ORAL ARGUMENT NOT YET SCHEDULED
No. 18-1114 (consolidated with 18-1118, 18-1139, 18-1162)

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

STATE OF CALIFORNIA, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents,

ASSOCIATION OF GLOBAL AUTOMAKERS, ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC.,

Intervenors.

On Petition for Review of Final Action of the United States Environmental Protection Agency

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CORRECTED BRIEF OF ADVANCED ENERGY ECONOMY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, *amicus curiae* the Advanced Energy Economy ("AEE") hereby submits the following corporate disclosure statement:

AEE is a not-for-profit business association dedicated to making energy secure, clean, and affordable. AEE does not have any parent companies or issue stock, and no publicly held company has a 10% or greater ownership interest in AEE.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1)(A), counsel certifies as follows:

A. Parties and *Amici*. All parties, intervenors, and *amici* appearing in this Court are listed or referenced in the Brief for State Petitioners, No. 1772468, filed on February 7, 2019.

B. Rulings Under Review. The ruling under review is described in the Brief for State Petitioners, No. 1772468, filed on February 7, 2019.

C. Related Cases. All related cases are listed in in the Brief for State Petitioners, No. 1772468, filed on February 7, 2019.

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RULE 29 STATEMENTS

The Court granted AEE's motion for leave to file an amicus brief on February 7, 2019, ECF No. 1772374. A separate brief filed on behalf of AEE is warranted for the reasons given in AEE's motion for leave, and because AEE is unaware of other entities intending to participate as *amici* whose views are substantially similar to those of AEE.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no party or party's counsel contributed money that was intended to fund preparing or submitting this brief. The *amicus curiae* received financial support from the Heising-Simons Foundation, through the Advanced Energy Economy Institute, intended to assist in preparing and submitting the brief. No party's counsel authored the brief in whole or in part, subject to the following proviso. The utility petitioners' counsel, Kevin Poloncarz and Donald Ristow, recently moved from their prior law firm to the same law firm as counsel for the amicus here, but (1) neither they, nor the utility petitioners, authored any part of this brief or contributed any money intended to fund preparing or submitting the brief, and (2) the respective representation of those parties and amicus here has been maintained separately in all respects, including the preparation of this brief.

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GLOSSARY

AEE	Advanced Energy Economy
APA	Administrative Procedure Act
CARB	California Air Resources Board
EPA	Environmental Protection Agency
GHG	Greenhouse Gas
NHTSA	National Highway Traffic Safety Administration

INTEREST OF AMICUS CURIAE

Advanced Energy Economy ("AEE"), a not-for-profit business association, was formed in 2011 to marshal the resources of industry to develop a prosperous economy based on secure, clean, and affordable energy. AEE, which works with state and regional partner organizations across the country, represents more than 100 companies and organizations spanning the advanced energy industry and its value chains.[1] AEE's members represent the advanced energy sector, which as a whole employs more than 3.4 million people in the United States who serve a $200 billion annual domestic market and a $1.7 trillion global market.

AEE is increasingly focused on the transition to advanced, clean cars. Its membership—which includes an Advanced Transportation Group comprised of leading companies in technology development, vehicle and engine manufacturing, electric vehicle charging infrastructure, fleet ownership and operation, grid integration, and transportation system software management—is at the leading edge of this shift. AEE's members are also directly involved in low- and zero-emission electric power generation and the provision of technologies and services that reduce

[1] This brief is reflective of the broad view of AEE's membership and their experience in the market for zero-emissions vehicles and supporting technology. Individual members of AEE may have different specific views on positions taken in this brief.

energy demand, and thus would benefit from increasing electrification of the automotive fleet.

INTRODUCTION AND SUMMARY OF ARGUMENT

For half a century and through multiple revisions, Congress, EPA, and the Courts have all recognized that the Clean Air Act (the "Act") was designed to promote technological solutions to our nation's air pollution problems. The Act was structured to lend central importance to "technology forcing"—i.e., requiring and providing incentives for new and improved pollution control technologies. The regulations requiring a Mid-Term Evaluation ("Evaluation") of greenhouse gas emissions from light-duty vehicles that are at issue here were specifically structured to give life to this promise. They were designed to provide a stable regulatory pathway of long duration that would allow investments in innovative technology that could achieve required reductions of greenhouse gasses and meet fuel efficiency targets. They also specified only performance targets, leaving the precise choice of the means of compliance to every automotive manufacturer. The Evaluation mandated by those regulations was structured to require a careful evaluation of emerging technologies that could help meet the clean air goals.

As intended by that regulatory framework, amicus AEE's members have built businesses that develop cost-effective technology innovations to meet the challenges of reducing air pollution from vehicles. AEE's members are building the ecosystem

in which a transition in the automotive industry is occurring: designing and manufacturing clean vehicles in which consumers will travel, erecting energy infrastructure and generating clean energy to power those vehicles, writing software code to facilitate communications between the grid, vehicles, and consumers, and fostering the creation of new service models, in which transportation will be sold not merely in the form of a car but as a mobility service, facilitated through the internet.

This major economic shift toward clean vehicles has been grounded, in part, on stable regulatory structures that enable companies to make long-term investments in research and development, innovation, and complex infrastructure. AEE and its members depend upon regulatory certainty and predictability to ensure that billions of dollars of investment can be made with confidence. Thus, AEE is dedicated to participating in state and federal policy processes that will engender predictability for its members.

Unfortunately, EPA has ignored the role of technology development in reversing its Initial Final Determination and reopening the underlying standards. It has disregarded the vast record developed by EPA, NHTSA, and the California Air Resources Board ("CARB") that led to EPA's earlier conclusion that these regulations would be achievable and that demonstrated the availability and cost-effectiveness of the evolving suite of automobile technologies to decrease emissions and increase fuel efficiency.

EPA's withdrawal of its Initial Final Determination and issuance of a New Final Determination subverts regulatory certainty and renounces the central role of technological innovation. EPA's actions undermine technology firms' ability to plan around predictable markets, and destabilize the investor confidence engendered by the benefits of long-term, evidence-based emissions performance standards. EPA's New Final Determination constitutes arbitrary and unlawful agency action and should be vacated.

ARGUMENT

I. EPA Ignores the Clean Air Act's Focus on Technological Development.

The Act is a "technology-forcing" statute designed to incentivize innovation and ingenuity to reduce air pollution and increase fuel efficiency in the automotive sector. *Union Elec. Co. v. EPA*, 427 U.S. 246, 258 (1976) (the Act's requirements "are of a 'technology-forcing character'" (citation omitted)); *Am. Trucking Ass'n v. Whitman*, 531 U.S. 457, 492 (2001) (Breyer, J., concurring) ("Subsequent legislative history confirms that the technology-forcing goals of the 1970 amendments are still paramount in today's Act."); *NRDC v. EPA*, 655 F.2d 318, 328 (D.C. Cir. 1981) (in the Act, Congress intended EPA to "'press for the development … of improved technology rather than be limited by that which exists today'" (citation omitted)). That goal of providing incentives for technology development applies even where

EPA must also evaluate cost considerations. *NRDC v. Thomas*, 805 F.2d 410, 428 n.30 (D.C. Cir. 1986) (discussing § 202).

The design of the Evaluation process and the underlying regulations that EPA has determined to reopen were all calibrated to ensure this focus on technology. The requirements were stated as "performance standards"—specifying the emissions limits that were required to be met by certain dates rather than specifying the technology itself. 40 C.F.R. § 86.1818-12. Congress has in the past adopted similar forms "of expressing standards instead of specifying control technology in order to avoid 'freezing the state of the art'." *Forcing Technology: The Clean Air Act Experience*, 88 Yale L.J. 1713, 1729 (1979) (citing legislative history).

The standards' long duration (through 2025), coupled with the intricate process rooting the Evaluation in a detailed technology assessment, reinforce the centrality of technology to the Evaluation. *See, e.g.*, EPA, Joint Technical Support Document at 3-3, EPA-420-R-12-901 (Aug. 2012) (JA__) ("The agencies plan to assess these technologies afresh, along with all of the technologies considered in this final rule, as part of our mid-term evaluation."); 77 Fed. Reg. 62,624, 62,631 (Oct. 15, 2012) (JA__) (describing how the long-duration standards can give rise to lower costs, greater efficiencies, more uptake across fleets, and new technologies). Indeed, EPA framed the Evaluation as needing to be based on a full and robust factual evaluation, *see* 77 Fed. Reg. at 62,632-33 (JA__-__), which was "intended to be as

robust and comprehensive as that in the original setting of the MY2017–2025 standards," *id.* at 62,784 (JA__).

Incredibly, EPA makes no mention in the New Final Determination of the technology-forcing nature of the statute or regulations. It takes a backward-looking approach that seems designed to ensure that manufacturers can comply merely by carrying on business-as-usual. To be sure, EPA has previously taken the position that it is not *required* to promulgate technology-forcing standards for light-duty vehicles, although it has *authority* to do so. *Id.* at 62,673 (JA__). Even assuming that interpretation is correct, however, EPA failed entirely to evaluate whether it ought to impose technology-forcing standards, which constitutes reversible error. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (agency errs where it "entirely failed to consider an important aspect of the problem" or did not consider "relevant factors"). Furthermore, EPA failed to provide a justification for drastically moving away from its earlier recognition of the importance of evolving technologies.

II. EPA's Actions Have Created Regulatory Instability, Which Inflicts Present, Material Harm Warranting Judicial Review.

EPA's withdrawal of the Initial Final Determination, and the process by which that occurred, harms AEE members, who have relied on the long-standing 2022-2025 standards to guide their investment decisionmaking. In 2016, AEE member Tesla, for example, invested $2.5 billion in U.S. automotive manufacturing, which

it notes was due to the stable regulatory environment in which it had been operating. Tesla Comments at 2, EPA-HQ-OAR-2015-0827-9201 (JA__). Having relied on such stability, various AEE members now face the prospect of rearranging years of planned investments around a newly uncertain regulatory regime.

Because the Evaluation regulations were specifically designed to require that EPA's Evaluation decision be tethered to a detailed technology assessment, EPA began a lengthy and in-depth process in 2014,[2] and continued more formal review in 2016 and early 2017, which culminated in the Initial Final Determination's conclusion that the 2022-2025 standards remained appropriate. *See infra* § III. But now, EPA's reconsideration and issuance of a New Final Determination remove that regulatory certainty: it is an attempt to satisfy a legal pre-requisite that would allow EPA to fundamentally revise the 2022-2025 standards, contrary to the longstanding regulatory structure on which extensive investment has relied. That has an adverse impact on AEE and its members *now* and thus warrants immediate judicial review,

[2] EPA lists a June 2014 presentation to the National Research Council as the first presentation in the Evaluation process. https://www.epa.gov/regulations-emissions-vehicles-and-engines/epa-presentations-regarding-midterm-evaluation-light-duty

particularly given that EPA violated its own regulations in its reevaluation, *see infra* § III.[3]

That conclusion is reinforced by the Evaluation's structure and purpose, which recognize that loss of regulatory certainty has immediate and present impacts on investments. The Evaluation process was designed as a way to inspire greater confidence in the adoption of emission standards with a sufficiently long duration that they could provide a relatively reliable basis for the sizeable investments required for developing alternative fuel and advanced technology vehicles, and to harmonize NHTSA's limited authority to adopt standards of comparable duration to

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[3] The record contains comments from automobile manufacturers indicating that an Evaluation decision to revise the emissions standards would itself be subject to judicial review. *See* Ford Motor Company Comments at 3, EPA-HQ-OAR-2010-0799-9463 (Feb. 13, 2012) (JA__) ("It is also essential that the agency decisions emerging from the mid-term evaluation be judicially reviewable.… [T]he possibility of such a challenge helps to ensure that the evaluation process will be robust and that the agencies will give full consideration to all comments."); National Association of Manufacturers Comments at 3, EPA-HQ-OAR-2010-0799-9587 (Feb. 13, 2012) (JA__) ("Moreover, as EPA and NHTSA recognize, both the appropriateness determination and any subsequent rulemaking would be final agency action subject to judicial review."); Alliance of Automobile Manufacturers Comments at 5, EPA-HQ-OAR-2010-0799-9487 (Feb. 13, 2012) (JA__) ("EPA has not specifically provided for expedited judicial review of the results of the final mid-term evaluation…. Following the process as proposed should enable the agencies to consider all relevant issues, make an informed decision about the appropriateness of the MY 2022-2025 standards, and allow sufficient time for the promulgation of different standards and/or judicial review, if necessary.").

EPA's. 77 Fed. Reg. at 62,631-33 (JA__-__) (noting that "[t]he final rules facilitate long-term planning by manufacturers and suppliers," and that given the "long time frame at issue," the agencies would conduct an Evaluation process).

This understanding is borne out by the record underlying the creation of the Evaluation process. Chrysler noted it "provides long-term fuel economy and greenhouse gas goals to automotive manufacturers and suppliers enabling strategic planning for the needed improvements."[4] The Chamber of Commerce was "pleased that the automobile industry is receiving the regulatory certainty it needs for long-term planning purposes," and acknowledged that regulatory certainty would "incentivize[]" the "infrastructure for many of the new technologies," "such as electric vehicles, fuel cells and alternative fuels."[5] Hyundai remarked that it "appreciates the substantial lead time provided by the regulations which will provide stability for long-term product planning."[6] The Motor and Equipment Manufacturers Association stated in support of the Evaluation structure that "[l]ong-

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[4] Chrysler Group LLC Comments at 5, EPA-HQ-OAR-2010-0799-9495 (Feb. 13, 2012) (JA__).

[5] Chamber of Commerce Comments at 1, 3, EPA-HQ-OAR-2010-0799-9521 (Feb. 13, 2012) (JA__-__).

[6] Hyundai America Technical Center, Inc. Comments at 3, EPA-HQ-OAR-2010-0799-9547 (Feb. 13, 2012) (JA__).

term planning is an especially important factor in the motor vehicle industry."[7] Mitsubishi observed that "the product cycle development begins nearly 10 years before the launch of a vehicle," and "[p]roduct plans are set in general for approximately five years at a time."[8]

EPA dismissed this focus on regulatory certainty without reasoned justification, agreeing that regulatory certainty is "extremely important," but then asserting that reconsidering the standards "is the best way to provide certainty." 83 Fed. Reg. 16,077, 16,087 (Apr. 13, 2018) (JA__). However, EPA entirely failed to explain this counterintuitive conclusion or otherwise meaningfully evaluate its actions' impact on regulatory certainty.

EPA also rejected concerns about regulatory certainty because "NHTSA must still complete a rulemaking for [model years] 2022-2025." *Id.* That ignores, however, that *EPA's* decision to reverse its Initial Final Determination itself—particularly where the agency has failed to follow the requisite procedures, *infra* § III—introduces new, present uncertainty, even as NHTSA's process unfolds. By contrast, if *EPA's* Initial Final Determination had remained in place, there would be

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[7] Motor and Equipment Manufacturers Association Comments at 5, EPA-HQ-OAR-2010-0799-9478 (Feb. 13, 2012) (JA__).

[8] Mitsubishi North America Comments at 3, EPA-HQ-OAR-2010-0799-9507 (Feb. 13, 2012) (JA__).

increased certainty even if *NHTSA* might take a different course with respect to its standards. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 501 (2007) ("The fact that DOT's mandate to promote energy efficiency by setting mileage standards may overlap with EPA's environmental responsibilities in no way licenses EPA to shirk its duty to protect the public 'health' and 'welfare,'."). EPA's all-or-nothing approach is illogical: EPA has significantly reduced regulatory certainty, even if absolute certainty would not have existed without EPA's reconsideration.

III. EPA's New Final Determination Suffers from Fatal Procedural Flaws.

A. EPA Failed to Base Its Reconsideration on the Record Required by the Evaluation Regulations.

In order to provide regulatory certainty critical to market participants, the Evaluation established a multi-step, technology-focused process that would first have EPA develop a technical record, then propose a determination, and only then issue a final determination. Each step was to be subject to public notice and comment and involve the creation of an in-depth record.

EPA skipped to the final step in that process when it withdrew and reversed its Initial Final Determination. It failed to revisit and analyze its previous technical determinations or use a robust process that allowed for full and frank public debate. Instead, EPA took public comment on the possibility of revising the Initial Final Determination and then, based almost entirely on unexamined evidence submitted by a few automotive industry participants (that was not made available for public

comment during the notice and comment period), issued its New Final Determination. This EPA cannot do.

The regulations *require* EPA's final determination to be based principally on consideration of (1) a draft Technical Assessment Report, (2) public comment on that report, and (3) public comment on whether the 2022-2025 standards are appropriate. 40 C.F.R. § 86.1818-12(h)(2); *see also* 83 Fed. Reg. at 16,078 (JA__) (describing these items as "required" by the regulations).

In issuing its Initial Final Determination, EPA followed these steps. In July 2016, EPA, NHTSA, and CARB jointly issued a 1,217 page Technical Assessment Report. Their conclusion, based on this extensive record, was that "[a] wider range of technologies exist for manufacturers to use to meet the MY2022-2025 standards, and at costs that are similar or lower, than those projected in the 2012 rule." Technical Assessment Report at ES-2, EPA-420-D-16-900 (JA__). Even before that Report was issued for public comment, the agencies met with "nearly all automotive manufacturers" and their trade associations "on numerous occasions" to obtain their input. *Id*. at 2-6 (JA__). Unsurprisingly, given this extensive outreach,

industry stakeholders recognized the robustness of the record in their public comments.[9]

After evaluating public comments, EPA released for public comment a 268-page Proposed Determination and a 719-page supporting Technical Support Document. The Proposed Determination found that the agencies' additional analysis supported the conclusion that the standards could feasibly be met in a cost-effective manner, and thus proposed to retain the 2022-2025 standards. Proposed Determination at ES-2 to ES-3, 55, EPA-420-R-16-020 (JA__-__).

Finally, after evaluating another round of comments, EPA issued its Initial Final Determination in January 2017, along with a 174-page document responding to comments, retaining the standards based on this extensive technical record. Initial Final Determination at 2-3, EPA-420-R-17-001 (JA__-__).[10]

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[9] Global Automakers, Inc. Comments at 5-6, EPA-HQ-OAR-2015-0827-4009 (Sept. 26, 2016) (JA__) ("reflects a serious and substantial effort to fully analyze the current state and future of the National Program. Global Automakers commends the agencies for the resources that they have devoted and will continue to devote during this midterm evaluation.").

[10] Some have argued EPA rushed to issue the Initial Final Determination. To the contrary, the agencies' *formal* process took place over a seven-month period—longer than the four-and-a-half month period that the Evaluation rule contemplated. *See* 40 C.F.R. §§ 86.1818-12(h)(3) (November 15, 2017 deadline to issue Technical Assessment Report), -12(h) (April 1, 2018 deadline for final determination). Moreover, a lengthy *informal* process preceded issuance of the Technical Assessment Report. *See* Proposed Determination Response to Comment Document

By contrast, EPA's New Final Determination fails to grapple in any meaningful way with this extensive technology-focused administrative record. EPA did not purport to reconsider or revise the Technical Assessment Report or the Technical Support Document. Moreover, EPA's 11-page New Final Determination barely mentions the former and makes no mention of the latter. Instead, EPA merely asserts that it "considered the complete record," 83 Fed. Reg. at 16,079 (JA__), without explaining how it weighed the Technical Assessment Report or other supporting technical information. EPA's New Final Determination is thus not based

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at 7, EPA-420-R-17-002 (Jan. 2017) (JA__) ("EPA believes that the comment period for the Proposed Determination is sufficient in light of the limited new data and information presented in that document as well as in the comments we received on the Draft TAR (which formed the technical underpinnings of the Proposed Determination). The Administrator has moved forward with the Proposed Determination based on an extensive technical record developed over several years of research, analysis, and public input, with the recognition that lead time and regulatory certainty are critical to the auto industry.").

These complaints are particularly misplaced given the automobile industry's previous admonitions that EPA should attempt to "*beat* … the deadlines set forth in the" rule to allow for greater certainty. Ford Motor Company Comments at 3, EPA-HQ-OAR-2010-0799-9463 (Feb. 13, 2012) (JA__) (emphasis added). *See also* National Association of Manufacturers Comments at 3, EPA-HQ-OAR-2010-0799-9587 (Feb. 13, 2012) (JA__) ("[W]e urge the Agencies to consider additional mechanisms to ensure that revised standards will be issued on schedule. For example, the Agencies could provide additional flexibility by beginning the review process earlier."); Alliance of Automobile Manufacturers Comments at 6, EPA-HQ-OAR-2010-0799-9487 (Feb. 13, 2012) (JA__) (stressing need to meet all deadlines in Evaluation process and noting that "[i]f anything is allowed to undermine or delay the process, it creates a significant potential for disputes and difficulties in the future, something we all hope to avoid").

on the "record then before the administrator," and fails to satisfy the Evaluation regulation. 40 C.F.R. § 86.1818-12(h). EPA also failed to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43.

EPA's disregard for the in-depth, scientifically-based administrative record and its failure to follow the regulatory requirements are particularly striking given the legal requirement that the agency must "provide more substantial justification" when a changed policy "rests upon factual findings that contradict those which underlay its prior policy." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015). As this Court recently held, "[a]n agency cannot ignore its prior factual findings that contradict its new policy nor ignore reliance interests. [A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Nat'l Lifeline Ass'n v. FCC*, No. 18-1026, ---F.3d---, 2019 WL 405020, at *6 (D.C. Cir. Feb. 1, 2019) (citation omitted) (second alteration in original). Such a reversal must be founded on a "searching and careful inquiry of the record." *Id.* (citation and quotation marks omitted). Even if EPA's New Final Determination could satisfy the requirements of reasoned administrative decision-making were EPA writing on a blank slate, it plainly cannot meet this heightened standard.

EPA also failed to engage with CARB in conducting its reconsideration. CARB Comments at 4, EPA-HQ-OAR-2015-0827-9197 (JA__) ("We are disappointed that CARB has not been included in discussions prior to the federal government's recent actions."). That is contrary to the Evaluation rule, which sets forth an expectation that the federal agencies would consult with California, which has independent regulatory authority over vehicle emission standards. *See* 76 Fed. Reg. 48,758, 48,760 (Aug. 9, 2011) (JA__). Moreover, California has considerable expertise in advanced technologies, including advanced technology vehicles, and its recognition of and promotion of those technologies is something that Congress has explicitly permitted. *See* 42 U.S.C. § 7543(b) (recognizing California as the only state that may adopt vehicle emission standards more stringent than EPA's). Many AEE companies operate or are based in California, and are focused on the technology innovation ecosystem that California has created. Moreover, California and the states following its standards represented approximately 30% of the motor vehicle market in 2016. Technical Support Document at 1-40 (JA__). It is a fatal procedural and substantive flaw for EPA to have failed to consider this input.

B. EPA Unlawfully Based Its New Final Determination Almost Entirely on Information Not Made Available for Public Comment.

"An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary." *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C.

Cir. 1982). Here EPA pointed to *no* data whatsoever in announcing its intent to reconsider its Initial Final Determination, and its New Final Determination relies almost entirely on data submitted at the end of the public comment period. *See* 82 Fed. Reg. 14,671, 14,671-72 (Mar. 22, 2017) (JA__-__) (announcing intent to reconsider but providing no analysis of information that would justify a different result); 82 Fed. Reg. 39,976, 39,976 (Aug. 23, 2017) (JA__) (soliciting public comment but not providing information that would support a different result). Specifically, EPA relied almost exclusively on new information from two automobile industry trade associations submitted at the end of the public comment period.

Interested parties were thus provided *no* opportunity to comment on the key information on which EPA relies, which requires rejecting EPA's New Final Determination. While EPA may use "'supplementary' data, unavailable during the notice and comment period, that 'expand[s] on and confirm[s]' information" on which the public has had an opportunity to comment, EPA's reliance on new data to *reverse* its Initial Final Determination falls far outside the scope of this exception. *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991) (citations omitted) (alterations in original). Thus, use of permissible "'supplementary information' … is distinct from 'provid[ing] entirely new information critical to the [agency]'s

determination.'" *Chamber of Commerce v. EPA*, 443 F.3d 890, 900 (D.C. Cir. 2006) (alterations in original) (citation omitted).[11]

IV. EPA's Reversal of Its Previous Technical Feasibility and Cost Effectiveness Findings Is Arbitrary and Capricious.

AEE agrees with Petitioners that EPA acted arbitrarily and capriciously in the manner by which it purported to consider virtually all of the factors that the regulations required it to consider in making its Evaluation determination. *See* 40 C.F.R. § 86-1818-12(h)(1). AEE highlights examples of EPA's failings with respect to three factors as to which AEE has expertise: "[t]he availability and effectiveness of technology;" the "cost on the producers or purchasers;" and the "feasibility and practicability of the standards." *Id.*

As to each factor, EPA failed to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43. To discharge that obligation, "a reasonable explanation of the *specific* analysis and evidence upon which the Agency relied is necessary." *Bluewater Network v. EPA*, 370 F.3d 1, 21

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[11] While the Evaluation is an adjudication, not a rulemaking, the regulation's requirement that there be "[a]n opportunity for public comment" before EPA makes a final determination, 40 C.F.R. § 86.1818-12(h), is parallel to the APA's requirement that interested persons be given "an opportunity to participate … through submission of written data, views, or arguments," 5 U.S.C. § 553(c). Thus, the logic of these APA rulemaking cases applies in full.

(D.C. Cir. 2004). EPA was also required to "respond to major substantive comments." *Sierra Club v. EPA*, 863 F.3d 834, 838 (D.C. Cir. 2017). Finally, because EPA was reversing its own previous conclusions, it was required to "provide more substantial justification." *Perez*, 135 S. Ct. at 1209.

EPA failed on each count: most of its findings are vague and inadequately explained; EPA ignored a host of comments providing contrary data; EPA ignored the key role of technological innovation; and, at a bare minimum, EPA's explanations in support of its about-face did not satisfy the heightened standard of *Perez* and *National Lifeline*.

A. The Emission Standards Are Technically Feasible and EPA Failed Adequately to Evaluate the Record Relevant to this Factor.

1. EPA Failed to Explain Its Departure From Its Own Previous Conclusions.

EPA's New Final Determination principally relies on its mistaken conclusion that the existing emissions standards are not technically feasible or practicable. As an initial matter, EPA failed to address its own record that repeatedly concluded that the standards *are* technically feasible. *Supra* § III. Nor does it provide a meaningful explanation as to why that previous conclusion is no longer accurate. EPA merely asserts 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." 83 Fed. Reg.

at 16,078 (JA__). EPA also says that it has "both developed and received additional data and assessments since the January 2017 Determination." *Id.* EPA fails to identify such data or assessments, however, or explain how changes in assumptions warrant changed outcomes. Simply put, the agency's New Final Determination fails to demonstrate that EPA "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and a choice made." *State Farm*, 463 U.S. at 43 (citation omitted). EPA also failed to rationally analyze future technological developments by not "responsibly … formulating a reasoned prediction" with "the degree of precision and clarity the subject matter permits." *NRDC v. EPA*, 655 F.2d 318, 344 (D.C. Cir. 1981).

2. EPA Failed to Address the Record Underlying the Initial Final Determination and Public Comments Demonstrating Technical Feasibility.

EPA largely ignores its extensive prior technical record and so did not come to terms with the evidence it (with NHTSA and CARB) previously compiled demonstrating the feasibility of various technology pathways for compliance. *See, e.g.*, Technical Assessment Report at ES-2 (JA__) (explaining agencies' independent analyses, which arrive at the same conclusion that "[a] wider range of technologies exist for manufacturers to use to meet the MY2022-2025 standards, and at costs that are similar or lower, than those projected in the 2012 rule"); *see*

also CARB Comments at 18-23, EPA-HQ-OAR-2015-0827-9197 (JA__-__) (citing new studies and comments detailing specific new technologies that warrant maintaining or strengthening the standards).

EPA also fails to confront new comments, studies, and analyses demonstrating feasibility submitted by commenters during EPA's reconsideration. *See, e.g.*, Union of Concerned Scientists Comments at 9, EPA-HQ-OAR-2015-0827-9200 (JA__) (disputing feasibility modeling upon which EPA and industry have relied "to claim that EPA has significantly underestimated the level of technology necessary to achieve the 2025 regulations"). These comments demonstrate that existing innovations in conventional internal combustion engine vehicles will have greatly enhanced efficiencies that will facilitate compliance with the emissions standards. *See, e.g.*, International Council on Clean Transportation Comments at 4-14, EPA-HQ-OAR-2015-0827-9187 (JA__-__) (discussing new technologies from Toyota, Mazda, and Volvo that have "already leapfrogged beyond the updated technology assessments of the past year").

While EPA acknowledged that these comments address "technical feasibility," 83 Fed. Reg. at 16,082 (JA__), EPA failed to meaningfully respond to them, and instead jumped to a conclusion that there is "significant uncertainty" that "supports its determination to reconsider the current standards," *id.* EPA's "failure to address these comments, or at best its attempt to address them in a conclusory

manner, is fatal to its defense." *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 449 (D.C. Cir. 2012).

B. EPA Failed to Address the Record Evidence Demonstrating That There Are Cost-Effective Pathways to Meeting the Standards, That Electrification Is Viable, and That Consumers Are Buying Advanced, Clean Vehicles.

EPA's discussion of cost-effectiveness in its New Final Determination simply notes that the Alliance and Global "identified areas where EPA underestimated costs," and that Global "asserted that EPA's modeling has consistently underestimated the costs." 83 Fed. Reg. at 16,084 (JA__).

EPA fails to explain how the Technical Assessment Report, Technical Support Document, and Initial Final Determination underestimate costs. EPA's Initial Final Determination found that the costs of compliance "are lower than those projected in the 2012 rule," and that "[c]onsequently, the EPA regards these lower estimated per-vehicle costs to be reasonable." Initial Final Determination at 20 (JA__). The Initial Final Determination provides documented analysis and reasoning to support EPA's prior conclusion that "there will be multiple technologies available at reasonable cost to allow the industry to meet the MY2022-2025 standards, with the majority in commercial production today." *Id.* at 18 (JA__).

EPA also fails to address the analysis of CARB, an independent co-regulator of automotive emissions under the Act, that EPA specifically built into the

Evaluation regulations as a partner. CARB's analysis demonstrated that the current standards can be met at the same or lower cost than originally predicted when they were adopted in 2012. CARB Advanced Clean Cars Midterm Review, at ES-20-21 (Jan. 18, 2017) ("[T]he 2022 through 2025 model year GHG standards can be met predominantly with lower cost technology improvements than were originally projected in the 2012 rulemaking.").[12] A number of commenters provide even more recent analysis showing that the Initial Final Determination significantly *overestimates* costs. *See, e.g.*, International Council on Clean Transportation Comments at 12-13 (JA__-__) (finding that compliance will cost as much as *40% less* than what EPA had predicted).[13]

Moreover, EPA's dismissal of vehicle electrification technology is without logic. EPA relies on a slight dip in electric vehicle sales in 2014-2015. 83 Fed. Reg. at 16,079-81 (JA__-__). Yet EPA ignores its own previous findings. EPA's Initial Final Determination found that "EPA analyzed a central case low-cost pathway as well as multiple sensitivity cases, all of which show that compliance can be achieved through a number of different technology pathways without extensive use of strong

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[12] *Available at* https://www.arb.ca.gov/msprog/acc/mtr/acc_mtr_summaryreport.pdf

[13] *See also* Union of Concerned Scientists Comments at 10-15 (JA__-__) ("Comparing the retrospective cost of compliance we have estimated to the agencies' projected cost, we find that *the agency's projections significantly overestimated industry's actual compliance costs*.").

hybrid or electric vehicles." Initial Final Determination at 4, 25 (JA__-__). EPA offers no meaningful explanation as to why this conclusion is no longer accurate.

Indeed, EPA nowhere explains what degree of electrification *would* be required to meet the existing 2022-2025 standards. This is in stark contrast to the Initial Final Determination, where EPA found that there "are multiple compliance pathways which would need only minimal (less than 3 percent) of strong hybrids and electric vehicles" to achieve compliance. Initial Final Determination at 25 (JA__).

In short, EPA's "generalized discussion of" claimed "limiting factors does not explain how the Agency arrived at the *specific* conclusion that emissions reductions" required by the existing emissions standards are not technologically feasible. *Bluewater Network*, 370 F.3d at 21-22. That is particularly so where, as here, EPA's "decision does not involve a prediction about the development of a technology that is not yet available," but rather is based on a conclusion that "technology that is *currently* available"—e.g., fuel-efficient vehicles and electric vehicles—cannot be implemented on a sufficiently widespread basis. *Id.*

Moreover, EPA fails to "meaningfully address comments and evidence that undercut its conclusion, such as economic analysis in the record indicating," *Nat'l Lifeline*, 2019 WL 405020 at *8, that electrification is growing significantly in the U.S. EPA fails to consider ample evidence of increasing demand for electrified

vehicles submitted by industry participants and others. *See, e.g.*, Tesla Comments at 4 (JA__) (discussing its August 2017 public disclosure of 455,000 reservations for its mass-market electric vehicle, the Model 3). *See also* National Coalition for Advanced Transportation Comments at 17, EPA-HQ-OAR-2015-0827-9101 (JA__) ("U.S. [electric vehicle] sales have grown 32 percent annually on average from 2012-2016 and 45 percent over the year ending June 2017;" "[o]ver the 2012 to 2016 period, plug-in EV sales tripled;" and in 2015 Americans "bought over 115,000 [electric vehicles], more than double the number purchased in 2012, notwithstanding lower gasoline prices." (citations omitted)). As to *future* sales, the U.S. Energy Information Administration projects that electric vehicle sales "will increase to about 1.5 million [vehicles] in 2025." *Id.*

The appeal of electrification should not be surprising, given the ample data that was presented by industry leaders to EPA on the increasing cost-competitiveness of electric vehicle technologies.[14] *See, e.g.*, *id.* at 14-15 (JA__-__) (noting (1) "average price of battery packs used in [electric vehicles], which currently account for about half the cost of [electric vehicles], fell 73 percent from

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[14] *See* Goldman Sachs, *Insights: An Inflection Point in the Global Expansion of Electric Vehicles* (May 14, 2018), *available at* https://www.goldmansachs.com/insights/pages/inflection-point-electric-vehicles-chris-buddin.html ("[A]t the rate that battery prices are coming down, we're going to be to a point in the next five years where it's not a choice between paying more to drive an electric vehicle versus an internal combustion engine. It's going to be a comparable choice.").

2010 to 2016," (2) studies project that "cost of batteries will decrease by 77 percent between 2016 and 2030," and (3) General Motors has already reduced price of a battery below EPA's estimated $180-200/kWh with "its current battery costs for the Chevy Bolt at $145 per kWh and projects that it will achieve costs of approximately $100 per kWh by 2022" (citations omitted)); Tesla Comments at 4 (JA__) (as compared to its high-end 2009 Roadster, its mass-market 2017 Model 3 was able to achieve a 77% improvement in peak power density for "around a quarter" of the cost).

Contrary to EPA's supposition, consumers are demanding these options *now*. The record demonstrates a sharp uptick in consumer demand for electric vehicles. National Coalition for Advanced Transportation Comments at 14-17 (JA__). More recent studies confirm the increase in electrification: 2018 saw 360,000 light-duty electric vehicles sold, representing a year-over-year increase of 81%,[15] and a recent AEE study noted that sales were nearly 200,000 in 2017, projected to increase by more than 50% in 2018, and that the compound annual growth rate for electric

[15] Julia Pyper, GreenTechMedia, *US Electric Vehicle Sales Increased by 81% in 2018* (Jan. 7, 2019), *available at* https://www.greentechmedia.com/articles/read/us-electric-vehicle-sales-increase-by-81-in-2018#gs.ZUO3Nzjk.

vehicle sales has been above 50% since 2011.[16] Tesla's Model 3 electric vehicle, in fact, has become one of the country's best selling cars.[17]

EPA also ignores overwhelming evidence that industry is responding to this consumer demand. The major automakers are making significant investments in the "all-electric" future their own trade associations impugn. *See, e.g.*, C2ES Comments at 3, EPA-HQ-OAR-2015-0827-9737 (JA__) (citing General Motor's announcement of at least 20 new all-electric vehicles that will launch by 2023).[18] Furthermore, automaker commitments to electric vehicles have been echoed by nations across the globe, including China.[19]

AEE's members' experience confirms this: they have seen tremendous growth in the sales of advanced, clean vehicles, as well as the development of significant

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[16] AEE, *EVs 101*, at 6-7 (Sept. 2018), *available at* https://info.aee.net/hubfs/EV%20Issue%20Brief_PDF_9.20.18.pdf

[17] Nathan Bomey, USA Today, *These 6 vehicles were the hottest-selling cars of 2018: Jeep, Toyota, Tesla make the list* (Jan. 3, 2019), *available at* https://www.usatoday.com/story/money/cars/2019/01/03/jeep-honda-toyota-subaru-lincoln-vehicles/2466015002/.

[18] *See also* Darren Palmer, New Generation Electric Vehicles, Ford *available at*: https://corporate.ford.com/articles/propulsion-choices/new-generation-electric-vehicles.html (celebrating "the company's $11 billion investment to bring 16 fully electric vehicles within a global portfolio of 40 electrified vehicles through 2022."). More recent analysis shows that "VW, Daimler, Nissan, Volvo and other global automakers have all made aggressive plans to electrify their vehicles over the next 10 years." Bloomberg New Energy Finance, *Electric Vehicle Outlook: 2018*, *available at*: https://bnef.turtl.co/story/evo2018?teaser=true

[19] David Roberts, Vox, *The world's largest car market just announced an imminent end to gas and diesel cars* (Sep. 13, 2017), *available at* https://www.vox.com/energy-and-environment/2017/9/13/16293258/ev-revolution

new charging infrastructure, software, and services and enabling technology required to facilitate their movement. As noted above, AEE member Tesla produces one of the best-selling cars in America. Moreover, AEE members have supported state-level utility commission and legislative proceedings that have approved nearly one billion dollars in utility electric vehicle infrastructure investments, with more than $1.5 billion in additional investments pending approval. AEE member companies such as Tesla, Proterra, BYD, EVgo, SemaConnect, Greenlots, EVBox, and Enel (eMotorWerks) have premised their business models on the viability of such technology and continue to demonstrate its feasibility, cost-effectiveness, and consumer acceptability due to steeply declining cost curves.

This more recent evidence confirms the extensive data already submitted to EPA that runs contrary to its conclusion, and that extensive submitted data represents "significant points articulated by the public" that EPA is required to address. *NRDC v. EPA*, 859 F.2d 156, 188-89 (D.C. Cir. 1988). EPA did not, and instead simply noted that these commenters "do not believe the auto manufacturers are correct about the degree of electrification they claim will be necessary to meet the standards." 83 Fed. Reg. at 16,081 (JA__). This does not satisfy EPA's obligation of reasoned decision-making. *See Sierra Club*, 863 F.3d at 838 (agency decisions are "arbitrary

or capricious where the agency has failed to respond to major substantive comments").[20]

CONCLUSION

For the foregoing reasons, the petition for review should be granted and EPA's New Final Determination vacated.

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[20] EPA also cites manufacturers' reliance on banked credits received by "over-complying" with the standards to date and concern that "the stringency curve [of the standards] dramatically increases at around the same time these credits *could* run out." 83 Fed. Reg. at 16,079 (JA__) (emphasis added). Far from indicating that the standards are flawed, the banking of credits demonstrates that the rule is operating as designed: the 2012 rule contemplated program flexibilities, including banking, designed to encourage over-compliance in the early years and provide flexibility in later years. 77 Fed. Reg. at 62,628 (JA__).

Moreover, EPA offers nothing more than speculation: it notes only that credits "could" run out, but provides no quantitative analysis or other evidence evaluating the likelihood of this scenario. EPA's own cited analysis demonstrates that five of the thirteen major manufacturers *generated* credits in 2016, and that the net deficit for 2016 of 31.4 million credits is only a small fraction of the 261.76 million credits carried over to 2017. Manufacturer Performance Report for the 2016 Model Year, Table 5-1, EPA-420-R-18-002 (JA__).

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with Federal Rules of Appellate Procedure 29(a)(4)(G) and 32(g)(1) and the Court's January 11, 2019 Order, because it meets the prescribed format requirements and contains 6,495 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1). This motion also 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 25th day of February, 2019, a true and correct copy of the foregoing brief was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

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