELIMINARY OPENING BRIEF FOR PETITIONERS

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January 14, 2021

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rules 12(c) and 28(a)(1), Petitioners certify the following:

A. Parties and Amici**Petitioners:****Case No. 20-1145 (instant case)**

Competitive Enterprise Institute; Anthony Kreucher; Walter Kreucher, James Leedy; Marc Scribner.

Case No. 20-1167

State of Delaware; People of the State of Michigan; State of New Mexico; City of Los Angeles; City of New York; City and County of San Francisco; State of California; State of Colorado; State of Connecticut; State of Hawaii; State of Illinois; State of Maine; State of Maryland; State of Minnesota; State of Nevada; State of New Jersey; State of New York; State of Rhode Island; State of Vermont; State of Wisconsin; District of Columbia; Commonwealth of Virginia; Commonwealth of Massachusetts; State of North Carolina; State of Oregon; Commonwealth of Pennsylvania; State of Washington; City and County of Denver.

Case No. 20-1168

Natural Resources Defense Council, Inc.; Center for Biological Diversity; Chesapeake Bay Foundation, Inc.; Communities for a Better Environment; Conservation Law Foundation; Consumer Federation of America; Environment

America; Environmental Defense Fund; Environmental Law and Policy Center; Public Citizen, Inc.; Sierra Club; Union of Concerned Scientists.

Case No. 20-1169

Environmental Defense Fund; Center for Biological Diversity; Chesapeake Bay Foundation, Inc.; Communities for a Better Environment; Conservation Law Foundation; Consumer Federation of America; Environment America; Environmental Law and Policy Center; Natural Resources Defense Council, Inc.; Public Citizen, Inc.; Sierra Club.

Case No. 20-1173

South Coast Air Quality Management District; Bay Area Air Quality Management District; Sacramento Metropolitan Air Quality Management District.

Case No. 20-1174

National Coalition for Advanced Transportation.

Case No. 20-1176

Advanced Energy Economy.

Case No. 20-1177

Calpine Corporation; Consolidated Edison, Inc.; National Grid USA; New York Power Authority; Power Companies Climate Coalition.

Case No. 20-1230

Clean Fuels Development Coalition; Environmental and Energy Study Institute; The Farmers' Educational & Cooperative Union of America, d/b/a National Farmers Union; Farmers Union Enterprises, Inc.; Glacial Lakes Energy, LLC.;

Governors' Biofuels Coalition; Montana Farmers Union; North Dakota Farmers Union; Siouxland Ethanol, LLC; South Dakota Farmers Union; Urban Air Initiative, Inc.

Respondents:

Case No. 20-1167 (instant case)

Andrew Wheeler, in his official capacity as Administrator, United States Environmental Protection Agency; Environmental Protection Agency; Elaine L. Chao, in her official capacity as Secretary, United States Department of Transportation; United States Department of Transportation, James C. Owens, in his official capacity as Acting Administrator, National Highway Traffic Safety Administration; National Highway Traffic Safety Administration.

Case No. 20-1168

Andrew Wheeler, in his official capacity as Administrator of the United States Environmental Protection Agency; Environmental Protection Agency.

Case No. 20-1169

James C. Owens, in his official capacity as Acting Administrator of the National Highway Traffic Safety Administration; Elaine L. Chao, in her official capacity as Secretary of the United States Department of Transportation; National Highway Traffic Safety Administration.

Case No. 20-1173

National Highway Traffic Safety Administration, James C. Owens, in his official capacity as Acting Administrator, National Highway Traffic Safety

Administration; Environmental Protection Agency; Andrew Wheeler, in his official capacity as Administrator, U.S. Environmental Protection Agency.

Case No. 20-1174

Environmental Protection Agency; Andrew Wheeler, in his official capacity as Administrator, United States Environmental Protection Agency; United States Department of Transportation; Elaine L. Chao, in her official capacity as Secretary, United States Department of Transportation; National Highway Traffic Safety Administration, James C. Owens, in his official capacity as Deputy Administrator, National Highway Traffic Safety Administration.

Case No. 20-1176

Andrew Wheeler, in his official capacity as Administrator, United States Environmental Protection Agency; Environmental Protection Agency; Elaine L. Chao, in her official capacity as Secretary, United States Department of Transportation; United States Department of Transportation, James C. Owens, in his official capacity as Acting Administrator, National Highway Traffic Safety Administration; National Highway Traffic Safety Administration.

Case No. 20-1177

Environmental Protection Agency; United States Department of Transportation; National Highway Traffic Safety Administration.

Case No. 20-1230

Environmental Protection Agency; United States Department of Transportation; National Highway Traffic Safety Administration.

Intervenors:**Case No. 20-1145 (instant case)**

Alliance for Automotive Innovation; Bay Area Air Quality Management District; City and County of Denver; Commonwealth of Massachusetts; Commonwealth of Pennsylvania; Commonwealth of Virginia; Conservation Law Foundation; Consumer Federation of America; District of Columbia; Environment America; Environmental Defense Fund; Environmental Law and Policy Center; Ingevity Corporation; Natural Resources Defense Council, Inc.; Public Citizen, Inc.; Sacramento Metropolitan Air Quality Management District; Sierra Club; South Coast Air Quality Management District; State of California; State of Colorado; State of Connecticut; State of Hawaii; State of Illinois; State of Maine; State of Maryland; State of Minnesota; State of Nevada; State of New Jersey; State of New York; State of North Carolina; State of Oregon; State of Rhode Island; State of Vermont; State of Washington; State of Wisconsin; Union of Concerned Scientists; American Honda Motor Co., Inc.; BMW of North America, LLC; Ford Motor Company; Rolls-Royce Motor Cars NA, LLC; Volkswagen Group of America, Inc.

Case No. 20-1167

Bay Area Air Quality Management District; Sacramento Metropolitan Air Quality Management District; South Coast Air Quality Management District.

Case No. 20-1168

Bay Area Air Quality Management District; City and County of Denver; Commonwealth of Massachusetts; Commonwealth of Pennsylvania; Commonwealth of Virginia; District of Columbia; Sacramento Metropolitan Air Quality Management District; South Coast Air Quality Management District; State of California; State of Colorado; State of Connecticut; State of Hawaii; State of Illinois; State of Maine; State of Maryland; State of Minnesota; State of Nevada; State of New Jersey; State of New York; State of North Carolina; State of Oregon; State of Rhode Island; State of Vermont; State of Washington; State of Wisconsin.

Case No. 20-1168

Bay Area Air Quality Management District; City and County of Denver; Commonwealth of Massachusetts; Commonwealth of Pennsylvania; Commonwealth of Virginia; District of Columbia; Sacramento Metropolitan Air Quality Management District; South Coast Air Quality Management District; State of California; State of Colorado; State of Connecticut; State of Hawaii; State of Illinois; State of Maine; State of Maryland; State of Minnesota; State of Nevada; State of New Jersey; State of New York; State of North Carolina; State of Oregon; State of Rhode Island; State of Vermont; State of Washington; State of Wisconsin.

Amici: The Court has not granted any motions to participate in this case as *amicus curiae*, nor have any motions been filed.

B. Rulings Under Review

The ruling under review in this case is the Final Rule issued by NHTSA and EPA on April 30, 2020, amending the corporate average fuel economy and tailpipe carbon dioxide emissions for cars and light trucks. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 FR 24174 (April 30, 2020), JA ____.

C. Related Cases

Other than the cases that have already been consolidated with this case, petitioners are not aware of any other related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, petitioners hereby state that the Competitive Enterprise Institute (CEI) is a non-profit corporation organized under the laws of the District of Columbia. CEI has no parent corporation, and no publicly held company has a 10 percent or greater ownership interest in CEI.

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GLOSSARY OF TERMS

CAFE	Corporate Average Fuel Economy
CASAC	Clean Air Scientific Advisory Committee
CEI	Competitive Enterprise Institute
CO2	Carbon Dioxide
DOT	United States Department of Transportation
EPA	United States Environmental Protection Agency
FR	Federal Register
ISA	Integrated Science Assessment
MY	Model Year
NAAQS	National Ambient Air Quality Standards
NHTSA	National Highway Traffic Safety Administration
JA	Joint Appendix
PM	Particulate Matter
PM 2.5	Particulate Matter with an average diameter of 2.5 microns
SAFE	The Safer Affordable Fuel-Efficient Vehicles Rule

JURISDICTIONAL STATEMENT

The United States Environmental Protection Agency (EPA) sets carbon dioxide (CO₂) emission standards for new vehicles under the Clean Air Act, 42 U.S.C. § 7521, relevant portions of which are set forth in Addendum A at A-2. EPA regulations relating to these standards are contained in 40 CFR Parts 86, 600.

The National Highway Traffic Safety Administration (NHTSA), a unit of the United States Department of Transportation (DOT), sets fuel economy standards for new vehicles under the Energy Policy and Conservation Act of 1975, as amended by the Energy Independence and Security Act of 2007. The relevant statutory provisions are contained in 49 U.S.C. §§ 32902 et seq., and are set forth in Addendum A at A-7. The NHTSA regulations relating to these standards are contained in 49 CFR § § 531.1 – 533.7, relevant portions of which are set forth in Addendum A at A-10.

At issue in this case are final fuel economy rules issued by NHTSA for model years (MY) 2021-26, and CO₂ emission rules set by EPA for MY 2021 and beyond. These rules were jointly issued on March 30, 2020, and published in the Federal Register (FR) on April 30, 2020. 85 FR 24174, Joint Appendix (JA) at ____.

The Clean Air Act, at 42 U.S.C. § 7607(b)(1), Addendum A at A-5, provides for the filing of petitions for review of an emissions rule in this Court within 60 days of its publication in the Federal Register. Similarly, the Energy Policy and Conservation Act, at 49 U.S.C. § 32909, Addendum A at A-9, provides for the filing of petitions to review

a fuel economy rule within 59 days after it is prescribed. The petition in the instant case was timely filed on May 1, 2020.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether NHTSA and EPA arbitrarily failed to adequately consider proposals to set standards more lenient than the ones they chose, given the clear indications that such standards would save more lives;
2. Whether the agencies arbitrarily overstated the health impacts of vehicle particulate emissions, given the evidence that many of the underlying studies on this issue were seriously flawed;
3. Whether two studies by EPA's Clean Air Scientific Advisory Committee should be added to the rulemaking record.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are in Addendum A to this brief.

STATEMENT OF THE CASE

I. Background

The fleet-wide fuel economy mandates known as CAFE standards, administered by NHTSA, have been in effect since 1978. EPA's CO₂ standards for vehicles first took effect in 2012. The current dispute originated with a series of increasingly stringent standards that were jointly set by EPA and NHTSA in 2012 for MY 2017-25. EPA & NHTSA, Final Rule, 77 FR 62623 (2012). By MY 2025, EPA's standards, expressed in

the form of allowable grams per mile of CO₂ tailpipe emissions, would have been equivalent to roughly 54.5 mpg on a fleet-wide basis. NHTSA's standards for MY 2025, set in terms of miles per gallon, would have been in the range of about 49-50 mpg. 77 FR 62627.

Because of the long timeframe involved in setting the standards through MY 2025, EPA proposed to undertake a "mid-term evaluation" that would reassess its MY 2022-25 standards by April 1, 2018. 77 FR 62633. (Unlike EPA, NHTSA by statute cannot set standards spanning more than five model years in a single rulemaking, and so its later standards are called "augural" because they are the agency's "current best estimate" of what would be feasible in the future.) *Id.*

In January, 2017, in the closing days of President Obama's administration, EPA issued its Midterm Evaluation ahead of schedule, reaffirming its MY 2022-25 standards. But in March of that year, under the administration of newly-elected President Trump, EPA announced that it would reconsider that evaluation. EPA, Notice of Intent to Reconsider, 82 FR 14671 (Mar. 22, 2017). A year later the agency announced its withdrawal of the evaluation. EPA, Notice: Withdrawal of Mid-Term Evaluation, 83 FR 16077 (April 13, 2018). The agency noted that its January, 2017 evaluation had been issued after an exceptionally short public comment period. 83 FR 16078. It was now making a new finding that "[m]any of the key assumptions EPA relied upon in its January 2017 Determination, including gas prices and the consumer acceptance of

advanced technology vehicles, were optimistic or have significantly changed and thus no longer represent realistic assumptions.” 83 FR 16078.

II. The Agencies’ Proposal and Final Rule

In August, 2018, NHTSA and EPA jointly issued their Notice of Proposed Rulemaking for what they called the “Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for MY 2021-2026 Passenger Cars and Light Trucks.” 83 FR 42986 (Aug. 24, 2018), JA _____. The proposal essentially consisted of freezing CAFE at the MY 2020 level for an additional six years, through MY 2026. According to the agencies, this proposal, when measured against the standards issued in 2012, would save over \$500 billion in social costs and reduce traffic fatalities by 12,700. (These figures are computed over the lifetimes of vehicles built through MY 2029.) *Id.* The agencies also presented several other proposals for public comment, with the comment period set for 60 days.

On March 30, 2020, the agencies issued their final SAFE Rule. The rulemaking notice had drawn over 750,000 comments, “more than any rulemaking in the history of the CAFE or CO₂ tailpipe emissions programs.” Final Rule, 85 FR 24174, 24181 (April 30, 2020), JA _____. The Final Rule was itself massive; when it was published one month later in the Federal Register, it took up over 1100 pages.

In their final rule, the agencies decided against the six-year freeze of the MY 2020 standard that they had originally proposed; instead, they chose to increase the stringency of that standard by 1.5 percent per year through MY 2026 for both passenger cars and light trucks. While these levels were somewhat more stringent than what they had first

proposed, they were still more lenient than the original augural standards, which would have increased at the rate of 5% per year. 85 FR 25102, JA ____.

NHTSA justified the rule as a proper accommodation of CAFE's four statutory factors, which are the basis for the "maximum feasible average fuel economy level" that the agency is charged with determining for a given model year. 85 FR 24177, JA ____.

Those factors are technological feasibility, economic practicability, the effect of other government standards, and the national need for energy conservation. EPA must consider similar factors such as cost and technical feasibility in setting its CO₂ standards. 85 FR 24177, JA ____.

In the agencies' view, the Final Rule was "the optimal way to move the needle forward on fuel economy, fuel savings, and emissions reductions without imposing excessive costs on automakers and consumers and overly reducing vehicle sales." 85 FR 25186, JA ____.

The agencies noted that, in the time since the augural standards were issued, there had been an unanticipated drop in fuel prices, and that this in turn made those stringent standards less practicable than previously realized: "The agency's assumptions in 2012—that consumers would gravitate toward the purchase of compact sedans and coupes in response to exceedingly high fuel prices—have proved incorrect. Fuel prices have fallen and remained relatively low, and are projected to remain relatively low throughout the period covered by this rulemaking." 85 FR 25115, JA ____.

One illustration of how this drop in fuel prices undercut the practicability of the standards was its effect on compliance with the CO₂ standard: “despite a variety of vehicles on the market today and over the past several years, the fleet has failed to comply with standards based upon performance beginning with the 2016 model year, and has fallen further behind in the 2017 model year, when only three major automakers complied with CO₂ emission standards based upon performance alone.” 85 FR 25116, JA ____.

CAFE compliance had suffered similarly:

2016 marked the first model year in CAFE history that the entire light duty fleet failed to meet its target. This continued in the 2017 model year (the most recent full model year of compliance data). In the 2017 model year, of the now 42 compliance fleets, only 14 fleets exceeded their targets. 25 failed to meet their target, with a total shortfall of 166,715,863 credits—the equivalent of \$1,133,430,584 in penalties. Required manufacturer reporting data shows the situation continuing to get worse in the 2018 and 2019 model years, despite manufacturers’ increasing ability to utilize generous credit provisions

85 FR 25184 (footnotes omitted; emphasis added), JA ____.

In addition, given the more recent drop in fuel prices due to the COVID pandemic, the agencies noted that compliance problems could well get even worse: “Moreover, the cost-benefit analysis conducted for these final rules has even been overtaken by events in many ways over recent weeks. Based upon current events, and for additional reasons ..., the benefits of saving additional fuel through more stringent standards are potentially even smaller than estimated in this rulemaking analysis.” 85 FR 24176, JA ____.

Petitioners CEI and Walter Kreucher both submitted timely comments proposing that the agencies adopt even less stringent standards than they had proposed. CEI argued that more lenient standards would save significantly more lives than under the proposed rule. Docket NHTSA-2018-0067-1201, pp. 2-7, JA ____; Mr. Kreucher similarly pointed out the safety benefits of a less stringent standard. Docket NHTSA-2018-0067-0444 at p.9, JA____.

SUMMARY OF ARGUMENT

Safety is a basic aspect of both the CAFE standards and the CO2 emissions standards at issue in this case. In formulating its CAFE standards, NHTSA repeatedly emphasized the importance of safety in determining the “maximum feasible average fuel economy level” called for by the underlying statute. NHTSA chose a standard that was more lenient than the standard that it was replacing, and it explained in detail how its new standard would save lives by reducing the costs of new cars and thus spurring the replacement of older, less safe vehicles. In addition, its more lenient standard would reduce manufacturers’ incentives to reduce vehicle size and weight—actions which could undermine vehicle crashworthiness.

However, NHTSA had before it several proposals for standards that were even more lenient than the ones it chose. These proposals would save even more lives than the Final Rule, as CEI demonstrated in comments that utilized NHTSA’s own modeling software. But by its own admission, NHTSA did not analyze these proposals in detail, claiming that their impact on vehicle *costs* would be minor.

NHTSA's claim regarding costs was faulty in its own right as a matter of simple arithmetic. More importantly, NHTSA used that claim to arbitrarily evade the basic question of safety, despite proclaiming that safety was its number one priority in setting CAFE standards.

The agencies' assessment of PM 2.5 vehicle emissions seriously overstated the health risks of these emissions. The agencies totally and capriciously ignored a review of the underlying science, which demonstrated flaws in many of the studies that the agencies relied on. More importantly, the agencies failed to consider a number of recommendations from EPA's own Clean Air Scientific Advisory Committee, which pointed out major scientific uncertainties regarding the health effects of PM 2.5 emissions. Had the agencies made a more balanced assessment of those effects, they might well have chosen more lenient standards.

Finally, given the role that the Advisory Board's two studies played in the SAFE rulemaking, this Court should grant petitioners' motion to add them to the record in this case.

STANDARD OF REVIEW

The applicable standard of review in this case is the Administrative Procedure Act's arbitrary and capricious standard under 5 U.S.C. § 706(2)(A), which "focuses [this Court's] inquiry on whether [the court] can discern a reasoned path from the facts and considerations before the [agency] to the decision it reached." *CEI v. NHTSA*, 956 F.2d 321, 328 (D.C. Cir. 1992) (citation omitted); *see also* 42 U.S.C. §

7607(d)(9)(a), Addendum A at A-6 (“In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”).

STANDING

In support of their standing, the four individual petitioners—Anthony Kreucher, Walter Kreucher, James Leedy and Marc Scribner—have each filed a declaration in this case. Kent Lassman, President of CEI, has filed a declaration on his behalf individually and on behalf of CEI’s Board of Directors. See Addendum B to this brief.

Under 49 U.S.C. § 32909(a), any person “that may be adversely affected” by an auto fuel economy standard may seek review. Each of the filed declarations describes the concerns and experiences of the declarant regarding the impact of high car prices on their ability to buy the type of car they would like. Most of those declarations specifically mention the importance to them of vehicle safety and its relationship to vehicle size. Similarly, petitioners are qualified to petition for review of the EPA rulemaking. 42 U.S.C. § 7607(b), Addendum A at A-5.

In *CEI and Consumer Alert v. NHTSA*, 901 F.2d 107 (D.C. Cir. 1990), the affidavits of several Consumer Alert members were held to establish that organization’s standing to represent its “members’ interest in the widest possible consumer choice of large passenger vehicles.” *Id.* at 112-13; see also *CEI v. NHTSA*, 956 F.2d 321 (D.C.

Cir. 1992) (reaffirming the standing of Consumer Alert's members). The declarations in the instant case establish a similar interest on the part of the declarants regarding their individual ability to find affordable vehicles. Two of these declarants, Walter Kreucher and Jim Leedy, also filed comments in the SAFE rulemaking opposing stringent standards. Docket NHTSA-2018-0067-0444, JA ___; Docket EPA-HQ-OAR-2018-0283-2065, JA ___.

Moreover, Walter Kreucher's declaration establishes him as an expert on CAFE. As his statement and attached resume shows, Mr. Kreucher worked on CAFE compliance and planning at Ford Motor Company from 1973 to 2004, and after that became a private consultant on fuel economy issues. On the basis of both his experience and his familiarity with the Final Rule, he concludes that if the agencies had chosen a more lenient standard, it would have produced monetary savings and safety benefits for consumers beyond those resulting from the Final Rule. In his words,

it is my expert opinion that while consumers in general will benefit from the Final Rule, they are nonetheless adversely affected by the respondents' failure to adopt less stringent standards than that Rule. My conclusions regarding CAFE's impact on vehicle choices and vehicle prices apply both to my own car leasing situation and to those of the other individual petitioners in this action.

Kreucher Declaration, para. 13, Addendum B at B-6.

Mr. Kreucher's citations to the Final Rule make it clear that his conclusions follow directly from the agencies' explicit rationale for that rule: the stringent requirements of the augural standards had made new cars increasingly unaffordable. The Final Rule would make those standards more lenient, reducing the pressure on new

car prices, stimulating new car sales and creating safety benefits for consumers. As Mr. Kreucher puts it, his

conclusions are amply supported in the Final Rule itself. In describing the benefits of the Rule, the agencies repeatedly describe the cost savings that are expected from the chosen standard as compared to those that would have been resulted from the original standards. See, e.g., 85 Fed. Reg. 24174, 25108: ‘the final standards would reduce the per-vehicle costs by \$1250 per vehicle in [model year] 2030, compared to the standard set in 2012’ These savings would not be retained solely by carmakers; to the contrary, they ‘likely would ... be passed on to consumers.’ *Id.* at 25110. More importantly, the Rule notes that these savings in per-vehicle costs would be even greater *if more lenient standards had been chosen*: ‘alternatives lower in stringency than the final standards would save consumers more ... while alternatives more stringent than final standards would save consumers less’ *Id.* The standards that I proposed and that CEI proposed fall precisely into that category of ‘alternatives lower in stringency’.

Kreucher Declaration, para. 10, Addendum B at B5.

Admittedly, the fact that this case involves the conduct of third parties—namely, auto manufacturers—may complicate matters. But a panel of this Court recently set out the proper approach in such situations when it upheld the standing of individual petitioners in *CEI v. Federal Communications Commission*, 970 F.3d 372 (D.C. Cir., Aug. 14, 2020): “In considering the likely reaction of third parties, we may consider a variety of evidence, including ‘the agency’s own factfinding,’ ...; affidavits submitted by the parties ..., evidence in the administrative record’ [and] arguments ‘firmly rooted in the basic laws of economics.’” 970 F.3d at 382. The filed declarations, coupled with Mr. Kreucher’s expert opinion and the record in this case, fully satisfy these standing requirements for the individual petitioners.

As for CEI, Kent Lassman's declaration establishes its associational standing to represent its board members in challenging the Final Rule. Mr. Lassman states that CEI is a nonprofit organization which seeks to promote deregulation, that several members of CEI's Board of Directors have expressed their concerns regarding the Final Rule's adverse impact on their car-buying plans, and that CEI's "participation as a petitioner in this case represents the interests of its Board in the deregulatory goals of this organization." Lassman Declaration at para. 2, 7-8, Addendum B at B-9 and B-10.

CEI's capacity to act in this manner is clear, based on this Court's ruling in *Action on Smoking & Health v. Department of Labor* ("ASH"), 100 F.3d 991, 992 (D.C. Cir. 1996). In that case, ASH challenged the Department of Labor's failure to regulate secondhand smoke in the workplace. ASH sought to represent the chairman of its board of trustees, who alleged injury due to such smoke at his job.

The Court ruled that it could do so: "We have no doubt that ASH may act in a representative capacity for the members of its board of trustees, and may treat their interests as its own for the purposes of establishing its standing to sue when those interests 'are germane to the organization's purpose.' The injury to the interests of one of its board members is therefore enough to allow ASH to proceed with the lawsuit." *ASH*, 100 F.3d at 992 (citations omitted).

For the foregoing reasons, the individual petitioners and CEI have standing to bring this action.

ARGUMENT

I. THE AGENCIES ARBITRARILY FAILED TO ADEQUATELY ASSESS THE PROPOSALS FOR LESS STRINGENT STANDARDS

The agencies' analysis of the SAFE Rule alternatives is lengthy and complex, but several generalizations stand out. First is their assessment that, overall, the less stringent alternatives have safety benefits. In the agencies' words, "Less-stringent standards remain better for safety and are projected to save thousands of lives and prevent tens of thousands of hospitalizations" 85 FR 25185, JA _____. Similarly, "[a]nother factor weighing toward reduced stringency is safety. As discussed previously, reduced stringency results in less pressure on manufacturers to reduce mass in vehicles, which, for smaller passenger cars has negative safety implications when involved in accidents with heavier vehicles." 85 FR 25119, JA ____; *see also* 85 FR 24256, JA ____ ("avoiding standards that unduly encourage safety-eroding downsizing").

Second, there was the agencies' assessment of the costs of the various alternative standards considered in formulating the Final Rule. The agencies analyzed seven alternatives, ranked in terms of increasing year-to-year stringency. See FR 24175-85, JA ____; *see also* 85 FR 24242, Section V, JA _____. (The Final Rule also occasionally refers to an eighth "no-action" alternative, which would have left the augural standards unchanged. 85 FR 24243, JA ____.) The agencies chose Alternative 3. But of the eight, the agencies concluded that the *less-stringent* alternatives "would result in additional technology cost savings." 85 FR 25108, JA _____. In their words, the less stringent

“Alternatives 1 and 2 would save manufacturers \$1,218 and \$1,181 in per-vehicle costs in MY 2030 compared to the previously issued standards. Alternatives more stringent than the final standards would be more burdensome to manufacturers, with Alternatives 4 through 8 ranging from a [smaller] cost savings to manufacturers of \$927 to \$351 per-vehicle compared to the previous standards.” 85 FR 25108, JA ____.

These cost savings were important in their own right, but they also had clear safety implications. As the agencies noted, CAFE-induced price increases have the effect of keeping old cars on the road:

As new vehicle prices increase, consumers tend to continue using older vehicles for longer, slowing fleet turnover and thus slowing improvements in fleet-wide fuel economy, reductions in CO₂ emissions, reductions in criteria pollutant emissions, and advances in safety.

85 FR 24186, JA ____ . In fact, the agencies had recently *increased* their “estimates of average per-vehicle cost increases due to higher standards.” 85 FR 24186-87, JA ____ .

The Final Rule was a step in the opposite direction by reducing CAFE’s pressure on new-car prices. This in turn would spur fleet turnover, meaning that more people would be driving in newer and safer cars. 85 FR 24701, JA ____ (“selling price for new vehicles will be reduced”).

Third, the agencies admitted that their analysis was probably biased toward tighter standards over more lenient ones: “The agencies note that the central analysis of the final rule features a conservative treatment of private benefits and costs *that may bias the results in the favor of more stringent regulatory alternatives.*” 85 FR 24702, JA ____

(emphasis added); see also 85 FR 24701, JA ____ (“agencies’ central analysis may overstate ... benefits from adopting more stringent fuel economy and CO2 emissions standards.”).

Given the agencies’ view that less stringent alternatives were associated with lower costs and improved safety, and given their admission that their analysis was biased towards more stringency, one would expect them to thoroughly consider the less stringent alternatives proposed by a number of commenters.

For example, CEI questioned DOT’s proposal not to freeze its fuel economy standard until 2020. CEI argued that DOT

chose the most lenient of its eight alternatives, finding that it best satisfied the statutory factors. What is noteworthy is that its analysis showed that, for all eight alternatives, the reduction in fatalities was positively correlated with the leniency of the alternative; *that is, the more lenient the alternative CAFE standard, the fewer fatalities occurred.* DOT should have followed the clear implications of this association. It should have gone beyond its original set of alternatives and examined less stringent ones as well— until it found one that, for some reason or another, failed to produce greater safety benefits or failed to meet the statutory factors.

CEI Comments at 2, JA ____, quoted in part at 85 FR 24258, JA ____.

CEI argued that, based on the agencies’ calculations of the lives that their proposal would save, a freeze at the 2018 level would save even more lives—2,900 more, using the agencies’ own modeling software. And an even more lenient rollback to 2017 would save 4,300 additional lives over the agencies’ proposal. CEI Comments at 4, JA ____.

Walter Kreucher proposed that the agencies keep the standards at the 2016 level, and impose only modest stringency increases for the three model years after that. Kreucher Comments at 9 (unnumbered), JA ____; see also 85 FR 24257, JA ____.

Similarly, several other commenters, such as Borg Warner and the Alliance for Vehicle Efficiency (AVE), argued for lowering the CAFE baseline to what the auto industry had actually achieved in MY 2018. 85 FR 24257, JA ____.

The agencies claim that they “carefully” considered these alternatives. 85 FR 24258, JA ____.

But in fact their consideration was cursory and arbitrary; the agencies dismissed “these two less stringent alternatives” and “did not include” them in their subsequent “detailed analysis.” 85 FR 24259, JA ____.

Their reason for doing so was that these alternatives do “not show dramatic cost reductions.” *Id.*

As is shown directly below, this reasoning is flatly wrong for two reasons. First, the agencies’ alleged requirement of “dramatic cost reductions” is belied by their own arithmetic. Second, that requirement artificially limits the issue to one of technology costs; it totally omits the far more important safety considerations which were the focus not only of CEI’s comments, but of the agencies’ own touting of their Final Rule.

As to the first issue, the agencies dismiss the idea of reverting to MY 2018 and MY 2019 because it “reduces average MY 2029 costs by only modest amounts.” 85 FR 24259, JA ____.

But the amounts are not all that modest. The Final Rule would impose technology costs in MY 2029 of \$1,639. *See id.*, Table V-6, line 5. By comparison, reverting to the MY 2018 standard would cost only \$1,255. *Id.* at line 1. That is a cost

reduction of \$384, or over twenty-three percent—hardly a negligible amount. Similarly, reverting to the MY 2019 standard would produce a cost savings of \$336—over twenty percent. See *id.*, comparing line 2 and line 5. And yet because this was supposedly not “dramatic” enough for the agencies, they “did not include these two less stringent alternatives in [their] detailed analysis” *Id.*

Much more important, however, is the second issue--*in terms of their safety effect, the least stringent alternatives have a major benefit.* This is indicated by the agencies’ sensitivity analysis of the “no standards” scenario, which shows a *reduction in fatalities of 6328* over the lifetime of vehicles manufactured through MY 2029. NHTSA, Final Regulatory Impact Analysis, Table VII-478 at p.1792, JA _____. By comparison, according to the agencies, their “Reference Case” (that is, the Final Rule) will reduce total fatalities by only 3344; it is this figure that the agencies give as representing the Final Rule’s projected overall safety effect. Final Regulatory Impact Analysis, Table VII-478 at p.1789, JA ____; *see also* 85 FR 24180, Table I-5, JA _____.

In short, in comparison to the Final Rule, the “no standards” scenario increases the number of lives saved by nearly 3000 additional lives--89%, more precisely. And because the “no standards” scenario is comparable to the low-stringency proposals of both CEI and Mr. Kreucher, this major life-saving impact potentially holds true for those proposals as well. Yet the agencies failed to fully analyze those proposals because they supposedly “did not show dramatic cost reductions.” 85 FR 24259, JA _____. This allowed them to simply ignore these safety benefits at the same time that they publicly

proclaimed that the Final Rule “Put Safety and American Families First.” DOT & EPA, Press Release, Mar. 31, 2020, <https://www.epa.gov/newsreleases/us-dot-and-epa-put-safety-and-american-families-first-final-rule-fuel-economy-standards>, JA __: “This rule reflects the Department’s #1 Priority—safety”

Moreover, the agencies’ analysis of three high-stringency scenarios further supports this disparity in safety benefits. These high-stringency scenarios involved “cases intended to force technology application at the highest possible rates”—increases of 10%, 20% and 30% per year. Final Regulatory Impact Analysis at 1768, 1792, JA ____, ____. In stark contrast to the life-saving benefits of the “no standards” case, these high-stringency cases were far more lethal; they would increase fatalities by 3690, 8172 and 10,542 respectively. *Id.* at 1792, JA ____. In short, the more stringent they were, the more lethal they were.

The seven alternatives that the agencies did consider were found to produce varying cost-benefit levels depending on what discount rate was chosen. 85 FR 24179, Tables I-3, I-4, JA ____. The agencies ultimately decided that there was a relatively small difference between using one discount rate versus another, and that in any case maximizing net benefits was not the decisive criterion. 85 FR 25186. But regardless of whether this was correct, it is clear that the agencies avoided confronting the safety issue when they summarily dismissed the least stringent proposals before them, such as those by CEI, Mr. Kreucher, and others. Having quoted CEI’s comments at length regarding CAFE-related deaths (85 FR 24258, JA ____), the agencies proceeded to omit

CEI's low-stringency proposal and others like it from their main analysis. As a result, they failed to confront what they were sacrificing in terms of safety.

As this Court noted in *CEI v. NHTSA*, 956 F.2d at 322,

Choice means giving something up. In deciding whether to relax the previously established ... standard for model year 1990, [NHTSA] confronted a record suggesting that refusal to do so would exact some penalty in auto safety. Rather than affirmatively choosing extra energy savings over extra safety, however, NHTSA obscured the safety problem, and thus its need to choose. Because NHTSA failed to reason through to its decision ... we remand the case for further consideration.

In the instant case, buried in the agencies' charts is the similar fact that rejecting the less stringent proposals would "exact some penalty in auto safety." Rather than squarely confront that penalty, the agencies arbitrarily obscured it by claiming there were no "dramatic cost reductions." 85 FR 24259, JA _____. Contrary to what they claimed in their public announcements, they definitely did not "put safety and American families first."

Safety is not a mere afterthought in the statutory scheme. NHTSA's duty to consider safety follows directly from CAFE's requirement that standards be set at the "maximum feasible average fuel economy level." 49 U.S.C. § 32902(a), Addendum at A-7. As this Court noted in *CEI v. NHTSA* (1992), "[i]n determining 'feasibility', NHTSA has always taken passenger safety into account ... and the agency maintains that safety concerns are relevant to whether the agency should adopt one CAFE standard over another." 956 F.2d at 322, citing *CEI v. NHTSA*, 901 F.2d 107, 120 n.11 (D.C. Cir. 1990). The agency itself acknowledges this, as demonstrated by the Final

Rule's extensive discussion of the topic. *See, e.g.*, "Considerations of Safety", 85 FR 25117-18, JA _____. Similarly, EPA too "has long considered the safety implications of its emissions standards." *Id.*

But as the 1992 *CEI v. NHTSA* case shows, on occasion NHTSA has utterly failed to properly handle this issue. In that ruling, this Court found that the agency had arbitrarily ignored the likelihood that its 27.5 mpg standard "kills people." 956 F.2d at 327. It did so through a combination of "lame" claims and "bureaucratic mumbo-jumbo." *Id.* at 325, n.1; 327. The Court criticized the agency for having "fudged the analysis, held the standard at 27.5, and, with the help of statistical legerdemain, made conclusory assertions that its decision had no safety cost at all. That is what it chose." 956 F.2d at 324.

And in a follow-on case, where the NHTSA's actions after remand were upheld, the Court still noted that its "failure adequately to respond" to a key study on the CAFE safety issue was "troubling." *CEI v. NHTSA*, 45 F.3d 481, 486 (1995).

In the instant case, NHTSA's treatment of the safety issue is, in general, far more satisfactory than it was in the above case, and the agency has been commendably candid in assessing many of CAFE's safety implications. Nonetheless, the agencies failed to consider the proposals for more lenient standards on the ground of their allegedly minor impact on vehicle costs. This attempt to skirt their far bigger safety benefits is totally arbitrary.

II. THE AGENCIES ARBITRARILY OVERSTATED THE HEALTH RISKS OF PARTICULATE MATTER

The health effects of particulate matter emissions played a major role in the agencies' cost-benefit calculations. As is shown below, however, those effects were arbitrarily overstated and thus skewed the agencies' calculations.

Particulate matter (PM) emissions are one of six criteria pollutants that are regulated under EPA's National Ambient Air Quality Standards (NAAQS). 85 FR 24854. Each of those NAAQS standards have been set by EPA at a level that "allow[s] an adequate margin of safety" and is "requisite to protect the public health." 42 U.S.C. § 7409(b)(1), Addendum at A-1.

In analyzing the changes in these emissions that would occur under the various alternatives that they considered, the agencies viewed particulates as raising the most health concerns. This is made clear by their cost-benefit analyses. For example, for the Final Rule (Alternative Three), the agencies' cost-benefit table at 85 FR 24202 (JA ___) quantifies the damage from increased CO₂ emissions at \$5.2 billion at a 3% discount rate; the damage from increased PM emissions follows closely behind at \$2.9 billion. A similar pattern can be seen in the 7% discount table, 85 FR 24206, JA ____. But while the agencies rank CO₂ emissions first in terms of overall costs, those emissions are far less important when it comes to health; the "direct health impacts of vehicles emissions stem more from criteria pollutant emissions than from CO₂ emissions." 85 FR 25115, JA ___.

CO₂ itself is not a criteria pollutant, and so PM ranks as the most serious of the criteria pollutants. Moreover, because most particulates in vehicle emissions are on the order of 2.5 microns in diameter, a category known as PM_{2.5}, it is this class of particulates that has been the focus of the agencies' attention. See NHTSA, Final Environmental Impact Statement at S-6, JA ____ (“this analysis focuses on PM_{2.5}”).

The agencies based their assessments of PM_{2.5} on two EPA documents: a 2009 *Integrated Scientific Assessment for Particulate Matter* (ISA), and an updated ISA for PM published in December 2019. 85 FR 24860, JA _____. The 2009 ISA categorized a series of human ailments based on their association with acute (short-term) or chronic (long-term) exposure, evaluating each ailment in terms of the strength of its causal relationship with ambient particulate matter. *Id.* As is shown below, these estimates are highly questionable.

One problem is that the agencies relied on a “benefits per ton” approach to evaluate the risk of premature deaths due to increases in emissions. 85 FR 24886-87, JA _____. But the agencies admit that they used this simplified approach in order to save “agency resources and time”, and that this could exaggerate the benefits of reducing emissions by “as much as 10 percent” over more complex modeling. 85 FR 24887, JA _____.

However, there is a more basic problem with this per-ton approach: it overlooks the fact that PM_{2.5} emissions are a real problem only in nonattainment areas, which are “regions where concentrations of criteria pollutants exceed Federal standards” 85

FR 25249, JA _____. This follows from the fact that EPA itself has set NAAQS at levels that provide “an adequate margin of safety.” 42 U.S.C. § 7409(b)(1), Addendum at A-1. As the agencies admit, the total population in these nonattainment areas (counting both 24-hour nonattainment and annual nonattainment) is roughly 32 million—only one tenth of the US population. 85 FR 24860, JA _____.

As for the possibility that there is some health benefit in reducing PM2.5 to levels *below* NAAQS, EPA itself has noted the lack of evidence for that claim. In a notice of proposed rulemaking published on the same day as the SAFE Final Rule, EPA proposed to “conclude that there are important uncertainties in the evidence for adverse health effects below the current standards and in the potential public health impacts of reducing ambient PM2.5 concentrations below those standards.” EPA, Proposed Action: Review of NAAQS for Particulate Matter, 85 FR 24094, 24095 (April 30, 2020). EPA’s final decision, published in December, 2020, came to this same conclusion. EPA, Final Action: Review of NAAQS for Particulate Matter, 85 FR 82684, 82685 (Dec. 2020). But this cuts against EPA’s benefits-per-ton approach, which is not limited to the small number of nonattainment areas in the country.

Even more importantly, there are fundamental questions about how significant a threat PM2.5 is at any level encountered in everyday life. As demonstrated in a study by Steve Milloy, there are reasons to doubt that it is—reasons that the agencies ignored. S. Milloy, *Will the Trump Fuel Economy Reform Proposal Create Deadly Air Pollution?* (Oct. 2018), attached to CEI Comments, JA _____.

Milloy examined the basic contention that the alleged deaths from PM2.5 emissions should be viewed on the same basis as traffic deaths. “[T]raffic deaths are real. No one disputes that they happen. But can the same be said for the claim that PM in outdoor air kills people?” Milloy at 2, JA _____. In his view, the answer is no, and certainly not on the scale claimed by the agencies.

Milloy bases his conclusion on several lines of evidence: epidemiological and clinical studies of humans; animal studies; and real-world experiences. Some of those doubts about the effects of PM2.5 first arose in 1996, shortly after EPA first proposed to regulate PM2.5. At that time EPA’s Clean Air Scientific Advisory Committee (CASAC)—a statutory required panel of experts selected by EPA to peer review its findings on PM2.5—determined that “there was insufficient evidence to support the claim that PM2.5 was associated with death.” Milloy at 4, JA _____.

EPA largely relies on what are known as the Six City and Pope studies for its claims of premature deaths from PM2.5. *Id.* Nonetheless, several recent studies have found no association between deaths and PM2.5. One is a 2015 study by Anthony Cox, chairman of CASAC, that found no drop in death rates despite a 30 percent decline in PM2.5 levels; another is a 2017 analysis of over two million deaths in California over a 12-year period, finding no association with PM2.5. Milloy at 5, JA _____.

Among the studies highlighted by Milloy was one by epidemiologist James Enstrom that “reanalyzed the Pope study with improved exposure data and reported *no association between PM2.5 and death.*” *Id.* (emphasis added). Given that startling finding,

one would expect it to be extensively discussed in EPA's 2019 ISA. But the ISA dismissed it in all of two sentences: "A recent reanalysis of early ...ACS [American Cancer Society] results observed a null association between county-level averages of PM2.5 measured by the Inhalable Particle Network between 1979 and 1983 and deaths between 1982 and 1988 ... Enstrom (2017)]. Inconsistencies in the results could be due to the use of 85 counties in the ACS analysis by Enstrom (2017) and 50 metropolitan statistical areas in the original ACS analysis (Pope et al., 1995)." EPA, 2019 ISA for PM, 11-67, JA ____.

This "could be" explanation, however, is no explanation at all. It says nothing about why Pope's conclusion should be favored over Enstrom's. If anything, Enstrom's focus on a larger geographical area (in Milloy's words, "improved exposure data") is a point in his favor. Milloy at 5, JA _____. This is far from the sort of reasoned analysis required on this issue.

The 2019 ISA took a similar approach in dismissing a 2017 Smith and Young study discussed by Milloy, which analyzed the over two million deaths that occurred in California in 2000-12 and found no association with PM2.5. *Id.* Once again, the ISA explained away that study's findings largely on the ground that it analyzed a multi-county air basin, rather than the single county analyzed in the 2006 study that found a positive association. ISA at 11-9, JA _____, comparing the Smith and Young 2017 study with that 2006 study.

Milloy's comments received no mention in any of the Final Rule's decision documents—not in the Rule itself, nor in the Final Regulatory Impact Analysis, nor in the Final Environmental Impact Statement, nor the 2019 ISA for Particulate matter.

Many of Milloy's contentions are supported by two subsequent reports from CASAC to EPA in 2019. EPA's NAAQS proposal notes the importance of CASAC's advice in the agency's formulation of its PM_{2.5} policy. 85 FR 24095. In an April 2019 report to EPA, CASAC reviewed the agency's draft ISA on particulate matter. Its major conclusion was that "the Draft ISA does not provide a sufficiently comprehensive, systematic assessment of the available science relevant to understanding the health impacts of exposure to particulate matter (PM)." Cover letter from Dr. L.A. Cox, CASAC Chair, to EPA Administrator A.R. Wheeler (April 11, 2019) 1 ("CASAC April 2019 Report"), ECF No. 1858924 Exhibit A¹, quoted in part at 85 FR 24099. Among its reasons for this conclusion were:

- "Lack of comprehensive, systematic review - some of the relevant and important scientific literature is not reviewed and study quality is not systematically considered. ..."
- "Inadequate evidence for altered causal determinations - the CASAC finds that the Draft ISA does not present adequate evidence to conclude that there is

¹ Petitioners have moved to have both this report and a related December 2019 CASAC Report added to the record. See Section III below, pages 30-33 below.

likely to be a causal relationship between long-term PM2.5 exposure and nervous system effects; between long-term ultrafine particulate (UFP) exposure and nervous system effects; or between long-term PM2.5 exposure and cancer.”

- Need for “Clearer discussion of causality and causal biological mechanisms and pathways - specifically including pulmonary inflammation.”

Id. (emphasis in original).

The CASAC April 2019 report, in its Consensus Responses, pointed to a number of basic weaknesses in EPA’s approach: “Some members of the CASAC think that the EPA must better justify their determination that short-term or long-term exposure to PM2.5 causes mortality.” *Id.*, Consensus Responses at 1, ECF No. 1858924 Exhibit A;

“The EPA’s mortality causality determination appears to be based almost exclusively on epidemiology studies, which cannot be used in isolation to determine causation.” *Id.*, Consensus Responses at 2, ECF No. 1858924 Exhibit A;

In his individual comments, CASAC Chairman Cox identified certain errors that should exclude consideration of studies unless they were corrected, such as “unstated, untested, unverified, or mistaken assumptions” or the failure “to distinguish between true exposure values and estimated exposure values in analyzing and presenting information.” *Id.* at A-36-37, ECF No. 1858924 Exhibit A. Cox pointed out that the Draft ISA omitted some studies “that appear to be discordant with conclusions in the

Draft ISA” and that the ISA needed to be “meticulous in reporting negative results accurately.” *Id.* at A-27, A-31, ECF No. 1858924 Exhibit A. He warned that the ISA “should not uncritically accept results based on poor-quality or speculative quasi-experimental studies” (*id.* at A-32, ECF No. 1858924 Exhibit A) and that some studies in the Draft ISA “misrepresent estimated exposures as if they were true exposures, leading to false statements about what has been found.” *Id.* at A-45, ECF No. 1858924 Exhibit A.

Cox also emphasized that researchers’ estimates of human exposure to PM_{2.5} could be seriously erroneous. “In general, studies that treat estimated exposures as true exposures and that ignore exposure estimation errors . . . do not support valid inferences about the shape of the C-R [concentration-response] curve for PM_{2.5}. . . . *Studies that do not address exposure measurement and estimation errors should not be used or cited as ‘evidence’* but should be excluded, unless they can be retroactively reanalyzed and corrected to model the effects of realistic exposure estimation errors.” *Id.* at A-43, ECF No. 1858924 Exhibit A (emphasis in original); see also December 2019 CASAC report at 4-5, ECF No. 1858924 Exhibit B, which includes EPA’s need to deal with such errors among CASAC’s “Overarching Recommendations.” Dr. L.A. Cox, CASAC Chair, to EPA Administrator A.R. Wheeler 1 (Dec. 16, 2019), ECF No. 1858924 Exhibit B.

To determine if a study properly accounted for such measurement errors, Chairman Cox recommended that EPA ask, “Did the study use appropriate errors-in-variables methods or other techniques to correct for differences between true and

estimated exposure values and between true and estimated values of other variables?”

April CASAC Report at A-56, ECF No. 1858924 Exhibit A.

The failure to account for measurement error is especially important in determining whether a threshold exists below which harm does not occur. EPA itself recognized that the “possible influence of exposure measurement error, and variability among individuals with respect to air pollution health effects, tend to smooth and ‘linearize’ the concentration-response function, and *thus can obscure the existence of a threshold or nonlinear relationship.*” EPA, Preamble to the Integrated Science Assessments 29 (Nov. 2015) (emphasis added), <https://bit.ly/3nLdMoW>. .

But EPA entirely ignored such errors-in-variables methods to account for measurement error. Errors-in-variables analysis was not even mentioned in the ISA. Instead, EPA continued to use studies which only estimate exposure to PM 2.5 without correcting for measurement error. One instance among many is the 2017 *Di et al.* studies of Medicare patients, relied upon by EPA in the 2019 ISA. See ISA at 11-61, 11-70, and 11-72, JA _____. In fact, EPA described the study as among its “strongest evidence” (ISA at 11-97, despite the fact that Chairman Cox characterized it as treating “guesses ... as if they were error-free measurements – a clear violation of sound statistical analysis for error-prone exposure estimates.” CASAC December 2019 Report, p. B-21, ECF No. 1858924 Exhibit B.

In EPA’s NAAQS Proposal, issued a year after the April 2019 CASAC Report, the agency stated that while it had not followed CASAC’s recommendation that a

second draft ISA be prepared, it did address CASAC's comments in the final ISA by expanding its text and by downgrading one causality determination. 85 FR 24099. But neither CASAC's recommendations nor the EPA's responses had any apparent effect on the agencies' calculations of the SAFE Rule's alleged PM_{2.5} health impacts. The agencies' use of such methods as the "benefits-per-ton" approach was essentially based on across-the-board modeling that largely ignored the numerous problems raised by CASAC.

Given EPA's extensive citations to CASAC's submissions, it arbitrarily failed to discuss why it had rejected so many of its key recommendations. If the agencies had properly assessed the health risks of PM_{2.5} emissions, their large estimate of its health-related costs might well have been lower. This would likely have shifted the "balance" that the Final Rule struck "between additional technology and required per-vehicle costs, consumer demand for fuel economy, fuel savings and emissions avoided". 85 FR 24176, JA _____. And that shift would have been in the direction of a more lenient standard than the one chosen by the agencies.

III. THE REPORTS ON PARTICULATE MATTER OF THE CLEAN AIR SCIENTIFIC ADVISORY COMMITTEE SHOULD BE ADDED TO THE RULEMAKING RECORD

Because of the relevance of the PM_{2.5} issue to the SAFE Rule, on Aug. 28, 2020, CEI moved to add both EPA's 2019 ISA for Particulate Matter and the two CASAC reports to the record in this case. ECF No. 1858924. The agencies agreed to the former but opposed the latter, arguing that "neither EPA nor NHTSA considered" the two

CASAC reports. Response in Opposition at 1, ECF No. 1862379. This Court, in its order of Oct. 19, ECF No. 1867064, granted CEI's motion regarding the ISA, but referred the remainder of that motion to the merits panel and directed that it be addressed in the briefs. For the reasons set out directly below, the CASAC reports should be added to the record.

In agreeing to add the ISA to the record, the agencies implicitly recognized its importance to the PM_{2.5} issue and the role of that issue in the SAFE rulemaking. CASAC's input, however, was essential to the formulation of that ISA and of EPA's position on PM_{2.5} as well.

This does not mean that the SAFE rulemaking record necessarily includes every PM-related document that was submitted to EPA. The CASAC reports, however, have a unique status. They were submitted by CASAC at the request of EPA as part of CASAC's statutory review function under 42 U.S.C. § 7409(d)(2), Addendum at A-1—a function which CASAC has been carrying out since the 1980s. ISA at P-3, JA _____. And given that this same body produced the December 2019 report on EPA's draft policy assessment of the PM NAAQS, that report likely received similar consideration and so should similarly be included in the SAFE rulemaking record.

Furthermore, the agency decisionmakers on CAFE directly considered the April CASAC report in creating the ISA. This is demonstrated in a July 25, 2019 letter from the EPA Administrator to CASAC in which the Administration expressly stated: "My staff and I are carefully considering your comments and recommendations" EPA

Administrator A.R. Wheeler, to Dr. L.A. Cox, CASAC Chair (July 25, 2019), ECF No. 1858924 Exhibit C. The Administrator went on to state that he had “directed my staff to do the following: . . . incorporate the CASAC’s comments and recommendations, to the extent possible” in the final ISA. *Id.* at 2. As evidence of its impact, CASAC is referenced over 35 times in the ISA alone.

The Administrative Procedure Act requires a court to “review the whole record or those parts of it cited by a party.” 5 U.S.C. § 706. This encompasses “the full administrative record that was before the Secretary at the time he made his decision.” *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). “This Court has interpreted the ‘whole record’ to include[s] all documents and materials that the agency directly or indirectly considered . . . [and nothing] more nor less.” *Pacific Shores Subdivision v. U.S. Army Corps of Engineers*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006) (internal citation omitted).

But despite the Administrator’s instructions, EPA did not incorporate all CASAC’s recommendations into the ISA. Worse yet, it failed to explain why it excluded the ones that it chose to reject. That failure makes it all the more important for this Court to be able to examine the rejected recommendations. “To review less than the full administrative record might allow a party to withhold evidence unfavorable to its case, and so the APA requires review of ‘the whole record.’” *Walter O. Boswell Mem. Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984).

The agencies claim that the CASAC reports are a part of the NAAQS rulemaking rather than the CAFE one. That they are a part of the NAAQS rulemaking is not in dispute. But CASAC's input was considered by EPA in creating its 2019 Particulate Matter ISA. That ISA, in turn, was relied upon by EPA in this SAFE rulemaking, which is why it is a part of record in both rulemakings.

This case is very similar to *Styrene Information & Research Center v. Sebelius*, in which plaintiffs sought to block an agency report on whether a certain chemical was a carcinogen. 851 F. Supp. 2d 57 (D.D.C. 2012). The agency relied upon an expert panel's evaluation. *Id.* at 60. That expert panel, in turn, had divided itself into several subgroups of experts, each of which had created its own report. *Id.* Plaintiffs attempted to supplement the record with these subgroup reports, some of which had been rejected by the expert panel as a whole. *Id.* at 63. The court described the issue as follows: “[e]ssentially, the plaintiffs rely on a two-step theory of influence: the subgroup reports influenced the Expert Panel’s recommendation to the [the agency], and in turn, the Expert Panel’s recommendation influenced the [the agency]’s decision to list styrene.” *Id.* at 64.

The court concluded that the “fact that the subgroup drafts were not ultimately passed on to the final decisionmaker does not lead to the conclusion that they were not before the agency.” *Id.* The court allowed the supplementation of the record with the subgroup reports. *Id.*

In the instant case, there are even stronger reasons for allowing supplementation than in *Styrene*. First, the influence of the CASAC reports on the final 2019 ISA (which the agencies concede is part of this rulemaking) is not a mere possibility; to the contrary, the final 2019 ISA specifically discussed the ways in which CASAC influenced its outcome. Second, in *Styrene* the subgroup reports were only considered by the expert panel, and its report in turn was relied upon by the agency; in this case, on the other hand, the ultimate agency decisionmaker, Administrator Wheeler, explicitly stated that he had directly considered the CASAC report. Given this consideration of such relevant expert analyses by EPA's SAFE decisionmaker, the CASAC reports should be included in the record for this rulemaking.

CONCLUSION

For the foregoing reasons, the agencies' decision not to seriously consider the proposals for more lenient standards should be ruled arbitrary and capricious, and the Final Rule should be remanded for reconsideration of those proposals. The Rule should not be vacated, however, because doing so could put back in place, at least temporarily, an even more stringent set of standards whose consequences would be even more adverse to safety. Given the "disruptive consequences of such an interim change", a remand without vacatur is fully warranted. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (citations omitted).

Dated: January 14, 2021

Respectfully submitted,

/s/ Sam Kazman

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Devin Watkins

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CERTIFICATE OF COMPLIANCE

Counsel certifies as follows:

1. The above brief complies with the type-volume requirement of Fed. R. App. P. 27(d)(2)(A) because this brief contains 8,757 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. The above brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Garamond font.

Dated: January 14, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2021, a copy of the Preliminary Opening Brief of Petitioners was electronically filed and served by operation of the Court's CM/ECF system to all parties other than the following, who was served via First Class Mail:

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Honolulu, HI 96813

Dated: January 14, 2021

Respectfully submitted,

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**ADDENDUM A
STATUTES AND REGULATIONS**

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Title 42. THE PUBLIC HEALTH AND WELFARE

42 U.S. Code § 7409 - National primary and secondary ambient air quality standards

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

...

(d)(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

Title 42. THE PUBLIC HEALTH AND WELFARE

42 U.S. Code § 7521 - Emission standards for new motor vehicles or new motor vehicle engines

(a) Authority of Administrator to prescribe by regulation

Except as otherwise provided in subsection (b)—

(1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d), relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.

(2) Any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

(3) (A) In general.—

(i) Unless the standard is changed as provided in subparagraph (B), regulations under paragraph (1) of this subsection applicable to emissions of hydrocarbons, carbon monoxide, oxides of nitrogen, and particulate matter from classes or categories of heavy-duty vehicles or engines manufactured during or after model year 1983 shall contain standards which reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the model year to which such standards apply, giving appropriate consideration to cost, energy, and safety factors associated with the application of such technology.

(ii) In establishing classes or categories of vehicles or engines for purposes of regulations under this paragraph, the Administrator may base such classes or categories on gross vehicle weight, horsepower, type of fuel used, or other appropriate factors.

(B) Revised standards for heavy duty trucks.—

(i) On the basis of information available to the Administrator concerning the effects of air pollutants emitted from heavy-duty vehicles or engines and from other sources of mobile source related pollutants on the public health and welfare, and taking costs into account, the Administrator may promulgate regulations under paragraph (1) of this subsection revising any standard promulgated under, or before the date of, the enactment of the Clean Air Act Amendments of 1990 (or previously revised under this subparagraph) and applicable to classes or categories of heavy-duty vehicles or engines.

(ii) Effective for the model year 1998 and thereafter, the regulations under paragraph (1) of this subsection applicable to emissions of oxides of nitrogen (NO_x) from gasoline and diesel-fueled heavy duty trucks shall contain standards which provide that such emissions may not exceed 4.0 grams per brake horsepower hour (gbh).

(C) Lead time and stability.—

Any standard promulgated or revised under this paragraph and applicable to classes or categories of heavy-duty vehicles or engines shall apply for a period of no less than 3 model years beginning no earlier than the model year commencing 4 years after such revised standard is promulgated.

(D) Rebuilding practices.—

The Administrator shall study the practice of rebuilding heavy-duty engines and the impact rebuilding has on engine emissions. On the basis of that study and other information available to the Administrator, the Administrator may prescribe requirements to control rebuilding practices, including standards applicable to emissions from any rebuilt heavy-duty engines (whether or not the engine is past its statutory useful life), which in the Administrator's judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare taking costs into account. Any regulation shall take effect after a period the Administrator finds necessary to permit the development and application of the requisite control measures, giving appropriate consideration to the cost of compliance within the period and energy and safety factors.

(E) Motorcycles.—

For purposes of this paragraph, motorcycles and motorcycle engines shall be treated in the same manner as heavy-duty vehicles

and engines (except as otherwise permitted under section 7525(f)(1) [1] of this title) unless the Administrator promulgates a rule reclassifying motorcycles as light-duty vehicles within the meaning of this section or unless the Administrator promulgates regulations under subsection (a) applying standards applicable to the emission of air pollutants from motorcycles as a separate class or category. In any case in which such standards are promulgated for such emissions from motorcycles as a separate class or category, the Administrator, in promulgating such standards, shall consider the need to achieve equivalency of emission reductions between motorcycles and other motor vehicles to the maximum extent practicable.

(4)

(A) Effective with respect to vehicles and engines manufactured after model year 1978, no emission control device, system, or element of design shall be used in a new motor vehicle or new motor vehicle engine for purposes of complying with requirements prescribed under this subchapter if such device, system, or element of design will cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function.

(B) In determining whether an unreasonable risk exists under subparagraph (A), the Administrator shall consider, among other factors, (i) whether and to what extent the use of any device, system, or element of design causes, increases, reduces, or eliminates emissions of any unregulated pollutants; (ii) available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such device, system, or element of design, and (iii) the availability of other devices, systems, or elements of design which may be used to conform to requirements prescribed under this subchapter without causing or contributing to such unreasonable risk. The Administrator shall include in the consideration required by this paragraph all relevant information developed pursuant to section 7548 of this title.

Title 42. THE PUBLIC HEALTH AND WELFARE

42 U.S. Code § 7607 - Administrative proceedings and judicial review

(b)Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) 1 of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

...

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A)arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B)contrary to constitutional right, power, privilege, or immunity;

(C)in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D)without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

Title 49. TRANSPORTATION

49 U.S. Code § 32902 Average fuel economy standards

(a) Prescription of Standards by Regulation.—

At least 18 months before the beginning of each model year, the Secretary of Transportation shall prescribe by regulation average fuel economy standards for automobiles manufactured by a manufacturer in that model year. Each standard shall be the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year.

(b) Standards for Automobiles and Certain Other Vehicles.—

(1) In general.—The Secretary of Transportation, after consultation with the Secretary of Energy and the Administrator of the Environmental Protection Agency, shall prescribe separate average fuel economy standards for—

- (A) passenger automobiles manufactured by manufacturers in each model year beginning with model year 2011 in accordance with this subsection;
- (B) non-passenger automobiles manufactured by manufacturers in each model year beginning with model year 2011 in accordance with this subsection; and
- (C) work trucks and commercial medium-duty or heavy-duty on-highway vehicles in accordance with subsection (k).

(2) Fuel economy standards for automobiles.—

(A) Automobile fuel economy average for model years 2011 through 2020.—

The Secretary shall prescribe a separate average fuel economy standard for passenger automobiles and a separate average fuel economy standard for non-passenger automobiles for each model year beginning with model year 2011 to achieve a combined fuel economy average for model year 2020 of at least 35 miles per gallon for the total fleet of passenger and non-passenger automobiles manufactured for sale in the United States for that model year.

(B) Automobile fuel economy average for model years 2021 through 2030.—

For model years 2021 through 2030, the average fuel economy required to be attained by each fleet of passenger and non-passenger automobiles manufactured for sale in the United States shall be the maximum feasible average fuel economy standard for each fleet for that model year.

(C) Progress toward standard required.—

In prescribing average fuel economy standards under subparagraph (A), the Secretary shall prescribe annual fuel economy standard increases that increase the applicable average fuel economy standard ratably beginning with model year 2011 and ending with model year 2020.

(3) Authority of the secretary.—The Secretary shall—

(A) prescribe by regulation separate average fuel economy standards for passenger and non-passenger automobiles based on 1 or more vehicle attributes related to fuel economy and express each standard in the form of a mathematical function; and

(B) issue regulations under this title prescribing average fuel economy standards for at least 1, but not more than 5, model years.

(4) Minimum standard.—In addition to any standard prescribed pursuant to paragraph (3), each manufacturer shall also meet the minimum standard for domestically manufactured passenger automobiles, which shall be the greater of—

(A) 27.5 miles per gallon; or

(B) 92 percent of the average fuel economy projected by the Secretary for the combined domestic and non-domestic passenger automobile fleets manufactured for sale in the United States by all manufacturers in the model year, which projection shall be published in the Federal Register when the standard for that model year is promulgated in accordance with this section.

(c) Amending Passenger Automobile Standards.—

The Secretary of Transportation may prescribe regulations amending the standard under subsection (b) of this section for a model year to a level that the Secretary decides is the maximum feasible average fuel economy level for that model year. Section 553 of title 5 applies to a proceeding to amend the standard. However, any interested person may make an oral presentation and a transcript shall be taken of that presentation.

Title 49. TRANSPORTATION

49 U.S. Code § 32909. Judicial review of regulations

(a) Filing and Venue.—

(1) A person that may be adversely affected by a regulation prescribed in carrying out any of sections 32901–32904 or 32908 of this title may apply for review of the regulation by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

(2) A person adversely affected by a regulation prescribed under section 32912(c)(1) of this title may apply for review of the regulation by filing a petition for review in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

(b) Time for Filing and Judicial Procedures.—

The petition must be filed not later than 59 days after the regulation is prescribed, except that a petition for review of a regulation prescribing an amendment of a standard submitted to Congress under section 32902(c)(2) of this title must be filed not later than 59 days after the end of the 60-day period referred to in section 32902(c)(2). The clerk of the court shall send immediately a copy of the petition to the Secretary of Transportation or the Administrator of the Environmental Protection Agency, whoever prescribed the regulation. The Secretary or the Administrator shall file with the court a record of the proceeding in which the regulation was prescribed.

(c) Additional Proceedings.—

(1) When reviewing a regulation under subsection (a)(1) of this section, the court, on request of the petitioner, may order the Secretary or the Administrator to receive additional submissions if the court is satisfied the additional submissions are material and there were reasonable grounds for not presenting the submissions in the proceeding before the Secretary or Administrator.

(2) The Secretary or the Administrator may amend or set aside the regulation, or prescribe a new regulation because of the additional submissions presented. The Secretary or Administrator shall file an amended or new regulation and the additional submissions with the court. The court shall review a changed or new regulation.

Title 49. TRANSPORTATION

49 CFR Part 531 Passenger Automobile Average Fuel Economy Standards

49 CFR § 531.1 Scope.

This part establishes average fuel economy standards pursuant to section 502 (a) and (c) of the Motor Vehicle Information and Cost Savings Act, as amended, for passenger automobiles.

49 CFR § 531.2 Purpose.

The purpose of this part is to increase the fuel economy of passenger automobiles by establishing minimum levels of average fuel economy for those vehicles.

49 CFR § 531.3 Applicability.

This part applies to manufacturers of passenger automobiles.

49 CFR § 531.4 Definitions.

(a) Statutory terms.

(1) The terms average fuel economy, manufacture, manufacturer, and model year are used as defined in section 501 of the Act.

(2) The terms automobile and passenger automobile are used as defined in section 501 of the Act and in accordance with the determination in part 523 of this chapter.

(b) Other terms. As used in this part, unless otherwise required by the context –

(1) Act means the Motor Vehicle Information and Cost Savings Act, as amended by Pub. L. 94-163.

49 CFR § 531.5 Fuel economy standards.

...

(c) For model years 2012-2026, a manufacturer's passenger automobile fleet shall comply with the fleet average fuel economy level calculated for that model year according to this Figure 2 and the appropriate values in this Table III.

Figure 2:

$$CAFE_{required} = \frac{\sum_i PRODUCTION_i}{\sum_i \frac{PRODUCTION_i}{TARGET_i}}$$

Where: *CAFE* required is the fleet average fuel economy standard for a given fleet (domestic passenger automobiles or import passenger automobiles); Subscript *i* is a designation of multiple groups of automobiles, where each group's designation, *i.e.*, *i* = 1, 2, 3, etc., represents automobiles that share a unique model type and footprint within the applicable fleet, either domestic passenger automobiles or import passenger automobiles; *Production* *i* is the number of passenger automobiles produced for sale in the United States within each *ith* designation, *i.e.*, which share the same model type and footprint; *TARGET* *i* is the fuel economy target in miles per gallon (mpg) applicable to the footprint of passenger automobiles within each *ith* designation, *i.e.*, which share the same model type and footprint, calculated according to Figure 3 and rounded to the nearest hundredth of a mpg, *i.e.*, 35.455 = 35.46 mpg, and the summations in the numerator and denominator are both performed over all models in the fleet in question.

Figure 3:

$$TARGET = \frac{1}{MIN \left[MAX \left(c \times FOOTPRINT + d, \frac{1}{a} \right), \frac{1}{b} \right]}$$

Where: *TARGET* is the fuel economy target (in mpg) applicable to vehicles of a given footprint (*FOOTPRINT*, in square feet); Parameters *a*, *b*, *c*, and *d* are defined in Table III; and The *MIN* and *MAX* functions take the minimum and maximum, respectively, of the included values.

Table III - Parameters for the Passenger Automobile Fuel Economy Targets, MYs 2012-2026

Model year	Parameters			
	a (mpg)	b (mpg)	c (gal/mi/ft ²)	d (gal/mi)
2012	35.95	27.95	0.0005308	0.006057
2013	36.80	28.46	0.0005308	0.005410
2014	37.75	29.03	0.0005308	0.004725
2015	39.24	29.90	0.0005308	0.003719
2016	41.09	30.96	0.0005308	0.002573
2017	43.61	32.65	0.0005131	0.001896
2018	45.21	33.84	0.0004954	0.001811
2019	46.87	35.07	0.0004783	0.001729
2020	48.74	36.47	0.0004603	0.001643
2021	49.48	37.02	0.000453	0.00162
2022	50.24	37.59	0.000447	0.00159
2023	51.00	38.16	0.000440	0.00157
2024	51.78	38.74	0.000433	0.00155
2025	52.57	39.33	0.000427	0.00152
2026	53.37	39.93	0.000420	0.00150

(d) In addition to the requirements of paragraphs (b) and (c) of this section, each manufacturer shall also meet the minimum fleet standard for domestically manufactured passenger automobiles expressed in Table IV:

Table IV - Minimum Fuel Economy Standards for Domestically Manufactured Passenger Automobiles, MYs 2011-2026

Model year	Minimum standard
2011	27.8
2012	30.7
2013	31.4
2014	32.1
2015	33.3
2016	34.7
2017	36.7
2018	38.0
2019	39.4
2020	40.9
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**ADDENDUM B
STANDING DECLARATIONS**

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No. 20-1145

Consolidated with Cases No. 20-1167, -1168,
-1169, -1173, -1174, -1176, -1177 & -1230

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

COMPETITIVE ENTERPRISE INSTITUTE et al.,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION et al.,

Respondents,

Declaration of Anthony Kreucher

I, Anthony Kreucher, hereby state as follows:

1. I reside at 8369 Elmhurst St., Canton, Michigan 48187.
2. I teach at a Catholic high school in southwest Detroit which focuses on underserved students. I drive to and from school each weekday in my car, which is a Ford Escape with about 80,000 miles on it. Between my commute and the other travelling that I do, I drive about 2,000 miles per month in this car.
3. I have been looking for a new car for the last 2-3 years. I would prefer a car with a conventional engine, rather than an electric or hybrid model. I have not yet bought one due to their high prices, which I believe are partly the result of federally-mandated fuel economy standards. I hope to find a car within the next year or two that I can afford on my relatively low teacher's salary. I would greatly prefer a new car, but if that turns out to be unaffordable, I would consider getting a used car with relatively low mileage on it.

4. I believe that less stringent federal fuel economy standards would reduce new car prices and make buying a new car easier for me in both the near future and in coming years.

Pursuant to 28 USC 1746, I hereby declare under penalty of perjury that the foregoing is true and correct.


Anthony Kreucher

10/21/2020
Date

No. 20-1145

Consolidated with Cases No. 20-1167, -1168,
-1169, -1173, -1174, -1176, -1177 & -1230

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

COMPETITIVE ENTERPRISE INSTITUTE et al.,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION et al.,

Respondents,

Declaration of Walter M. Kreucher

I, Walter M. Kreucher, hereby declare as follows:

1. I reside at 3241 Erie Drive, Orchard Lake, Michigan 48324.
2. I make this declaration in both my capacity as an individual petitioner in this action, and as an expert in the federal corporate average fuel economy program, popularly known as CAFE.
3. I lease two cars annually from Ford Motor Company, where I worked for over three decades and from which I retired in 2004. One of these two cars is for me and the other is for my wife. My current car is a Ford Edge, a mid-sized SUV. My wife also drives a Ford Edge.
4. I have already ordered a replacement vehicle, a 2021 Ford Bronco Sport. That model, like the Ford Edge that I currently drive, is a mid-sized SUV. My wife will be replacing her vehicle with another Ford Edge. My wife needs a large vehicle with a high seat to comfortably allow her nonagenarian parents to get into and out of the vehicle, since she is the primary driver for her parents to the doctor's office for their

medical needs. I have tried two different plug-in hybrids in the past and find that there is limited trunk space for luggage; in fact, their trunks cannot even hold a single set of golf clubs.

5. In recent years stringent CAFE standards have restricted our vehicle choices and increased their prices. I used to lease Ford Fusions, which are mid-sized sedans. I actually prefer such sedans to SUVs. The Ford Fusions I drove were equipped with conventional engines. However, in later years the Fusion became available only as a hybrid car. I stopped leasing it because of its higher price and limited trunk space. Back in 2017, the Ford Fusion hybrid sedan listed (MSRP) for \$25,295, in 2018 the price went up to \$26,245, by 2019 the price was \$27,555 and in 2020 the price was \$28,000. In my opinion, the major factor in Ford's decision to stop manufacturing Fusions with conventional engines was the need to comply with CAFE.

6. For similar reasons involving CAFE, Ford has announced the discontinuation of sedans and all passenger cars beginning in 2021 (except for the Mustang). If there was stability in the CAFE standards at the more lenient standards adopted by the respondent agencies, the Environmental Protection Agency (EPA) and the National Highway Traffic Administration (NHTSA), in their Final Rule, this situation might be alleviated somewhat. Moreover, it is likely that our car-buying choices would be even broader, and car prices would be even lower, if the agencies had adopted standards that were even more lenient than what they chose in that rule. This would be the case, for example, if the agencies had adopted standards such as what I proposed in the comments that I filed during this rulemaking, or what the Competitive Enterprise Institute proposed in its comments.

7. I based these conclusions on two grounds: a) my extensive experience as a CAFE compliance officer for Ford Motor Company and as an environmental consultant; and b) the agencies' own statements in the Final Rule and its accompanying documents.

8. My professional experience is detailed in my attached CV. My three decades of work for Ford encompassed all aspects of managing corporate compliance and planning concerning CAFE. This ranged from analyzing the economic and marketing aspects of planned and anticipated CAFE standards, to dealing with the impacts of fuel prices on both a short-term and long-term basis. Similarly, as an environmental consultant since leaving Ford, I have advised clients on a range of CAFE-related matters. My clients included NHTSA, VOLPE, and Environmental Defense.

9. In addition, since 2018 I have authored and published an annual *Advanced Automotive Technology Buying Guide*—a detailed examination of the costs and benefits of

battery-powered cars, plug-in and non-plug-in hybrids, and diesel-powered vehicles that are available to consumers. In the 2020 model year, the average cost premium (including fuel cost and the social benefits) of an electric vehicle was \$20,500 above the cost of its gasoline counterpart. The average cost premium for a plug-in hybrid electric vehicle was \$21,600 and only sixty-three percent met their 2025 model year fuel economy target. The average cost premium for a hybrid electric vehicle was \$6500. Only fifty-one percent of these vehicles meet their 2020 model year fuel economy target and only thirty-nine percent meet their 2025 model year fuel economy target. Customers are rational. The price of gasoline would have to exceed \$7.80 per gallon for the average electric vehicle sold in the 2020 Model Year to save the customer money.

10. Based on my professional experience, CAFE standards have a major impact on the automotive choices available to consumers and on the purchase prices of various models. This impact is especially strong when fuel prices are relatively low, because low-priced gasoline forces many carmakers to adjust prices and model availability so that new-car purchases produce a sales mix that complies with CAFE. This impact, in turn, has downstream effects on the prices of used cars as well. The impact is greatest on larger vehicles, which consumers generally prefer when fuel prices are either low or are anticipated to drop in the near future. The preference is due to the greater utility, safety and other advantages that consumers see in such vehicles.

11. These conclusions are amply supported in the Final Rule itself. In describing the benefits of the Rule, the agencies repeatedly describe the cost savings that are expected from the chosen standard as compared to those that would have been resulted from the original standards. See, e.g., 85 Fed. Reg. 24174, 25108: “the final standards would reduce the per-vehicle costs by \$1250 per vehicle in [model year] 2030, compared to the standard set in 2012” These savings would not be retained solely by carmakers; to the contrary, they “likely would . . . be passed on to consumers.” *Id.* at 25110. More importantly, the Rule notes that these savings in per-vehicle costs would be even greater *if more lenient standards had been chosen*: “alternatives lower in stringency than the final standards would save consumers more . . . while alternatives more stringent than final standards would save consumers less” *Id.* The standards that I proposed and that CEI proposed fall precisely into that category of “alternatives lower in stringency”.


12. The agencies also admit that less stringent standards offer consumers such benefits as greater safety: “Another factor weighing toward reduced stringency is safety. As discussed previously, reduced stringency results in less pressure on manufacturers to reduce mass in vehicles, which, for smaller passenger cars has negative safety implications when involved in accidents with heavier vehicles. Further, as vehicle prices decrease compared to the previous standards, more consumers will be able to afford

newer vehicles, which are significantly safer.” 85 Fed. Reg. 25119. See also id. at 25185 (“Less stringent standards remain better for safety and are projected to save thousands of lives”).

13. For the foregoing reasons, it is my expert opinion that while consumers in general will benefit from the Final Rule, they are nonetheless adversely affected by the respondents’ failure to adopt less stringent standards than that Rule. My conclusions regarding CAFE’s impact on vehicle choices and vehicle prices apply both to my own car leasing situation and to those of the other individual petitioners in this action.

Pursuant to 28 USC 1746, I hereby declare under penalty of perjury that the foregoing is true and correct.


Walter M. Kreucher


Date

Environmental Consultants of Michigan, LLC

Walter M. Kreucher

Walter has over thirty years of experience overseeing vehicle regulatory and legislative issues related to fuel economy, fuel quality, and alternative fuels.

He ran a major inter-industry research project and dealt directly with the Chief Executive Officers of the largest automotive and petroleum companies in the world.

Retired from Ford Motor Company April, 2004

Area of Expertise

- Corporate Average Fuel Economy, vehicle testing, fuel economy compliance, and modeling
- Fuel Economy Regulations
- Life Cycle Analysis of Fuels
- Fuel Quality

Work Experience

Environmental Consultants of Michigan, LLC.

Providing consulting services to groups and organization outside the automobile industry on fuel economy and fuel related regulatory and legislative matters, management issues, and other business matters.

1973 – 2004 Ford Motor Company Dearborn, MI

Vehicle Energy Planning Manager

- Managed CAFE compliance, fuel quality and alternative fuel regulatory efforts.
- Negotiated CAFE regulatory and legislative matters.
 - Developed and implemented strategy that resulted in the CAFE reform movement.
 - Developed position papers and background material in support of Congressional debates
 - Developed Hybrid Electric Vehicle Tax Credit incorporated into the Energy Policy Act
- Provided technical support on fuel economy and fuel quality matters.
 - Key negotiator in the first ever gasoline quality standards (California and Federal)
- Co-Chairman of primary technical committee for the Auto/Oil Air Quality Improvement Research Program; a \$40 million joint research program that developed data demonstrating that gasoline quality improvements could reduce vehicle emissions and improve air quality.
 - Worked with the CEO's of fourteen oil companies and the big three automobile companies.
- Developed responses to various vehicle related regulations
- Monitored vehicle certification testing
- Helped develop the first CAFE reporting procedures for Ford.

Education

1973 University of Michigan

B.S.E., Materials and Metallurgical Engineering

1984 University of Detroit

M.B.A Finance Major

Member Beta Gamma Sigma, National Honor Society of top Business School Graduates

Publications

[Description of Auto/Oil Air Quality Improvement Research Program](#)

Vaughn R. Burns, Jack D. Benson, Albert M. Hochhauser, William J. Koehl, Walter M. Kreucher, Robert M. Reuter

[Economic, Environmental and Energy Life-Cycle Assessment of Coal Conversion to Automotive Fuels in China](#)

Walter M. Kreucher, Weijian Han, Dennis Schuetzle, Zhu Qiming, Zhang Alin, Zhao Ruilan, Sun Baiming, Malcolm A. Weiss

[Economic, Environmental and Energy Life-Cycle Inventory of Automotive Fuels](#)

Walter M. Kreucher

The Relationship between Gasoline Composition and Vehicle Hydrocarbon Emissions: A Review of Current Studies and Future Research Needs

Dennis Schuetzle , Walter Siegl, Trescott E. Jensen , Mark A. Dearth , E. William Kaiser , Robert Gorse, Walter Kreucher , Edward Kulik

2020 Advanced Automotive Technology Buying Guide

This buying guide examines the costs and benefits of battery electric, plug-in hybrid electric, hybrid, and diesel-powered vehicles that are available in the United States in the 2020 model year

Walter Kreucher

2019 Advanced Automotive Technology Buying Guide

Thinking about buying an electric vehicle, a hybrid, a diesel? Wondering if it will be cost effective? This guide looks at the cost of buying the vehicle, the fuel savings, and even the environmental benefits using the latest government data and methodology. Don't purchase a new car or truck without reading this book.

Walter Kreucher

2018 Advanced Technology Buying Guide

This book guides buyers of battery electric vehicles, plug-in hybrid electric vehicles, hybrid electric vehicles, and diesel vehicles in assessing the costs and benefits of the advanced technologies.

Walter Kreucher

Hybrid Buying Guide

A review of the top twenty 2012 Model Year hybrid electric vehicles including the true cost to own and EPA fuel economy.

Walter Kreucher

No. 20-1145

Consolidated with Cases No. 20-1167, -1168,
-1169, -1173, -1174, -1176, -1177 & -1230

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

COMPETTIVE ENTERPRISE INSTITUTE et al.,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION et al.,

Respondents,

DECLARATION OF KENT LASSMAN

I, Kent Lassman, hereby declare:

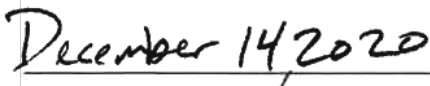
1. I am an adult resident of the City of Alexandria, Virginia.
2. I am President and CEO of the Competitive Enterprise Institute (CEI), a non-profit organization headquartered and incorporated in the District of Columbia. I have held that position since April, 2016, and am fully familiar with CEI's structure, programs and activities.
3. CEI is a nonprofit, nonpartisan public policy organization dedicated to advancing the principles of limited government, free enterprise, and individual liberty. CEI's focus is on economic overregulation in areas ranging from technology and finance to energy and the environment.
4. CEI is governed by an 11-member Board of Directors, each serving for three-year terms.

5. I personally plan to buy a car within the next 18 months. I believe that the federal fuel economy standards will adversely impact my vehicle choices in terms of both price and range of models. Specifically, I believe that I will have fewer choices and face higher prices due to these standards, because I will be seeking a car based on its safety, size and passenger capacity. I do not plan to buy an electric car, and I'm unlikely to buy a hybrid car.
6. I believe that these adverse effects will be partly alleviated by the reduced stringency of the new SAFE Rule, but that they would be alleviated more if the SAFE Rule was even more lenient.
7. Since April, when the final SAFE Rule was issued, at least three other members of CEI's Board have expressed their concerns regarding the effect of the SAFE Rule on their own plans to buy a car within the next one to four years.
8. For these reasons, I believe that CEI's participation as a petitioner in this case represents the interests of its Board in the deregulatory goals of this organization.

Pursuant to 28 USC 1746, I hereby declare under penalty of perjury under the laws of the District of Columbia and that United States that the foregoing is true and correct.



Kent Lassman



Date

No. 20-1145

Consolidated with Cases No. 20-1167, -1168,
-1169, -1173, -1174, -1176, -1177 & -1230

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

COMPETTIVE ENTERPRISE INSTITUTE et al.,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION et al.,

Respondents,


Declaration of James Leedy

I, James Leedy, hereby state as follows:

1. I, my wife and our four children reside at 3005 E. Lakewood St., Mesa AZ 85213.
2. I currently own a 2012 minivan with nearly 130,000 miles on it; a large SUV that's over 50 years old; and a 2020 1/2 ton pickup truck.
3. Within the next 3-5 years I expect to buy a car for my twin sons. Because this will be their first car, it will be a used model, probably a large, heavy sedan.
4. The most important criteria for me in choosing a car are safety, affordability and size. I believe that, other things being equal, size and safety generally go hand-in-hand.

5. In my experience, cars have become extremely expensive in recent years. This is true for both new and used cars. I believe one major reason for this is the effect of the federal government's automotive fuel economy standards. Less stringent standards would make it easier for us to buy the car we'd like for our sons.

Pursuant to 28 USC section 1746, I hereby declare under penalty of perjury that the foregoing is true and correct.



James Leedy

11/20/20

Date

No. 20-1145

Consolidated with Cases No. 20-1167, -1168,
-1169, -1173, -1174, -1176, -1177 & -1230

IN THE UNITED STATES COURT OF APPEALS
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Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION et al.,

Respondents,

Declaration of Marc Scribner

I, Marc Scribner, hereby state as follows:

1. I live at 811 Quintana Place NW, Washington DC 20011.
2. I do not currently own a car. I plan to buy one in the next one to three years to use for personal travel both in the DC area and for longer road trips
3. Depending on vehicle prices and availability, I hope to buy either a full-size sedan or a cross-over model. Safety and luggage capacity are the most important factors for me, as well as the ability to fold down the rear seats so that I can move large, boxed items. For safety reasons, I do not plan to buy a compact or anything smaller than that.
4. I am on a limited budget. I would prefer to buy a new car for reliability and safety reasons, but if new cars that meet my criteria are too expensive, I may buy a used car instead.

5. In my view, the federal auto fuel economy standards have raised vehicle prices and restricted the range of models that are available to me. I think these problems will be lessened by the new SAFE rules, but I believe that my car-buying situation would be improved even more by more lenient standards.

Pursuant to 28 USC section 1746, I hereby declare under penalty of perjury that the foregoing is true and correct.



Marc Scribner



Date