

ORAL ARGUMENT NOT YET SCHEDULED

Case No. 22-1080

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

NATURAL RESOURCES DEFENSE COUNCIL
Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *et al.*,
Respondents.

On Petition for Review of a Final Rule of the
National Highway Traffic Safety Administration

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

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASE

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

A. Parties and Amici. All parties, intervenors, and amici appearing in this Court are listed in the initial brief of Petitioner American Fuel & Petrochemical Manufacturers and State Petitioners.

B. Rulings Under Review. The agency action under review is the final rule of the National Highway Traffic Safety Administration (NHTSA) entitled Corporate Average Fuel Economy Standards for Model Years 2024-2026 Passenger Cars and Light Trucks, 87 Fed. Reg. 25,710 (May 2, 2022), amending model year 2024-2026 fuel-economy standards

C. Related Cases. Three consolidated cases in this Court challenge the rule under review: Natural Resources Defense Council v. NHTSA (No. 22-1080); Texas v. NHTSA (No. 22-1144); and American Fuel & Petrochemical Manufacturers v. NHTSA (No. 22- 1145).

CORPORATE DISCLOSURE STATEMENT

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

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GLOSSARY

EPA United States Environmental Protection Agency

NHTSA National Highway Traffic Safety Administration

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

ConservAmerica is the party that has authorized the preparation and filing of this brief and its interest in this case is with the environmental impacts of a potential ruling upholding the final rule at issue and ensuring that executive branch administrative agencies follow the statutory language in Congress' grant of authority to the agency to regulate.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

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

INTEREST OF AMICUS CURIAE

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

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

SUMMARY OF ARGUMENT

Petitioners in this case seek the review of another segment of a coordinated plan by the National Highway Traffic Safety Administration (“NHTSA”), the United States Environmental Protection Agency (“EPA”), and the State of California to engineer a wholesale shift in the nation’s vehicle fleet from traditional gas-powered vehicles to electric vehicles. This segment of the plan – a final rule by NHTSA setting average corporate fuel economy standards for passenger cars and light trucks for model years 2024-2026 – must also be set aside because NHTSA unlawfully evaded Congress’ prohibition against the consideration of electric vehicles. Additionally, NHTSA arbitrarily and capriciously formulated a fuel economy standard without recognizing that higher fuel standards will not necessarily result in a decrease in the use of fossil fuels since those fuels would still be necessary to provide the production of materials to make electric vehicles as well as the energy to power electric vehicles.

ConservAmerica submits this *amicus curiae* brief to advise the Court that the coordinated approach endorsed by NHTSA, EPA, and the State of California has serious and widespread implications for energy policy, the environment, and the economy. While NHTSA, EPA, and California have endorsed the policy of rapidly escalating the use of electric vehicles as the best approach to meeting climate change goals, this policy does not account for the fact that when the full lifecycle

of a vehicle and its current energy sources are taken into account – including greenhouse gas emissions from fuel production, manufacturing, operation, and disposal stages – advanced internal combustion engine vehicles and hybrid electric vehicles are capable of achieving comparable or better reductions in greenhouse gas emissions as similarly equipped, full battery electric vehicles. The policy promoted by NHTSA and EPA in favor of a swift conversion to electric vehicles also discourages the development of new technologies which could reduce emissions. Because NHTSA’s final rule is based, in part, upon the assumption that the rapid move to electric vehicles will result in greater emission reductions, and that assumption is not supported by the record, it is arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)

ARGUMENT

I. NHTSA’S FINAL RULE EVADES CONGRESS’ PROHIBITION AGAINST CONSIDERING THE FUEL ECONOMY OF ELECTRIC VEHICLES IN SETTING CORPORATE AVERAGE FUEL ECONOMY STANDARDS.

NHTSA acknowledges in its final rule that the Energy Policy and Conservation Act of 1975 prohibits NHTSA from considering the fuel economy of electric vehicles when setting new fuel economy standards. 49 U.S.C. § 32902(h)(1); 87 Fed. Reg. 25721. Despite recognizing this prohibition, NHTSA cites to the fact that automakers are using electric vehicles as a compliance option

and relies on this fact in the consideration of setting fuel economy standards. *Id.*

NHTSA also considered the fuel economy of electric vehicles in at least two other ways. First, NHTSA stated that it “believes it is appropriate to include [zero emission vehicles] in the baseline for this final rule” because of (1) EPA’s decision to grant California’s waiver under the Clean Air Act to set its own standards which include electric vehicles and (2) “other legal obligations that automakers will be meeting during this time period.” 87 Fed. Reg. 25,744.¹ Second, NHTSA included in its models the fuel economy of additional electric vehicles that manufacturers would introduce in model years 2023 and 2026–2029 in response to the more stringent standards imposed in this rulemaking. 87 Fed.Reg. 25,995. These instances of NHTSA considering electric vehicles in the setting of fuel standards demonstrate that NHTSA believes it can create its own exceptions to Congress’ statutory prohibition against the consideration of electric vehicles. However, the prohibition is clear and unequivocal and thus NHTSA’s final rule violates the prohibition against the consideration of electric vehicles.

¹ EPA’s waiver of Clean Air Act preemption to California for its Clean Cars Program is under review by this Court in *State of Ohio v. EPA*, Case No. 22-1081.

II. THE POLICY OF PROMOTING A RAPID SHIFT TO ELECTRIC VEHICLES WOULD NOT MEANINGFULLY IMPACT GREENHOUSE GAS EMISSIONS.

The executive branch made a policy choice by setting a goal that 50 percent of all new passenger cars and light trucks sold in 2030 be electric zero-emission vehicles. Executive Order 14037 (August 5, 2021). In its final rule setting fuel standards, NHTSA seeks to conform its rulemaking to that policy and attempts to justify the decisions made in the rulemaking by contending that its rule will achieve environmental benefits by reducing greenhouse gas emissions. However, the assumption that a swift increase in the use of electric vehicles will result in less overall emissions – an assumption that NHTSA relies upon – fails to account for the whole lifecycle of emissions in the production of electric vehicles, i.e., from the production of the raw materials to make the vehicles to the salvage of the vehicles. 87 Fed. Reg. 25877 ("By reducing the volume of petroleum-based fuel produced and consumed, adopting higher [corporate economy fuel standards] will thus mitigate global climate-related economic damages caused by the accumulation of [greenhouse gases] in the atmosphere.") The available science does not show that the rapid increase in the use of electric vehicles in place of gas-powered vehicles would reduce greenhouse gas emissions. The emerging consensus is that even a wholesale shift to electric vehicles will not meaningfully impact greenhouse gas emissions when the full lifecycle of a vehicle and its energy source is taken into

account – including greenhouse gas emissions during fuel production, manufacturing, operation, and disposal stages.² Moreover, advanced internal combustion engine vehicles and hybrid electric vehicles are capable of achieving comparable or better reductions in greenhouse gas emissions as similarly equipped, full-battery electric vehicles. *Id.* While ConservAmerica supports the continued development of electric vehicles and recognizes that fully electric vehicles will play an important role in reducing emissions and fighting climate change, a rapid wholesale move now away from gasoline-powered vehicles to fully electric vehicles will not likely achieve the benefits touted by NHTSA in its rulemaking.³

III. BY IMPLICITLY ENDORSING ELECTRIC VEHICLES, NHTSA ARBITRARILY REJECTS A TECHNOLOGY-NEUTRAL APPROACH TO BETTER FUEL ECONOMY STANDARDS.

NHTSA's final rule, in coordination with actions by EPA and California as acknowledged in the preamble to the rule, advances the executive branch policy of having 50 percent of all passenger cars and light trucks produced by the year 2030 be fully electric vehicles. By adopting a policy of selecting one technology – fully

² Steffen Mueller, *High Octane Low Carbon Fuels: The Bridge to Improve Both Gasoline and Electric Vehicles*, (Mar. 22, 2021), https://erc.uic.edu/wp-content/uploads/sites/633/2021/03/UIC-Marginal-EV-HOF-Analysis-DRAFT-3_22_2021_UPDATE.pdf.

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

electric vehicles – over all other technologies, NHTSA’s rule in furtherance of the executive branch policy does not allow for innovation and forecloses the possibility of more technological breakthroughs through efficiency and fuels – that could have significant long-term impacts.

In fact, based on the greenhouse gas intensity of today's electric grid, hybrid vehicles often outperform all other vehicle types – including electric vehicles from the standpoint of reducing emissions.⁴ Research into alternative fuels suggests that gasoline internal combustion engines have the potential for even greater reductions in greenhouse gas emissions.⁵ The studies show a variety of automotive technologies and powertrains deliver comparable emission reductions and demonstrate the importance of taking a technology-neutral approach in setting transportation policies to obtain the most efficient reductions in greenhouse gas emissions.

CONCLUSION

NHTSA’s final rule, adopted in coordination with EPA and California and in furtherance of the policy of the production of 50 percent of all new passenger cars

⁴ See Todd Johnston, “Slow Down: The Case for Technology Neutral Transportation Policy”, ConservAmerica (Dec. 10, 2020).

⁵ See Mueller; finding that under the current electric grid infrastructure, ethanol-based fuels outperform electric vehicles throughout the Midwest.

and light trucks be fully electric by the year 2030, must be set aside because it violates the statutory prohibition on the consideration of electric vehicles and is arbitrary and capricious in its reasoning on achieving emission reductions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT

This brief complies with the Federal Rule of Appellate Procedure 32(g) along with the Court's scheduling Order because it contains 2622 words and was prepared using 14 point font using a proportionally spaced typeface.

/s/ John A. Sheehan
John A. Sheehan

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2022, I electronically filed the foregoing Brief of ConservAmerica as Amicus Curiae with the Clerk of the Court of the U.S. Court of Appeals for the D.C. Circuit by using the CM/ECF system. All participants in this case that are registered CM/ECF users will be served by the CM/ECF system.

/s/ John A. Sheehan

John A. Sheehan