IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF CALIFORNIA, et al., Plaintiffs, v. ELAINE L. CHAO, et al., Defendants.	No. 1:19-cv-2826-KBJ

ENVIRONMENTAL DEFENSE FUND, et al., Plaintiffs, v. ELAINE L. CHAO, et al., Defendants.	No. 1:19-cv-2907-KBJ

REPLY BRIEF IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS OR TRANSFER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

* Authorities chiefly relied upon are marked with an asterisk.

* Authorities chiefly relied upon are marked with an asterisk.

Statutes

* Authorities chiefly relied upon are marked with an asterisk.

Federal Registers

Legislative Materials

Treatise

* Authorities chiefly relied upon are marked with an asterisk.

INTRODUCTION

NHTSA has the duty to "prescribe by regulation average fuel economy standards for automobiles." 49 U.S.C. § 32902(a). When doing so, Congress mandates that "[e]ach standard shall be the maximum ***feasible*** average fuel economy that the Secretary decides manufacturers can achieve in that model year." *Id.* (emphasis added). This mandates that NHTSA balance statutory considerations to set fuel economy standards that are not too low—and not too high.

"[I]n carrying out [Section 32902(a)]," *id*. § 32909, NHTSA joined with EPA to promulgate the One National Program Action, which includes the Preemption Regulations at issue here. *See* 84 Fed. Reg. 51,310 (Sept. 27, 2019). NHTSA regulates fuel economy by measuring and, as a practical matter, regulating tailpipe greenhouse gas emissions. And that, too, is congressionally mandated of NHTSA under 49 U.S.C. § 32904(c).

California and other states claim authority to independently regulate automobile greenhouse gas emissions. California has attempted to effectively set different standards for fuel economy than those set by NHTSA through both its tailpipe greenhouse gas emissions program and its Zero Emission Vehicle mandate. Automakers have gone to great length and expense to comply with such laws. And California recently agreed that certain manufacturers—companies who agree not to contest their regulatory authority in this and other cases—will be subject to lower, more flexible standards.[1]

NHTSA has concluded that state greenhouse gas standards for tailpipe emissions relate and are an obstacle to Congress's mandate for ***NHTSA*** to determine and implement fuel economy standards as required by Section 32902(a). So NHTSA promulgated the Preemption

[1] A copy of California's recent agreement with certain manufacturers is posted on the website for the California Air Resources Board at: https://ww2.arb.ca.gov/sites/default/files/2019-07/Auto%20Terms%20Signed.pdf (last visited November 27, 2019).

Regulations. Because NHTSA's regulations are "carrying out" Sections 32901-32904, Congress states that judicial review of this rule must occur in the court of appeals. 49 U.S.C. § 32909(a).

Plaintiffs ignore the actual character and effect of the Preemption Regulations. They also disregard the present statutory text of Section 32909 in favor of the now-repealed formulation of prior section 15 U.S.C. § 2004. But even if the Court accepts a swap of defunct text in for operative text—and, on the facts of this case, it should not do so—the Preemption Regulations were "prescribed under" Sections 32901-32904. The Preemption Regulations prevent state laws regulating tailpipe greenhouse gas emissions—emissions which Congress mandates that NHTSA measure "under" Section 32904(c), and therefore regulate "under" Section 32902—from disrupting NHTSA's setting and enforcement of fuel economy standards "under" Section 32902 *et seq*. Because the Preemption Regulations would also be "prescribed under" the enumerated provisions of Section 32909(a)(1) (providing for circuit court review of regulations "prescribed in carrying out any of sections 32901-32904 or 32908"), these cases should still be dismissed.

Moreover, as Plaintiffs acknowledge, this case must go to the D.C. Circuit for resolution so long as it is merely "colorable" that the Preemption Regulations were promulgated under Sections 32902(a), 32904(c), and the other related provisions articulated in Section 32909. This exceedingly low standard is easily met. NHTSA provided a lengthy explanation of why NHTSA was properly invoking its authority under the enumerated statutory sections to promulgate the Preemption Regulations. Further—and despite their protestations—Plaintiffs' own practice in the Second Circuit confirms that, even accepting their view of Section 32909, this case belongs in the D.C. Circuit, not in this Court.

To the extent there is any doubt, the Court should allow the D.C. Circuit to resolve any questions about its jurisdiction in the first instance. As described in Defendants' opening brief, a

first review by the Court here, followed by certain appeals to the D.C. Circuit, will only delay resolution of this nationally significant rule. And there is no dispute that the EPA component of the joint One National Program Action must be reviewed in the D.C. Circuit. Several such petitions, including petitions by these Plaintiffs, are now pending.[2] It makes little sense to review these intricately related actions in two different courts on separate tracks. That is especially so with the Preemption Regulations. Plaintiffs do not dispute that, in order to obtain relief, they must defeat *both* the NHTSA Preemption Regulations *and* the EPA waiver withdrawal. *See* Mot. at 22. Yet only one of those two agency actions can be adjudicated here. As a result, while the facts of this case are distinguishable from those in *TRAC*, the underlying principle remains valid: the D.C. Circuit should assess its own jurisdiction. That includes, critically, any determination of whether the Preemption Regulations' claim of authority under Sections 32901-03 is *ultra vires*. These cases should be dismissed or transferred to the D.C. Circuit.

ARGUMENT

I. NHTSA Properly Invoked 49 U.S.C. §§ 32901-03 For The Preemption Regulations, Requiring Judicial Review In The Court of Appeals.

Plaintiffs' Oppositions recognize that if NHTSA had even just "colorable" grounds to invoke 49 U.S.C. §§ 32901-03 as authority to promulgate the Preemption Regulations, then these cases belong in the D.C. Circuit. *See* 49 U.S.C. § 32909(a)(1); Interest Group Opp. at 15-16, 22; State Pls. Opp. at 6. The Preemption Regulations bar state standards that relate to, may conflict with, or otherwise serve as an obstacle to NHTSA's determination of what constitutes

[2] *See Union of Concerned Scientists v. NHTSA*, Dkt. 19-1230 (D.C. Cir., filed Oct. 28, 2019) and consolidated cases. In particular, Dkts. 19-1239, 19-1241, and 19-1242 each challenge the EPA component of the One National Program Action in addition to the NHTSA component.

"maximum feasible average fuel economy that the [agency] decides manufacturers can achieve" as required by Section 32902(a). The Preemption Regulations thus are unquestionably "carrying out any of Sections 32901-32904," 49 U.S.C. § 32909(a)(1). Plaintiffs seek to rewrite the statute. Plaintiffs argue that "carrying out" means "prescribed under"—even though Congress discarded Plaintiffs' preferred language when passing the current statute.

But even if one accepts the atextual interpretation of Section 32909(a)(1) that Plaintiffs advance, the D.C. Circuit still has jurisdiction to review the Preemption Regulations. It was certainly "colorable" for NHTSA to claim that its regulations were "prescribed under" one of the enumerated EPCA sections. *See, e.g., Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513 (2006); *see also* Interest Group Opp. at 15-16 (conceding that this standard applies, citing *Loan Syndications & Trading Ass'n v. SEC*, 818 F.3d 716, 721-24 (D.C. Cir. 2016)). Specifically, the Preemption Regulations were properly "prescribed under" NHTSA's authority in *at least* Section 32902.

A. The Preemption Regulations Were "Prescribed Under" 49 U.S.C. §§ 32901-04, Particularly Including 49 U.S.C. § 32902.

In the Preemption Regulations, NHTSA recognized that Congress delegated to the Secretary of Transportation and NHTSA the duty to set standards at the "maximum feasible average fuel economy level that the [agency] decides manufacturers can achieve." 49 U.S.C. § 32902(a). Doing so, NHTSA must consider and balance a variety of factors based upon the information before the agency. At any given time, some factors weigh toward higher fuel economy standards, while others weigh toward setting a lower standard, *see* 49 U.S.C. § 32902(f). In weighing these conflicting factors, Congress requires the agency to set standards that are not too low and not too high. Mot. at 3-5, 15. The Preemption Regulations further "prescribe" and confirm that NHTSA's standards are the standards that manufacturers shall comply with on a *nationwide* basis. Notwithstanding the existence of State greenhouse gas

emission standards that might purport to obligate automobile manufacturers to comply with even higher fuel economy and tailpipe greenhouse gas emissions standards than those set by NHTSA, the Preemption Regulations "prescribe" that NHTSA's standards "under" Section 32902(a) are the standards that manufacturers must comply with, not those set by States.[3]

The Preemption Regulations were "colorably" promulgated under Section 32902(a). *See Arbaugh*, 546 U.S. at 516 n.10 (elaborating on deferential "colorable" standard in the context of invoking the federal question statute). And where a statute grants direct review, but its application to the agency action in question is ambiguous, the Court will "not presume" that "Congress intended to locate initial APA review of agency action in the district courts" rather than the courts of appeals "[a]bsent a firm indication that Congress [so] intended." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 735, 745 (1985); *see also N.Y. Republican State Comm. & Tenn. Republican Party v. SEC*, 799 F.3d 1126, 1133 (D.C. Cir. 2015).

The Preemption Regulations are relevant, and indeed critical, to NHTSA's administration of the program Congress created under Sections 32901-04. *See* Mot. at 2, 13-15, 17 (collecting citations and noting that the regulations were prescribed under this authority). As NHTSA explained, the exercise of this authority was "necessary to maintain the integrity of the corporate average fuel economy program and compliance regime established by Congress as a nationwide program." Preemption Regulations, 84 Fed. Reg. at 51,311. In particular, the Preemption Regulations are "*necessary to the effectiveness* of NHTSA's existing and forthcoming fuel economy standards [under Section 32902] . . . specifically, one set of *national* standards." *Id.* at

[3] "Even identical standards interfere with the national program by imposing requirements not applicable to nationwide fleets and impose compliance regimes inconsistent with EPCA." Preemption Regulations, 84 Fed. Reg. at 51,317.

51,316 (emphasis added) (noting that the need for national uniformity is underscored by EPCA's express preemption provision).

When State and local actors enact fuel economy standards that are more stringent than the national standards set by NHTSA, NHTSA explained that this renders the agency's judgment about which fuel economy standards are maximum feasible, as determined and set by the agency considering required statutory factors, inapplicable in those States. State standards thus frustrate NHTSA's careful balancing of the congressionally mandated factors, which balancing is done using the agency's expert judgment and in light of public comments. *See id.* at 51,313; *see also id.* at 51,311-12 (noting that "[u]niform national fuel economy standards are essential" and State and local requirements "render the critical balancing required by EPCA devoid of meaning"); *id.* at 51,314 ("Indeed, the entire purpose of a balanced standard is defeated if a State can place its thumb on the scale."). "State and local requirements—unbound by these considerations—undermine NHTSA's ability to set standards applicable across the entire country." *Id*. at 51,317.

California's tailpipe greenhouse gas emission standards exemplify this problem. *See id.* ("That supposition has now been demonstrated by California's preemptive action to effectively set higher standards than the Federal standards, should the forthcoming final SAFE rule finalize anything lower than the no action alternative described in the [Notice of Proposed Rulemaking] for model years 2021 through 2026."). As NHTSA explained, these State standards are fuel economy standards, just by another name. As a result, these standards effectively represent a displacement and frustration of NHTSA's standards in California and other jurisdictions that adopt them.

Given the foregoing, NHTSA did not just "colorably" conclude that the Preemption Regulations could be promulgated under its authority in Sections 32901-03 (and particularly its

authority under Section 32902)—NHTSA's assertion of that authority was entirely correct. The Preemption Regulations provide clarity that standards established by NHTSA under Section 32902(a), based upon a careful balancing of statutory factors, are the appropriate maximum feasible fuel economy standards that manufacturers can and must meet on a national basis. *See id.* at 51,325 ("*49 U.S.C. 32902* makes clear that NHTSA sets nationally applicable fuel economy standards, and NHTSA is *implementing its authority to do so* through this regulation clarifying the preemptive effect of its standards consistent with the express preemption provision in 49 U.S.C. 32919." (emphasis added)).[4] The Preemption Regulations thus affirm and restore to operation these Section 32902 standards—even in jurisdictions that have attempted to undermine or displace them with alternative standards purporting to merely regulate greenhouse gases.[5]

B. NHTSA Did Not Limit Its Basis For Promulgating The Preemption Regulations To EPCA's Express Preemption Provision In 49 U.S.C. § 32919.

Plaintiffs have no meaningful rejoinder for NHTSA's express, proper reliance on Sections 32901-03 as authority for the Preemption Regulations. So they try to ignore the actual character and effect of the Preemption Regulations—which are to advance the standards NHTSA sets in Section 32902(a). To this end, because EPCA includes an express preemption provision

[4] Plaintiffs' criticism of NHTSA for not invoking its authority in Sections 32901-903 in the proposed rule is also overstated. Many of these Plaintiffs made such comments during the notice and comment proceedings. So, in the final rule, NHTSA responded by further elaborating on its statutory and case law authority for the preemption rule, including by reference to the Supreme Court's decision in *Geier*. *See* 84 Fed. Reg. at 51,320 ("NHTSA therefore has clear authority to issue this regulation under 49 U.S.C. 32901 through 32903 to effectuate a national automobile fuel economy program unimpeded by prohibited State and local requirements."). This is not improper. This is the way the process is supposed to work.

[5] Indeed, that the Preemption Regulations derive from NHTSA's authority under Section 32902(a) borders on tautological: Section 32902(a) requires NHTSA to prescribe nationwide standards; the Preemption Regulations ensure that these standards are, in fact, nationwide.

in Section 32919, Plaintiffs suggest that the Preemption Regulations can only have been prescribed under that provision, not Section 32902(a). *See* State Pls. Opp. at 1, 4, 17; Interest Group Opp. at 1, 4-5. But Plaintiffs cite no provision of law that limits NHTSA to justifying its regulations solely on Section 32919. And NHTSA did not so limit itself. Instead, as NHTSA explained, the Preemption Regulations were promulgated not merely to explain the effect of express statutory preemption under Section 32919 but also and expressly to implement Congress's direction in Section 32902(a) to set *nationwide* fuel economy standards. The Preemption Regulations thus advance that congressional directive. NHTSA made clear that State efforts to regulate fuel economy under the guise of tailpipe greenhouse gas emission standards cannot be permitted to bypass and modify NHTSA's fuel economy standards. *See* Preemption Regulations, 84 Fed. Reg. at 51,325.

Of course, Section 32919 does confirm Congress's express desire that any State and local requirements that relate to such standards should be preempted. But NHTSA did not rely exclusively on Section 32919 to promulgate its rule. Rather, NHTSA independently and specifically invoked its Section 32902(a) authority to "prescribe by regulation average fuel economy standards for automobiles" as impliedly preempting conflicting State and local greenhouse gas emission standards. *See* Preemption Regulations, 84 Fed. Reg. at 51,314 (discussing how State and local requirements conflict with EPCA's direction that "average fuel economy" be calculated based on specific statutory requirements, citing 49 U.S.C. §§ 32901(a)(5), 32904; *see also id.* at 51,319 ("The regulation NHTSA is finalizing in this document *implements that authority in 49 U.S.C. 32902* by making clear that State and local requirements that relate to fuel economy standards for future model year vehicles conflict with NHTSA's ability to set nationally applicable standards for those vehicles in the future and thus

are impliedly preempted."); *id.* at 51,322. Indeed, NHTSA separately codified its conclusion on implied preemption. *See id.* at 51,361-63 (expressly citing Section 32902(a), not Section 32919 as NHTSA's regulatory authority).

Plaintiffs offer no explanation for how or why NHTSA is compelled to rely exclusively on Section 32919's *express* preemption provision and cannot independently base its regulation on principles of *implied* preemption. Indeed, Supreme Court precedent about NHTSA regulations reinforce the independent operation of these sources of preemption. For instance, in *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869-74 (2000), the Court held that even when an express preemption clause contained a savings clause removing some tort actions from the scope of statutory preemption, that "does *not* bar the ordinary working of conflict pre-emption principles." *Id.* at 869. Thus, the Supreme Court held that State laws were preempted when they conflict with NHTSA regulations providing automobile manufacturers a variety of safety compliance options. In fact, the majority reached that conclusion over the dissent's objection that there was no "formal agency statement of pre-emptive intent as a prerequisite to concluding that a conflict exists." *Id.* at 884. Here, by contrast, NHTSA actually provided that statement of preemptive intent that the Supreme Court recognized that NHTSA is entitled to make. *Geier* similarly relied on *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995), for the proposition that the mere existence of an express preemption clause does not foreclose implied preemption by negative implication.

Because the Preemption Regulations were "prescribed under" the enumerated provisions of Section 32909(a), *i.e.*, Sections 32901-04, the cases Plaintiffs rely on to assert this Court's jurisdiction are simply inapposite. In the cases Plaintiffs cite, the agency regulations at issue were not expressly promulgated pursuant to and in reliance on the sections enumerated in a

direct judicial review provision. *See, e.g.*, Interest Group Opp. at 10, 19; *Loan Syndications & Trading Ass'n*, 818 F.3d at 721-24 (unique nature of joint rulemaking, where neither agency could have acted alone, required that the agencies have relied on section 78o-11 of the Exchange Act, which did not allow direct review in the D.C. Circuit); *API v. SEC*, 714 F.3d 1329, 1333 (D.C. Cir. 2013) (SEC conceded it relied on subsection 15(d) of the Exchange Act, which was not an enumerated provision in the direct review statute; subsection 13(q) which directed implementing regulations was also not enumerated); *Nat'l Auto. Dealers Ass'n v. FTC*, 670 F.3d 268, 270-72 (D.C. Cir. 2012) (direct review provision "plainly does not apply to the agency action" at issue).[6] Here, by contrast, NHTSA has a more than "colorable" basis for asserting that the Preemption Regulations are promulgated under 32902 and has explicitly asserted and explained that rationale.[7] *See, e.g.*, *Loan Syndications & Trading Ass'n*, 818 F.3d at 722-23 (citing and summarizing *Media Access Project v. FCC*, 883 F.2d 1063, 1064-65 (D.C. Cir. 1989) and *Int'l Bhd. of Teamsters v. Pena*, 17 F.3d 1478, 1481-82 (D.C. Cir. 1994)).

Plaintiffs' petitions for review in the Second Circuit also reinforce this point. Plaintiffs argue that Section 32909 does not provide for review of the Preemption Regulations in the court of appeals, yet have now asserted that 32909 broadly provides for court of appeals review of two

[6] The Supreme Court's decision in *National Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617 (2018), similarly does not support Plaintiffs' argument, even under their narrow interpretation. In that case, the regulation at issue was one defining the jurisdictional scope of "waters of the United States" under the Clean Water Act; it was thus not itself an "effluent limitation" and was not promulgated under 33 U.S.C. § 1311. *Id.* at 628-29. Here, the Preemption Regulations were promulgated pursuant to and by reason of NHTSA's authority in Sections 32901-04.

[7] For the reasons described above, NHTSA is not, as Plaintiffs argue, relying on its "mere designation" of the Preemption Regulations as pursuant to its authority under Sections 32901-03. Interest Group Opp. at 15 (citing *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 279, 283 (1978)).

separate rulemaking actions—first to delay and then to reconsider the application of the 2015 Civil Penalties Inflation Adjustment Act to the CAFE civil penalty rate. Plaintiffs in those cases referred to the challenged rulemaking actions as "regulation[s] prescribed under [Section] 32912(c)(1)." That statutory provision authorizes NHTSA to increase the civil penalty rate for violations of fuel economy standards by undertaking a specific process. State Pls. Opp. at 14-15; Interest Group Opp. at 18-19. But in their initial Second Circuit petition, *NRDC v. NHTSA*, Dkt. No. 17-2780, Doc. 115 (2d Cir. Mar. 6, 2018), plaintiffs sought review of an interim NHTSA rulemaking that delayed an increase in the penalty rate specified by Section 32912(b) from $5.50 to $14 per tenth of a mile—an increase that was prompted by the 2015 Civil Penalties Inflation Adjustment Act, and not by the process prescribed in Section 32912(c)(1). Plaintiffs then filed petitions for review in *State of New York v. NHTSA*, Dkt. No. 19-2395 (2d Cir. filed Aug. 2, 2019), and *NRDC v. NHTSA*, Dkt. No. 19-2508 (2d Cir. filed Aug. 12, 2019). These later petitions sought judicial review of NHTSA's final rulemaking reconsidering the earlier increase in the penalty rate. *See* 84 Fed. Reg. 36,007 (July 26, 2019).

The problem for Plaintiffs is that—although NHTSA's regulations delaying implementation of the rate were significantly related to NHTSA's authority to increase the penalty rate under Section 32912(c)(1)— the regulations subject to review in the first cases were not actually "prescrib[ing] . . . a higher amount" for the penalty rate, 49 U.S.C. § 32912(c)(1)(A). They were delaying and, ultimately, determining not to increase the penalty rate, at least not unless and until the agency went through the Section 32912(c)(1) process. Here, the Preemption Regulations are much more directly tied to implementation of NHTSA's regulatory authority under Sections 32901-04 than the claim against the delayed implementation of the penalty regulations is tied to NHTSA's authority under Section 32912(c)(1). If the penalty delay

regulations were "prescribed under" Section 32912(c)(1), it is not merely "colorable" that the Preemption Regulations were similarly "prescribed under" Section 32902(a).[8]

Interest Group Plaintiffs also erroneously suggest that NHTSA has "effectively conceded that the Preemption Regulations do not 'carry out' either Sections 32902 or 32903" because NHTSA determined that it was not required to consult with the Secretary of Energy in promulgating the Preemption Regulations. Interest Group Opp. at 17-18 (citing 49 U.S.C. § 32902(i), (j)). But whether NHTSA was required to consult with the Secretary of Energy is an issue for merits review, which is beyond this Court's jurisdiction.[9] And far from "conceding" this point, NHTSA repeatedly asserted the exact opposite. NHTSA said it was invoking its authority under Sections 32901-03, and supported this assertion with a well-reasoned explanation. *See supra* at 4-7; Mot. at 13-15.[10]

[8] That the text of subsection 32909(a)(1) is broader than that in subsection 32909(a)(2) only confirms this point.

[9] And on its substance, Plaintiffs' argument fails. Although the Preemption Regulations were promulgated pursuant to NHTSA's authority under Section 32902 (among other provisions), they did not prescribe the level of the standard for particular model years. They instead maintained the integrity of the standards as nationwide standards—an aspect of the standards required by Congress that did not require consultation with DOE. *See* Preemption Regulations, 84 Fed. Reg. at 51,311 ("NHTSA's action in this document is not to set standards for particular model years, but rather is an exercise of its authority under 49 U.S.C. 32901 through 32903, necessary to maintain the integrity of the corporate average fuel economy program and compliance regime established by Congress *as a nationwide program*." (emphasis added)). NHTSA did, however, consult with DOE when setting the preexisting CAFE standards. *See* 77 Fed. Reg. 63,624, 63,149 (Oct. 15, 2012) ("[i]n accordance with 49 U.S.C. 32902(j)(i), we submitted this final rule to the Department of Energy for review").

[10] For similar reasons, State Plaintiffs' attempt to characterize NHTSA's repeated invocation of these provisions and explanation for doing so as merely "passing," State Pls. Opp. at 19 & n.12, is baseless. Moreover, the Preemption Regulations clearly reflected NHTSA's view that this case belongs in the D.C. Circuit, *see* Preemption Regulations, 84 Fed. Reg. at 51,361, which necessarily means that NHTSA viewed this case as falling within Section 32909(a).

In sum, NHTSA is entirely correct (but at the very least colorable) in stating that Sections 32901-03 (and particularly Section 32902) provide a source of authority for the Preemption Regulations. And Section 32904(c)—in which Congress directed that fuel economy is tested by measuring carbon emissions—further reinforces the conclusion that NHTSA's regulations preempting tailpipe greenhouse gas (carbon) emission standards were promulgated "under" Section 32904, as well. However, the Court need not go so far to decide this case. The only question before this Court is whether NHTSA's invocation of this authority was "colorable." *Arbaugh*, 546 U.S. at 516 n.10. For the reasons above, NHTSA has easily demonstrated that its invocation of this authority is "colorable." So jurisdiction is therefore proper in the D.C. Circuit.

II. At a Minimum, the Preemption Regulations Were "Prescribed in Carrying Out" 49 U.S.C. § 32902.

The Court need not reach Plaintiffs' argument that the scope of Section 32909(a) should be limited to regulations "prescribed under" Sections 32901-04—notwithstanding the fact that the Preemption Regulation was, in fact, "prescribed under" those authorities. As discussed above, even under a narrow interpretation of Section 32909(a), this case belongs in the D.C. Circuit. But Plaintiffs' attempts to not only rely upon the previous version of Section 32909(a), but read into that version an even narrower meaning, are wrong and precluded by the current text of the statute.

Plaintiffs argue that the Court should restrictively read "prescribed in carrying out" based on a narrow reading of now-repealed text in prior section 15 U.S.C. § 2004. To this end, they cite notations in the public law and legislative history expressing that the recodification statute was generally not intended to have "substantive" effect. *See* State Pls. Opp. at 8-10; Interest Group Opp. at 12-14. But there is a predicate problem with Plaintiffs' theory. A change that impacts which court is assigned to hear a challenge in the first instance is not unambiguously a

change of *substantive* effect. Rather, it is a change that affects the *procedural* issues of judicial review. So it is unclear that this legislative history applies to Section 32909(a). Regardless, Congress unquestionably did change the statutory text of the procedures in Section 32909(a)(1), while leaving those in Sections 32909(a)(2) and 32909(b) *unchanged*. The plain text of Section 32909(a)(1) must be given effect. As a rule, the unambiguous enacted text of a statute controls. *Russello v. United States*, 464 U.S. 16, 23 (1983) (courts must interpret statute as written by Congress); *see also Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) ("It is well established that, when the statutory language is plain, we must enforce it according to its terms."). And "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Sebelius v. Cloer*, 569 U.S. 369, 378 (2013) (quoting *Bates v. United States*, 522 U.S. 23, 29-30 (1997)).

To try and suggest that their narrowed interpretation must be accepted, Plaintiffs attack a strawman. They assert that if the Preemption Regulations are "carrying out" Section 32902, that means that all regulations that tangentially relate to fuel economy standards under Section 32902 are subject to review in the courts of appeals. This ignores the role of NHTSA in defining the purpose of a given rule-making—*i.e.*, defining what provisions of EPCA the new regulations are designed to carry out. But the "carrying out" standard in Section 32909(a)(1) need not reach every tangentially related regulation. And even if it did so, that is because Congress made that choice in the plain language used. In Section 32909(a)(1), Congress said it wanted all regulations that give effect to ("carry out") the standards NHTSA sets in Section 32902 reviewed

in the court of appeals.[11] Regardless, as discussed in Defendants' opening brief and above, the Preemption Regulations are "directly and integrally tied to NHTSA's authority to set and implement national, uniform fuel economy standards that are neither too low nor too high." Mot. at 15, 17; *see also supra* at 4-5. In other words, the Preemption Regulations effectuate the "average fuel economy standards" that NHTSA "shall prescribe by regulation," 49 U.S.C. § 32902(a), by ensuring that the standards will actually apply in all 50 states.

In any event, Plaintiffs are also wrong that giving effect to the plain language of the statute would render portions of Section 32909(a) superfluous. They claim NHTSA's reading would draw into the scope of Section 32909(a) every regulation that might be promulgated in connection with every section of EPCA. *See* State Pls. Opp. at 11; Interest Group Opp. at 11-12. It does not. For instance, regulations under 49 U.S.C. § 32918(e)(1) governing the "testing and other procedures for evaluating the extent to which retrofit devices affect fuel economy and emissions of air pollutants" do not "carry out" fuel economy standards under Section 32902. Likewise, it would not sweep in the administrative regulations to be promulgated under Section 32910(d) implementing DOT's power to issue and enforce administrative subpoenas. Nor does NHTSA read Section 32909(a)(2) out of the statute. Defendants do not contend that the Court should read Section 32909(a)(1) so broadly as to contend that a civil penalty increase under Section 32912(c)(1) would fall under Section 32909(a)(1).

Put differently, Plaintiffs' argument assumes its own conclusion. Reading "prescribed under" and "prescribed in carrying out" harmoniously in Section 32909(a) does not require adopting the exceedingly narrow reading Plaintiffs advance. Instead, Congress's choice of the

[11] *See, e.g.*, https://www.merriam-webster.com/thesaurus/carry%20out ("to carry through (as a process) to completion"); https://dictionary.cambridge.org/us/dictionary/english/carry-out-something ("to perform or complete a job or activity; to fulfill").

phrase "prescribed in carrying out" for the current, operative text suggests that this section should not now be construed in Plaintiffs' unduly restrictive terms. *See, e.g.*, *Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC)*, 899 F.3d 1178, 1189-92 (11th Cir. 2018) (plain language of statute was unambiguous and therefore the court need not look at statutory history, notwithstanding textual change occurring in recodification); *Nuclear Info. & Res. Serv. v. United States DOT Research & Special Programs Admin.*, 457 F.3d 956, 960-62 (9th Cir. 2006) (holding history of statute irrelevant in light of clear text).[12]

Plaintiffs cannot dispute that in a different *subsection* of the *same* judicial review provision, Section 32909(a)(2)—as well as in several other instances in Title 49, *see, e.g., id.* Sections 30161(a), 32503(a), 33117, 60119—Congress ***still used*** the more restrictive language ("prescribed under") in delineating certain matters subject to review in the courts of appeals. *Cf. United States v. Wells*, 519 U.S. 482, 492 (1997) (comparison to other provisions in same recodification suggested change was deliberate). And Congress recodified these passages at the same time as Section 32909(a)(1). Stated another way, Plaintiffs' position is that even though the recodified version of Section 32909(a)(1) altered the text of the repealed version, while Congress simultaneously maintaining the "prescribed under" language elsewhere, the Court should simply disregard the extant text and go back to the language in the repealed section. That is flatly refuted by the Supreme Court's *Russello* canon of construction. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello*, 464 U.S. at 23 (citation omitted). Indeed, Plaintiffs

[12] *See also Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 124-25 (2010) (Sotomayor, J., dissenting); *Keene Corp. v. United States*, 508 U.S. 200, 221 (1993) (Stevens, J., dissenting).

effectively concede the application of the *Russello* canon. *See* State Pls. Opp. at 11 (recognizing that Section 32909(a)(2) retains "under" language), Interest Group Opp. at 13 (conceding express inclusion of "carrying out" and inclusion of "under" in Section 32909(a)(1)).

In addition, throughout Public Law 103-272, which effectuated the recodification of the provision at issue here and many other provisions, Congress used the phrase "carry out" to replace previous statutory text that swept broadly such as "necessary to the exercise of its functions," "assure the proper discharge," and "assure the purposes of this subchapter will be achieved." H. R. Rep. No. 103-180, at 10, 15, 62 (1993).[13] Plaintiffs' reliance on the statutory and legislative history thus cuts both ways. Although NHTSA agrees that the recodification law was not generally intended to work "substantive" changes, *see Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 281-82 (2014), in this narrow instance the application of the primary canons of statutory construction (before reaching the legislative history) reveals an unquestionable congressional intent to change the specific provision of Section 32909(a)(1), notwithstanding the generic disclaimer. And, as noted above, it is not at all clear that this purely "procedural" provision about the proper court for judicial review is a "substantive" change of the type contemplated by the legislative history. *See supra* at 13-14.

Courts have taken divergent approaches on this issue. But decisions more faithful to current, textual notions of statutory construction hold that when recodification laws suggest they did not generally work substantive changes in a law as a whole but have, nonetheless, materially and plainly altered certain statutory text, the new text controls if canons of interpretation reflect

[13] Although discussing other aspects of the changes made to Section 32909, the legislative history does not discuss the substitution of the phrase "prescribed in carrying out" for "prescribed under." *See* H. R. Rep. No. 103-180, at 239-40 (1993); *cf.* S. Rep. No. 103-265 (1994) (not discussing the changes to the text).

such a specific change was intended. *See, e.g.*, *Wells*, 519 U.S. at 496-97 (noting indications of congressional intent to work a substantive change in this provision, particularly changes in the text in the relevant provision and similar provisions); *Benjamin v. United States, SSA (In re Benjamin)*, 932 F.3d 293, 298 (5th Cir. 2019) (quoting A. SCALIA & B. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 40, p. 257 (2012)); *Shawnee Tribe v. United States*, 423 F.3d 1204, 1214-16 (10th Cir. 2005); *United States v. Ahmad*, 213 F.3d 805, 810 (4th Cir. 2000).

Finally, Plaintiffs mischaracterize *Delta Construction Co. v. EPA*, which focused on the meaning of the word "prescribed." 783 F.3d 1291, 1298-99 (D.C. Cir. 2015). The Court explained that "[t]his provision and the statutory provisions to which it refers relate only to generally applicable rules, standards, and procedures 'prescribed' by the Secretary." *Id.*; *see also id.* at 1298 (discussing *Public Citizen, Inc. v. NHTSA*, 489 F.3d 1279 (D.C. Cir. 2007), which held that "[d]eclining to amend a standard" is not "prescribing"). The Court held that the denial of a petition for rulemaking is not the same as prescribing a regulation, such that the denial did not fall within the scope of Section 32909(a). Here, there is no question that NHTSA has "prescribed" a regulation. Instead, the issue is whether the Preemption Regulations are "carrying out any of Sections 32901-32904 or 32908." 49 U.S.C. § 32909(a)(1).[14] *Delta Construction* did not address this issue at all. That case is immaterial.

When Section 32909(a)(1) is correctly construed—*i.e.*, when the Court applies its plain text against the backdrop of Congress not having altered Section 32909(a)(2), which uses the

[14] For similar reasons, Interest Group Plaintiffs' attempt to point to the respondents' brief in *Delta Construction*, Interest Group Opp. at 14, is inapt. Moreover, Interest Group Plaintiffs are flatly wrong in treating the brief as some sort of concession—that brief expressly stated that respondents' view was that "[t]he Court has statutory jurisdiction over these challenges to . . . NHTSA's fuel efficiency standards under 49 U.S.C. § 32909(a)(1)." Resp'ts Br., 2014 WL 6662583 at *2 (Nov. 24, 2014).

term "under"—the basis for dismissing this case for lack of jurisdiction or transferring it to the D.C. Circuit is even stronger. The Preemption Regulations are unquestionably "carrying out" Section 32902—in addition to having been "prescribed under" Sections 32901-32904, so NHTSA's position is entirely "colorable."

III. The D.C. Circuit Is The Appropriate Forum to Hear This Case and Questions as to Jurisdiction Should be Resolved by that Court.

The court of appeals' jurisdiction over the Preemption Regulations under Section 32909(a) is clear. But even if Plaintiffs raised material questions about the scope of that statute, they should be resolved by the circuit court, not by this Court. *See, e.g., TRAC v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) ("[W]here a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review of the Court of Appeals.") (emphasis in original). Plaintiffs object that *TRAC* is a poor analogy. They say the statute at issue there directed review of all final agency orders to the courts of appeal, whereas EPCA does not. State Pls. Opp. at 21. But *TRAC* did not turn on whether circuit court review of an agency's action was "all or nothing." Instead, the relevant question under *TRAC* is whether the particular agency action at issue was ultimately reviewable in the court of appeals. *See, e.g., Cutler v. Hayes*, 818 F.2d 879, 887 n.61 (D.C. Cir. 1987) (analyzing whether any part of the FDA Act "commits direct review of FDA new drug regulations" to the court of appeals). Here, as explained above, the particular agency action at issue—NHTSA's issuance of the Preemption Regulations—is reviewable exclusively in the court of appeals.

Although there is no allegation that the agency is delaying action in a manner that could thwart eventual circuit court review, *see* Mot. at 20, the underlying principle of *TRAC* is that when Congress places review of an agency action in the court of appeals, "Congress manifested

an intent that the appellate court exercise sole jurisdiction over the class of claims covered by the statutory grant of review power." *TRAC*, 750 F.2d at 77; *see also Ukiah Adventist Hosp. v. FTC*, 981 F.2d 543, 549 (D.C. Cir. 1992) (rejecting argument that district courts can review "jurisdictional challenges [that] present purely legal questions" notwithstanding circuit court jurisdiction under *TRAC*).

Plaintiffs also object that this Court should not take into account principles of judicial economy when deciding where the Preemption Regulations are reviewable. State Pls. Opp. at 21, Interest Group Opp. at 23-24. Plaintiffs are correct that judicial economy and efficiency cannot override the unambiguous text of a statute. *See, e.g., Five Flags Pipe Line Co. v. DOT*, 854 F.2d 1438, 1442 (D.C. Cir. 1988) (even if logic, policy, and efficiency favor initial circuit court review, statutory language vesting initial review in district court is not ambiguous). But their argument misses the point. The plain text of Section 32909(a)(1) does vest review in the court of appeals—certainly it at least "colorably" does. And if statutory language regarding jurisdiction and its application is ambiguous, then the ambiguity should be construed in favor of circuit court review. *Lorion*, 470 U.S. at 745; *Public Citizen*, 489 F.3d at 1287 (noting *Lorion* but declining to apply it because petitioners had not identified any ambiguity in the relevant statute). Because Plaintiffs fall far short of proving that judicial review should unambiguously and unquestionably be in the district court, the proper course is to defer to the court of appeals to assess its own jurisdiction in the first instance.

The efficiency concerns discussed in Defendants' opening brief reinforce this conclusion. They underscore the sound reasons the Supreme Court articulated in *Lorion* for initial review in the courts of appeals. These include that bifurcated review of related proceedings is disfavored; avoiding duplication of district court and court of appeals review; and the absence of any need

for the district court to develop a factual record. *Lorion*, 470 U.S. at 743. These concerns are especially compelling in the context of the One National Program Action, a joint action which consists of EPA's waiver withdrawal action and NHTSA's Preemption Regulations. Here, Plaintiffs cannot obtain the ultimate relief they seek—the restoration of California's authority to set greenhouse gas emission standards for automobiles—without *also* obtaining a favorable ruling on their D.C. Circuit petitions for review of the EPA component of the rulemaking. *See* Mot. at 22 (also discussing the interwoven nature of the NHTSA and EPA components of the rulemaking as evidenced by Plaintiffs' own Complaints). In other words, the D.C. Circuit is going to be reviewing NHTSA and EPA's joint agency actions. And even if this Court heard Plaintiffs' record-based APA review of NHTSA's Preemption Regulations, the decision will be appealed to the D.C. Circuit for *de novo* review. That duplicative review makes no sense. Instead, the D.C. Circuit can and should consider Plaintiffs' allegations, including their contentions regarding the proper forum for judicial review, in the first instance.

CONCLUSION

The Preemption Regulations are "carrying out" NHTSA's statutory authority under various "Sections 32901-32904." 49 U.S.C. § 32909(a)(1). They were even "prescribed under" NHTSA's authority under Section 32901-904. Therefore, the Amended State Complaint and the Interest Group Complaint both should be dismissed for lack of jurisdiction or, in the alternative, transferred to the United States Court of Appeals for the D.C. Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2019, I served a copy of the foregoing Reply Brief in Support of Defendants' Motion to Dismiss or Transfer on lead counsel for Plaintiffs in each related case via e-mail.

s/ *Daniel R. Dertke*