ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1145 (and consolidated cases)

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

COMPETITIVE ENTERPRISE INSTITUTE, *et al.*,
Petitioners,

v.

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

On Petition for Review of Final Agency Action of the
Environmental Protection Agency and the
National Highway Traffic Safety Administration
85 Fed. Reg. 24,174 (Apr. 30, 2020)

BRIEF OF *AMICI CURIAE* THE NATIONAL LEAGUE OF CITIES; THE U.S. CONFERENCE OF MAYORS; AND 18 CITIES, TOWNS, COUNTIES, AND MAYORS IN SUPPORT OF STATE AND LOCAL GOVERNMENT AND PUBLIC INTEREST PETITIONERS

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DATED: January 21, 2021

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Jan. 13, 2021

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Except for those listed in the Identities and Interests section below, all parties, intervenors, and *amici* appearing in this case are listed in the briefs for State and Local Government and Public Interest Petitioners.

References to the rulings under review and related cases appear in the briefs for State and Local Government and Public Interest Petitioners.

Jan. 13, 2021

STATEMENT REGARDING SEPARATE BRIEFING, AUTHORSHIP, AND MONETARY CONTRIBUTIONS

Amici National League of Cities, U.S. Conference of Mayors and 18 cities, towns, counties, and mayors file this separate *amicus* brief in compliance with the word limits set forth in the Court's Order of October 19, 2020 (Doc. No. 1867064). *See* Fed. R. App. P. 29(a)(5), 32(a)(7)(B)(i). A single joint brief is not practicable in this case because the other *amicus* briefs do not address the unique perspective of governments that are responsible for local responses to climate change. *See* D.C. Circuit Rule 29(d).

Under Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that no party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person—other than the *amici curiae* or their counsel—contributed money intended to fund the preparation or submission of this brief.

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CORPORATE DISCLOSURES

The undersigned counsel for *amici* certifies that no corporation among *amici* has ever issued stock, and that none has a parent company whose ownership interest is 10 percent or greater.

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EPA	United States Environmental Protection Agency
NHTSA	National Highway Traffic Safety Administration
SAFE Rule	Safer Affordable Fuel-Efficient Vehicles Rule

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IDENTITIES AND INTERESTS OF *AMICI CURIAE*

The National League of Cities (NLC), founded in 1924, is the oldest and largest organization representing U.S. municipal governments. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. In partnership with 49 state municipal leagues, NLC advocates for over 19,000 cities, towns, and villages, where more than 218 million Americans live. Its Sustainable Cities Institute provides NLC members with resources on climate mitigation and adaptation. The U.S. Conference of Mayors, founded in 1932, is the official nonpartisan organization of the more than 1,400 U.S. cities that are home to 30,000 people or more. The Conference of Mayors established its Climate Protection Center to assist with implementation of the 2005 Mayors Climate Protection Agreement, which over 1,000 mayors have joined, each pledging to reduce their city's greenhouse gas emissions levels to below 1990 levels.

The Local Government Coalition's eighteen individual members include: Albany, California; Albuquerque, New Mexico; Annapolis, Maryland; Boston, Massachusetts; Boulder County, Colorado; Detroit, Michigan; Glen Rock, New Jersey; Harris County, Texas; Las Cruces, New Mexico; Minneapolis, Minnesota; Pittsburgh, Pennsylvania; Portland, Oregon; Providence, Rhode Island; Saint Paul, Minnesota; Salt Lake City, Utah; Santa Fe, New Mexico; and the Mayors of

Durham, North Carolina, and Fayetteville, Arkansas. They represent over ten million residents.

Local Government Coalition members are the first responders to climate change, and have taken great strides to mitigate and adapt to climate impacts. They are also working to reduce other risks posed by transportation pollution, which threatens health and welfare in U.S. cities. As discussed *infra*, the repeal of the 2012 motor vehicle emissions standards and issuance of the Safer Affordable Fuel Efficient Vehicles (SAFE) Rule hamstring those efforts.

1. Cities Are Already Grappling with the Effects of Climate Change.

Over 80 percent of Americans live in urban areas—and even more work in cities—meaning that *amici*'s members are responsible for understanding the risks to, and planning for the wellbeing of, the great majority of Americans.[1] Virtually all cities report feeling the effects of a changing climate.[2] Climate change can also exacerbate cities' existing challenges, including social inequality, aging and deteriorating infrastructure, and stressed ecosystems.[3]

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[1] Center for Sustainable Systems, University of Michigan. 2020. "U.S. Cities Factsheet." Pub. No. CSS09-06.

[2] Alliance for a Sustainable Future, MAYORS LEADING THE WAY ON CLIMATE 2 (Jan. 2020), https://bit.ly/2T4tMpY.

[3] *See* Maxwell, K., et al., *Ch. 11: Built Environment, Urban Systems, and Cities* in *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* (Reidmiller, D.R. et al., eds. 2018). U.S. Global Change

(continued…)

Members of the Local Government Coalition present their arguments to this Court because they are experiencing climate impacts today. Coastal communities are responding to the devastating effects of sea level rise, and the associated high costs of infrastructure corrosion and general disruption to daily life resulting from shrinking coastlines.[4] In **Annapolis**, flooding events have increased 925% in the past 50 years, inflicting devastating revenue losses on the city and local businesses that depend on tourism in the coastal downtown area.[5] For coastal communities and others, on top of this grinding, expensive nuisance looms the enormous threat of destructive storm surges like those that accompanied Hurricanes Maria, Isabel, Katrina, Rita, Harvey, Florence, Michael and Sandy. These and similar events caused hundreds of billions of dollars of damage in **Harris County, Glen Rock**,

Research Program, Washington, DC, USA, p. 439 [hereinafter "4th National Climate Assessment"].

[4] *See* Boesch, D.F., W.C. Boicourt, R.I. Cullather, T. Ezer, G.E. Galloway, Jr., Z.P. Johnson, K.H. Kilbourne, M.L. Kirwan, R.E. Kopp, S. Land, M. Li, W. Nardin, C.K. Sommerfield, W.V. Sweet. 2018. Sea-level Rise: Projections for Maryland 2018, University of Maryland Center for Environmental Science, Cambridge, MD at 1, https://bit.ly/2IYJDUU; Fleming, et al., *Ch. 8: Coastal Effects* in 4th National Climate Assessment, 322.

[5] *NOAA: "Nuisance flooding" an increasing problem as coastal sea levels rise*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN (July 28, 2014); *see also* Nat'l Oceanic and Atmospheric Admin, Sea Level Rise and Nuisance Flood Frequency Changes around the United States (June 2014), https://bit.ly/3nwiLK9.

and other affected communities.[6] Since 2015, **Harris County** has seen six federal disaster declarations due to rain events.[7]

Storms impacting inland and riverine areas, like the one that set new rainfall records in **Boulder County** in September 2013, are also increasingly fueled by climate change.[8] One estimate puts total losses resulting from the 2013 flood at $2 billion.[9] Between 1996 and 2017, flooding caused over $1 billion worth of property damage in Wayne County, home to **Detroit**.[10]

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[6] *See*, Nat'l Oceanic and Atmospheric Admin., *Fast Facts: Hurricane Costs*, https://coast.noaa.gov/states/fast-facts/hurricane-costs.html (visited Dec. 17, 2020). Weather and climate disasters in the United States caused an estimated $1.75 trillion worth of damage between 1980 and 2019. *Id*.

[7] FEMA, *Texas Tropical Storm Imelda (DR-4466-TX)* (Oct. 4, 2019), https://www.fema.gov/disaster/4466; FEMA, *Texas Hurricane Harvey (DR-4332-TX)* (Aug. 25, 2017), https://www.fema.gov/disaster/4332; FEMA, *Texas Severe Storms and Flooding (DR-4272-TX)* (June 11, 2016), https://www.fema.gov/disaster/4272; FEMA, *Texas Severe Storms and Flooding (DR-4269-TX)* (Apr. 25, 2016), https://www.fema.gov/disaster/4269; FEMA, *Texas Severe Storms, Tornadoes, Straight-line Winds, and Flooding (DR-4245-TX)* (Oct. 31, 2015), https://www.fema.gov/disaster/4245; FEMA, *Texas Severe Storms, Tornadoes, Straight-line Winds, and Flooding (DR-4223-TX)* (May 29, 2015), https://www.fema.gov/disaster/4223.

[8] *See* Pardeep Pall et al., *Diagnosing Conditional Anthropogenic Contributions to Heavy Colorado Rainfall in September 2013*, 17 WEATHER AND CLIMATE EXTREMES, 1 (2017); National Academies of Sciences, ATTRIBUTION OF EXTREME WEATHER EVENTS IN THE CONTEXT OF CLIMATE CHANGE 85–86 (2016), bit.ly/1S2JHgf.

[9] David Gochis et al., *The Great Colorado Flood of September 2013*, BULLETIN AM. METEOROLOGICAL SOC'Y, Sept. 2015; *see also* Boulder County, *2013 Flood Recovery*, https://bit.ly/2T65H2k (visited Dec. 11, 2020).

[10] Michigan Dep't of State Police, Michigan Hazard Analysis (Apr. 2019) at 147, https://bit.ly/34nnyXP.

Heat waves made more frequent, hotter, and longer by climate change similarly injure members of the Local Government Coalition.[11] As Coalition members know well, heat waves are the deadliest type of extreme weather.[12] Because urban "heat islands" heat up faster and stay hotter than suburban and rural areas, city dwellers are disproportionately affected by heat waves.[13] News of heat wave-related deaths and hospitalizations has become a tragic annual event, and the Environmental Protection Agency ("EPA") estimates that failure to mitigate climate change will result in an additional 12,000 deaths per year from extreme temperature by 2100 in 49 major U.S. cities.[14] The impacts of heat waves are felt in **Pittsburgh**, **Albuquerque**, and other cities—and temperatures are on track to keep rising.[15] In **Salt Lake City**, higher temperatures exacerbate air pollution that already threatens public health.[16] Heat waves often do costly damage to infrastructure as well as to human health. The 2011 heat wave in **Harris County**

[11] *See* National Academies of Sciences, *supra* note 8.

[12] Nat'l Weather Serv., *Heat*, https://www.weather.gov/phi/heat (visited Dec. 17, 2020).

[13] John Balbus & George Luber, et al., *Ch. 14, Human Health*, in 4th National Climate Assessment at 554.

[14] *Id*.; EPA. 2015. Climate Change in the United States: Benefits of Global Action. United States Environmental Protection Agency, Office of Atmospheric Programs, EPA 430-R-15-001 at 6, https://bit.ly/2xc5uC0.

[15] Maxwell, K., *supra* note 3 at 441 (projecting increases in the number of very hot days in Pittsburgh and other cities).

[16] Salt Lake City, Climate Adaptation Plan for Public Health (2017) at 6, 32.

burst pipes and water mains.[17] Additionally, "[m]ore frequent and severe heat waves in many parts of the United States would increase stresses on electric power, increasing the risk of cascading failures within the electric power network that could propagate into other sectors."[18]

Cities' cost to recover from damage caused by climate change will be enormous. The first nine months of 2020 saw 16 climate disaster events with losses exceeding $1 billion in the United States, and such events will become more frequent and destructive as greenhouse gases rise.[19] Without emissions reductions, the cost of coastal storm damage is expected to climb to $5 trillion through 2100.[20] By that year, on an annual basis, unmitigated climate change could cause 57,000 pollution-related deaths, resulting in an estimated $930 billion in economic losses; lead to 1.2 billion lost labor hours, valued at $110 billion; and result in hundreds of billions of dollars in infrastructure, water supply and other costs.[21]

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[17] Kai Zhang et al., *Impact of the 2011 heat wave on mortality and emergency department visits in Houston, Texas*, ENVTL. HEALTH, Jan. 17, 2015.
[18] Leah Nichols & Robert Vallario, *Ch. 17: Sector Interactions, Multiple Stressors, and Complex Systems*, in 4th National Climate Assessment at 652.
[19] Nat'l Oceanic and Atmospheric Admin., *Billion-Dollar Weather and Climate Disasters: Overview*, https://www.ncdc.noaa.gov/billions/ (visited Dec. 17, 2020); *see also* RICHARD BLACK & RUSSELL BAUM, ENERGY & CLIMATE INTELLIGENCE UNIT, Even Heavier Weather, 6 (2018).
[20] EPA, *supra* note 14 at 7
[21] *Id*. at 78.

The acute relevance of anthropogenic climate change to cities' responsibilities has focused Local Government Coalition members' attention on the dangers of failing to mitigate climate change, as well as on the pressing need to adapt. Educated by their experiences and anticipating the still more dramatic climatic changes looming in the foreseeable future, *amici* write in support of the petitioners challenging the SAFE Rule.

A. The SAFE Rule Frustrates Cities' Efforts to Address and Adapt to Climate Change

Cities are not only on the front lines of climate impacts—they are also at the forefront of climate change adaptation and mitigation efforts nationwide. Yet, local governments have little ability to regulate the circumstances imposed on them by the wider world. The need for broader efforts led 292 local governments to declare their support for climate action to meet the goals of the 2015 Paris Agreement after President Trump announced that the United States would withdraw.[22] "Decisions

[22] We Are Still In, *"We Are Still In" Declaration* (visited Dec. 10, 2020), https://bit.ly/2VnQx9Y; We Are Still In, *Who's In* (visited Dec. 10, 2020), https://bit.ly/39APYxh. Although holding global temperature increase to 2 degrees Celsius was a commonly stated goal before 2015, the Paris Agreement seeks to limit warming to 1.5 degrees. "Climate-related risks to health, livelihoods, food security, water supply, human security, and economic growth are projected to increase with global warming of 1.5ºC and increase further with 2ºC." IPCC, 2018: Summary for Policymakers. In: Global Warming of 1.5°C. (Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, (continued…)

made today determine risk exposure for current and future generations and will either broaden or limit options to reduce the negative consequences of climate change."[23] By failing to take climate change seriously now, EPA and the National Highway Traffic Safety Administration ("NHTSA") will cause cities to shoulder greater adaptation costs over the coming decades and centuries.

The following summaries of Local Government Coalition members' adaptation and mitigation efforts demonstrate cities' grasp of the need to act, as well as the scale of efforts currently underway that would be undermined by the SAFE Rule.

i. Adaptation Efforts

The adaptation plans devised by Local Government Coalition members reflect earnest efforts to deal with the new climate norm. **Boston**, acutely aware of rising sea levels, has been investing in adaptation since forming a Climate Preparedness Task Force in 2013.[24] **Annapolis** has developed a plan to protect its historic downtown area from flooding, which includes resiliency measures costing

X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield, eds.) at 9.

[23] David Reidmiller, et al., *Ch. 1: Overview*, in 4th National Climate Assessment at 34.

[24] Boston Climate Preparedness Task Force, Climate Ready Boston: Municipal Vulnerability to Climate Change (Oct. 2013); Katie Choe et al., *Climate Resilient Design Standards & Guidelines* (October 2018), https://bit.ly/3a69cLS.

up to $50 million.[25] **Boulder County** has been integrating adaptation into its operations since adopting its 2012 Climate Change Preparedness Plan, and has conservatively estimated the cost of adaptation measures through 2050 to be $96 million to $157 million.[26] **Santa Fe**, **Minneapolis**, **Saint Paul**, **Albany**, and **Durham** have similarly developed plans to prepare for and adapt to climate change.[27]

Cities are making significant strides in adapting to climate change, but they should not be forced to shoulder ballooning costs in a world of unmitigated climate change. The burdens of adaptation are likely to overwhelm cities without federal action to significantly reduce greenhouse gas emissions.

ii. Mitigation Efforts

[25] City of Annapolis and Historic Annapolis, Inc., Transforming City Dock (Jan. 14, 2020), https://bit.ly/2LjUABy.
[26] Jason Vogel et al., Boulder County Climate Change Preparedness Plan (May 2012), bit.ly/1ZhBfg8; The Impact of Climate Change: Projected Adaptation Costs for Boulder County, Colorado (Apr. 2018), https://bit.ly/2SZ1Tjb.
[27] *See* Santa Fe Watershed Association, Forest and Water Climate Adaptation: A Plan for the Santa Fe Watershed (Oct. 14, 2014), https://bit.ly/2TgqHSN; Minneapolis, Climate Change Resiliency (visited Dec. 11, 2020), https://bit.ly/2T18Xf4; City of Saint Paul, Climate Action & Resilience Plan (Dec. 2019) at 26-27, https://bit.ly/2TnhRUG; Rogers, Karin, Matthew Hutchins, James Fox, and Nina Flagler Hall. *Triangle Regional Resilience Assessment: Technical Report for the Triangle Regional Resilience Partnership*. Asheville, NC: UNC Asheville's National Environmental Modeling and Analysis Center, October 2018 at 15, https://bit.ly/2UucItb; City of Albany Climate Action and Adaptation Plan (Dec. 2019), https://bit.ly/38ipL7M.

Local Government Coalition members are also responding to the climate crisis by committing to mitigation. For instance, **Minneapolis** set greenhouse gas emissions reduction targets of 30% below 2005 levels by 2025 and 80% below 2005 levels by 2050.[28] **Pittsburgh** plans to reduce emissions 20% by 2023, 50% by 2030, and 80% by 2050, as compared to 2003 levels.[29] **Portland** plans to reduce emissions by 80% from 1990 levels by 2050, and **Boulder County** set out to reduce emissions by 90% from 2005 levels by 2050.[30] **Saint Paul** and **Providence** have committed to achieving citywide carbon neutrality by 2050.[31] **Santa Fe** has resolved to make the city carbon neutral by 2040, and **Albany** plans to do so by 2045.[32]

Vehicle emissions account for a significant portion of greenhouse gases in cities, and many cities' climate goals cannot be achieved without deep cuts in emissions from the transportation sector. For example, 27% of greenhouse gas

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[28] City of Minneapolis, Minneapolis Climate Action Plan: A Roadmap to Reducing Citywide Greenhouse Gas Emissions (June 2013), https://bit.ly/34nOTJi; Minneapolis Health, Env't & Community Engagement Comm., Setting a Long-term Carbon Reduction Goal for Minneapolis (Apr. 2014), bit.ly/1QPbFbT.
[29] City of Pittsburgh, Climate Action Plan (2017) at 18, https://bit.ly/3cBs8Ux.
[30] Climate Action Plan for Portland and Multnomah County (June 2015) at 7, https://bit.ly/2R0WO8C; Boulder County Sustainability Plan (2018) at 41, https://bit.ly/2T1CbKP.
[31] City of Saint Paul, *supra* note 27 at 7; City of Providence, Climate Justice Plan (Fall 2019) at 8, https://bit.ly/3aqmEdv.
[32] City of Santa Fe, Resolution No. 2019-47 (Sept. 11, 2019); City of Albany, *supra* note 27 at 5.

emissions in **Fayetteville** come from transportation.[33] A 50% reduction in transportation emissions by 2030 is a cornerstone of the climate action plan in **Pittsburgh**, where transportation accounts for approximately 18% of greenhouse gas emissions.[34] **Portland**'s plan likewise depends on a 78% decrease in transportation emissions by 2050.[35] As discussed *infra*, reducing urban transportation emissions in turn depends on strong federal standards. The repeal of the 2012 standards and issuance of the SAFE Rule frustrates local governments' efforts to meet their greenhouse gas reduction targets.

2. Cities Are Overburdened By Criteria Pollutants Emitted by Vehicles.

Cities also have a significant interest in addressing the public health threats posed by non-greenhouse gas pollution that vehicles emit. Motor vehicle emissions within cities are a significant source of criteria pollutants such as particulate matter and precursors to ozone. Nearly half of the American population lives in counties with unhealthy levels of both pollutants, an increase over the last several years.[36] Ozone damages healthy lungs and is associated with increased mortality due to

[33] Energy Action Plan for the City of Fayetteville, Arkansas (2018) at 44, https://bit.ly/2Jg8XWO.
[34] City of Pittsburgh, *supra* note 29; City of Pittsburgh EV Task Force, https://bit.ly/3fGE7lP.
[35] Portland, *supra* note 30.
[36] *See* U.S. EPA, *Criteria Air Pollutants*, https://www.epa.gov/criteria-air-pollutants (visited Dec. 11, 2020); American Lung Association, State of the Air 2020 (2020) at 5, 39, www.stateoftheair.org/assets/SOTA-2020.pdf.

respiratory and cardiovascular disease.[37] Particulate matter can lead to heart attacks, irregular heartbeat, decreased lung function, respiratory symptoms, adult premature mortality, and infant mortality, and can cause lung cancer.[38] Both pollutants exacerbate asthma, which is the leading chronic illness among children, afflicting over 6.2 million children nationwide. *See* NHTSA-2018-0067-12459_4-5, 4-25.[39]

Cities increasingly face the need to manage the threat of ozone pollution. Nationally, ozone pollution spiked in 2016-2018. Over the same period, many cities experienced an increase in the number of unhealthy ozone days.[40]

Managing particulate matter is likewise a major need and a challenge for U.S. cities. Half of the 26 most polluted cities faced worse levels of year-round particulate matter during the 2016-2018 period than in previous years. Of cities with major decreases in year-round particulate matter during 2016-2018, many still have not reached healthy air quality. Short-term particulate matter—periods of

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[37] Zhang J, Wei Y and Fang Z (2019) *Ozone Pollution: A Major Health Hazard Worldwide*. Front. Immunol. 10:2518. doi: 10.3389/fimmu.2019.02518 at 1.
[38] U.S. EPA, *Health and Environmental Effects of Particulate Matter*, https://bit.ly/37Y1iFR (visited Dec. 30, 2020).
[39] Deborah A. Gentile, Tricia Morphew, Jennifer Elliott, Albert A. Presto & David P. Skoner (2020): Asthma Prevalence and Control among Schoolchildren Residing near Outdoor Air Pollution Sites, Journal of Asthma, DOI: 10.1080/02770903.2020.1840584 at 1.
[40] American Lung Association, *supra* note 36 at 7.

unhealthy spikes in particulate matter—is also a growing problem for cities. Of the 25 most polluted cities, 22 had more unhealthy air days during the 2016-2018 period than in the several years prior, and several cities had the highest average of unhealthy air days ever recorded. [41]

Climate change exacerbates local air quality pollution and amplifies its impacts.[42] Moreover, urban populations experiencing socioeconomic inequality are more vulnerable to the impacts of heat.[43] The risks of air pollution are further heightened by the current pandemic: air pollution has been linked to higher COVID-19 death rates.[44]

For these reasons, local governments have a significant interest in controlling vehicle emissions in order to minimize air pollution and its negative health effects. Local Government Coalition members have made strides through local policy. For example, **Pittsburgh**—where, in some schools, over 22% of children have asthma and 70% are exposed to unhealthy levels of particulate matter—has committed to reducing transportation emissions and increasing

[41] American Lung Association, *supra* note 36 at 7-8.
[42] C.G., P.D. Dolwick, N. Fann, L.W. Horowitz, V. Naik, R.W. Pinder, T.L. Spero, D.A. Winner, and L.H. Ziska, 2018, *Ch. 13: Air Quality*, in 4th National Climate Assessment; American Lung Association, *supra* note 36 at 6, 39.
[43] Maxwell, K., et al., *supra* note 3 at 447.
[44] Harvard T.H. Chan School of Public Health, *Air Pollution Linked with Higher COVID-19 Death Rates* (May 5, 2020), https://bit.ly/2YpSq5Q.

electrification of its own fleet.[45] **Fayetteville** has prioritized the sector in its energy goals by promoting electric vehicles, public transportation, and non-vehicle transportation and by planning to reduce per capita vehicle miles traveled to 2010 levels by 2030. [46] **Glen Rock** has installed two electric vehicle-charging stations for public use and has promoted electric vehicles through car shows.[47] **Providence**'s Climate Justice Plan aims to increase public transit ridership; and to ensure that vehicle miles traveled are reduced by 20%, and 80% of those miles are electric, by 2050.[48] These measures depend on strong federal standards that will increase market penetration of low- and zero-emission vehicles. Instead the SAFE Rule frustrates local governments' efforts to protect their residents' health. *See* 85 Fed. Reg. 24,174, 25,107 (recognizing that the SAFE Rule's technology penetration rate is much lower than the preexisting standards').

ARGUMENT

1. EPA Acted Arbitrarily and Capriciously by Failing to Consider the Need to Reduce Transportation Emissions to Address Climate Change.

In repealing the preexisting standards and replacing them with a far weaker

[45] City of Pittsburgh EV Task Force, https://bit.ly/3fGE7lP; Gentile, *supra* note 39 at 6-7.
[46] Energy Action Plan for the City of Fayetteville, Arkansas (2018) at 8, 44, 46, https://bit.ly/2Jg8XWO.
[47] Glen Rock, *Electric Vehicles* (visited Jan. 7, 2021), https://bit.ly/3q0POb8.
[48] Providence Great Streets Master Plan (Jan. 2020) at 12, https://bit.ly/36YuEUe.

rule, EPA ignored "an important aspect of the problem" by disregarding the urgent need to cut vehicular greenhouse gases in order to avoid the most catastrophic consequences of climate change. *Michigan v. EPA*, 576 U.S. 743, 752 (2015) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Additionally, "[t]he 'requirement that agency action not be arbitrary and capricious includes a requirement that the agency adequately explain its result.'" *Snohomish Cty, Wash. v. Surface Transp. Bd.*, 954 F.3d 290, 301 (D.C. Cir. 2020) (quoting *Jost v. Surface Transp. Bd.*, 194, F.3d 79, 85 (D.C. Cir. 1999)). "The agency must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 52 (quoting *Burlington Truck Lines, Inc. v. United States*, 371U.S. 156, 168 (1962)); *see also Sierra Club v. EPA*, 884 F.3d 1185, 1189 (D.C. Cir. 2018)) (EPA must provide a "reasonable connection to the facts in the record") (quoting *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 629 (D.C Cir. 2016)). EPA offers no rational connection between the record, which overwhelmingly establishes the imperative to decrease greenhouse gas pollution from the transportation sector, and its choice to instead increase emissions by dramatically weakening motor vehicle standards.

For example, state and city commenters warned that as a result of climate change many U.S. cities are increasingly threatened by vector-borne disease, heat

waves, and sea-level rise. NHTSA-2018-0067-12361_3, 6, 12-13 (quoting 4th National Climate Assessment at 26, 744, 752-53, 1104, 1107)).[49] Commenters further noted that transportation is "the top contributor to U.S. greenhouse gas emissions." *Id*. at 3, (quoting 4th National Climate Assessment at 483). The record also reflects the Intergovernmental Panel on Climate Change's conclusion that "[c]limate related risks to health, livelihoods, food security, water supply, human security, and economic growth are projected to increase with global warming of 1.5° C and increase further with 2° C." NHTSA-2017-0069-0680_SPM-11.

However, EPA has issued a rule that it recognizes will significantly increase greenhouse gases. As compared to no action—leaving the preexisting standards in place—the SAFE Rule will lead to an additional 867-923 million metric tons of carbon dioxide emissions. 85 Fed. Reg. at 24,167. This is equivalent to running 223-237 coal plants for a year.[50] The SAFE Rule is expected to result in a 9% increase in U.S. carbon dioxide emissions by 2100, contributing to temperature rise

[49] *See also* NHTSA-2017-069-0682_16 ("Research suggests that mortality risk for those 65 or older from heat waves could increase ten-fold by the 2090s because of climate change." (quoting California's Fourth Climate Change Assessment, Statewide Summary (2018)); *id*. at 20 ("[T]he incidence of daily tidal flooding is accelerating in more than 25 Atlantic and Gulf Coast Cities. Global average sea levels are expected to continue to rise . . . A rise of as much as 8 feet by 2100 cannot be ruled out." (citing 4th National Climate Assessment, Vol. I at 10)).

[50] *See* EPA Greenhouse Gas Equivalencies Calculator, https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator (visited Dec. 1, 2020).

of over 2° Celsius by 2060 and well above 3° Celsius by 2100. NHTSA-2018-0067-12459_5-35, 5-40. EPA is aware of the scientific consensus that warming of more than 2° Celsius will cause "truly catastrophic climate change impacts." NHTSA-2017-0069-0685_27.[51]

While the Environmental Impact Statement seeks to downplay the additional increment of temperature rise caused by the SAFE Rule as small relative to overall projected warming, NHTSA-2018-0067-12459_5-40, this rhetoric runs afoul of the Supreme Court's admonition that "[a]gencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop," *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007); *see also id*. (rejecting the "erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum"); Endangerment Finding for Greenhouse Gases Under Clean Air Act Section 202(a), 74 Fed. Reg. 66,495, 66,543 (Dec. 15, 2009) (noting that even

[51] *See also* NHTSA-2017-0069-0685_20 n.85 (during the Plioscene, when the earth's temperature was 2° – 3.5° C above preindustrial levels, sea level was up to 66 feet higher than today) (citing 4th National Climate Assessment Vol. I at 141); EPA-HQ-OAR-2018-0283-4135_44 ("Risks increase at a steepening rate under an additional warming of 1 to 2° C and become high above 3° C, due to potential for large and irreversible sea level rise from ice sheet loss.") (quoting IPCC, 2014: Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva, Switzerland, 151 p. 72.); EPA-HQ-OAR-2018-0283-5054_370 (citing likelihood that warming of 2° Celsius will trigger feedback loops that will drive further warming even if greenhouse gas emissions cease).

where "individual greenhouse gas source categories could appear small in comparison to the total," contributors must all do their part to reduce greenhouse gas emissions).

Faced with projected warming of more than 3° Celsius by 2100, EPA cannot throw its hands in the air and conclude that no action is worth taking because it has already fallen short of its statutory duty to address climate change. *See Massachusetts*, 549 U.S. at 533. Rather, "[w]hen EPA evaluates scientific evidence in its bailiwick, [this Court] ask[s] . . . that it take the scientific record into account in a rational manner." *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102, 122 (D.C. Cir. 2012) (internal citations omitted), *rev'd in part on other grounds, Utility Air Reg. Grp. v. EPA*, 573 U.S. 302 (2014).

The record calls for meaningful emissions reductions. EPA acted unlawfully by failing to offer a "reasonable connection [between] the facts in the record" and its decision to increase greenhouse gases by weakening motor vehicle standards. *Sierra Club*, 884 F.3d at 1189.

2. EPA Acted Arbitrarily and Capriciously by Disregarding the Clean Air Act's Purpose.

In replacing the 2012 standards with a rule that will increase emissions and endanger public health and welfare, EPA has acted arbitrarily and capriciously by failing to consider Congress's clear intent. *See Gresham v. Azar*, 950 F.3d 93, 104

(D.C. Cir. 2020), *cert. granted Arkansas v. Gresham*, --- S.Ct.---, 2020 WL 7086047 (Mem); *see also Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983) (courts "must not 'rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute'") (quoting *NLRB v. Brown*, 380 U.S. 278, 291-292 (1965)); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. Ruckelshaus*, 719 F.2d 1159, 1165 (D.C. Cir. 1983) ("A statute should ordinarily be read to effectuate its purposes rather than to frustrate them.").

Congress enacted the Clean Air Act "to speed up, expand, and intensify the war against pollution." *Motor Vehicle Mfrs. Ass'n*, 719 F.2d at 1165 (internal citations omitted). This Court has recognized "the job Congress gave [EPA] in [Clean Air Act] § 202(a)—utilizing emission standards to prevent reasonably anticipated endangerment from maturing into concrete harm." *Coalition for Responsible Regulation*, 684 F.3d at 122; s*ee also Ethyl Corp. v. EPA*, 541 F.2d 1, 25 (D.C. Cir. 1976) ("The statute[] and common sense demand regulatory action to prevent harm."); S. Rep. 91-1196, 91st Cong. 2d. sess. (Sept. 17, 1970) at 59 ("Such emissions standards must be based on the degree of emission control needed to protect the public health and welfare."). By taking deregulatory action that will significantly increase greenhouse gases and other air pollution, EPA

"threatens to make that interest illusory." *Wagner v. Fed. Elec. Comm'n*, 717 F.3d 1007, 1014 (D.C. Cir. 2013).

EPA acknowledges that "the primary purpose of Title II of the Clean Air Act is the protection of public health and welfare" and that the goal of the greenhouse gas vehicle emissions standards "is to reduce these emissions which cause or contribute to air pollution." 85 Fed. Reg. at 25,105-06. Yet the SAFE Rule will increase emissions and cause further harm. As discussed *supra*, the SAFE Rule will contribute to greenhouse gases and climate change impacts. Additionally, even according to the agencies' flawed analysis, *see* Pet. Br. at xx, the SAFE Rule is expected to cause premature deaths and heart attacks, and exacerbate asthma and respiratory symptoms, due primarily to rising upstream criteria pollutants from the production and transportation of gasoline. 85 Fed. Reg. at 25,111-12.

By replacing standards that EPA acknowledges are already technologically feasible with a rule whose "net benefits straddle zero," EPA leaves meaningful emissions reductions on the table with no legitimate justification. *Id*. at 25,108; EPA-HQ-OAR-2018-0283-7671_9; *see also* Pet. Br. at xx. Despite its clear statutory directive, EPA treats these forfeited cuts in pollution as largely irrelevant. *See, e.g.*, *id*. at 25,113 (privileging non-statutory factors such as impacts on consumers over attainable emissions decreases); EPA-HQ-OAR-2018-0283-7671_9 (dismissing the additional 867-923 million metric tons of carbon dioxide

that the SAFE Rule will produce because "overall benefits" will outweigh the costs).

The SAFE Rule cannot stand because it "will [not] accomplish what the statute plainly requires." *U.S. Sugar Corp. v. EPA*, 830 F.3d at 628. "[T]he intent of Congress is clear." *Gresham*, 950 F.3d at 100. The Clean Air Act was enacted to reduce pollution to protect public health and welfare, "and, as a result, the [EPA] 'must give effect to that unambiguously expressed intent of Congress.'" *Id*. (quoting *Chevron, U.S.A, Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) (internal alterations omitted)). Disregard for the "statutory purpose" of waging a "war against pollution" "to prevent harm" renders EPA's action arbitrary and capricious. *Id*. at 104; *Motor Vehicle Mfrs.*, 719 F.2d at 1165; *Ethyl Corp.* F.2d at 25.

3. The Agencies Failed to Adequately Consider Local Governments' Reliance Interests.

EPA and NHTSA ("the agencies") acted arbitrarily and capriciously by failing to provide a "detailed justification" for a new policy where their "prior policy has engendered serious reliance interests that must be taken into account." *FCC v. Fox Television*, 556 U.S. 502, 515 (2009); *see also Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1114 (D.C. Cir. 2019). "[B]ecause [the agencies were] not writing on a blank slate, . . . [the agencies were] required to assess whether there were reliance interests, determine whether they were significant, and weigh any

such interests against competing policy concerns." *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020) (internal citations omitted). The agencies did not take any of these steps.

Rather, after noting that commenters expressed concern about reliance interests, the SAFE Rule's preamble asserts that "[e]xplanations relying on new data are sufficient to satisfy the more detailed explanatory obligation." 85 Fed. Reg. at 25,158 (citing *Mingo Logan Coal Company v. EPA*, 829 F.3d 710, 727 (D.C. Cir. 2016)). This language from *Mingo Logan* simply states the type of explanation an agency must provide for changing regulatory course. 829 F.3d at 727. By citing *Mingo Logan*, the agencies conflate their obligation to justify a policy reversal based on new information with their separate obligation to consider reliance interests generated by a previous policy. In actuality, these burdens are distinct, giving rise to "different claims supported by different arguments." *Id*. at 723. The *Mingo Logan* court expressly did not consider the petitioner's argument that the agency inadequately weighed its reliance interests, finding that the petitioner failed to press the issue before the agency or the court below. *Id*. at 721-24.

By contrast, during the comment period on the SAFE Rule, many local governments across the country warned that their climate action plans rely on the preexisting standards that have now been repealed. *See, e.g.*, EPA-HQ-OAR-2018-

0283-5763 (Anchorage); EPA-HQ-OAR-2018-0283-5472 (Aspen); EPA-HQ-OAR-2018-0283-3903 (Boulder); EPA-HQ-OAR-2018-0283-4017 (Chula Vista); EPA-HQ-OAR-2018-0283-3899 (Eugene); EPA-HQ-OAR-2018-0283-4152 (Edina); EPA-HQ-OAR-2018-0283-4130 (Houston); EPA-HQ-OAR-2018-0283-3326 (Metropolitan Washington Air Quality Committee); EPA-HQ-OAR-2018-0283-4413 (Nashville); EPA-HQ-OAR-2018-0283-3907 (Ojai); EPA-HQ-OAR-2018-0283-5685 (Portland); EPA-HQ-OAR-2018-0283-5687 (Sacramento); EPA-HQ-OAR-2018-0283-4160 (Salt Lake City); *see also* Pet. Br. at xx (noting states' reliance on preexisting standards to develop State Implementation Plans). The agencies were required to assess those reliance interests, determine their significance, and weigh them against policy considerations. *Regents of the Univ. of Calif.*, 140 S. Ct. at 1915. In neglecting to do so, the agencies acted arbitrarily and capriciously. *Id*.

4. The Agencies' Environmental Justice Analysis is Arbitrary and Capricious

Finally, the agencies acted arbitrarily and capriciously by failing to properly analyze whether the SAFE Rule will disproportionately harm communities of color and low-income communities ("environmental justice communities"). *See Communities Against Runway Expansion v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004) (because agency conducted environmental justice analysis, that analysis is

subject to an arbitrary and capricious standard).[52] In reaching the unsupported conclusion that the SAFE Rule will not exacerbate environmental disparities, the agencies fell short of their obligation to undertake a "logical and rational" analysis. *See Michigan*, 576 U.S. at 750 (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998)).

The agencies recognize that Executive Order 12,898 directs federal agencies—and the Department of Transportation's Environmental Justice Order 5610.2(a) requires NHTSA—to identify and address the "disproportionately high and adverse" health and environmental effects that their actions impose on environmental justice communities. *See* 85 Fed. Reg. at 25,257; *see also* 59 Fed. Reg. 7629 (Feb. 16, 1994); 77 Fed. Reg. 27,534 (May 10, 2012). The agencies accordingly determined that "minority and low-income populations may experience some disproportionate effects" under the SAFE Rule. 85 Fed. Reg. at 25,263. More specifically, the agencies expect "disproportionate exposure of minority and low-income populations to air pollution from oil refineries," which

[52] *Communities Against Runway Expansion* considered an environmental justice analysis conducted in an environmental impact statement under the National Environmental Policy Act. 867 F.3d at 355 F.3d at 689. Although only NHTSA was required to prepare an environmental impact statement for the SAFE Rule, the rule's preamble and regulatory impact assessment rely on the Environmental Impact Statement's environmental justice analysis. *See* 85 Fed. Reg. at 25,258; EPA-HQ-OAR-2018-0283-7671_2174.

will rise as oil consumption increases under the rule. *Id*. at 25,259. The agencies also recognized that "a disproportionate prevalence of minority and low-income populations [are] living near mobile sources of pollutants," and found that under the SAFE Rule cars are projected to emit higher levels of hazardous pollutants such as benzene, a known carcinogen. *See id.*; NHTSA-2018-0067-12459_4-8, 4-9, 4-43. Finally, the agencies observed that environmental justice communities are "at higher risk from climate variability and climate-related extreme weather events." 85 Fed. Reg. at 25,261. As discussed *supra*, the SAFE Rule will increase greenhouse gas emissions and fuel climate change.

Nonetheless, the agencies determined that the SAFE Rule "would not result in disproportionately high and adverse" effects on environmental justice communities, because the "overall impacts on human health and the environment would not be 'high and adverse.'" 85 Fed. Reg. at 25,262. This conclusion is fatally flawed for at least two reasons.

First, the agencies did not "adequately address the harms of deregulation or justify [their] portrayal of those harms as negligible." *United Keetoowah Band of Cherokee Indians in Oklahoma v. FCC*, 933 F.3d 728, 740 (D.C. Cir. 2019). The agencies characterize the SAFE Rule's contribution to climate change as "minor" rather than "high" because it represents a small percentage of total U.S. carbon dioxide emissions. 85 Fed. Reg. at 25,262. But agencies cannot dismiss

incremental increases in greenhouse gas emissions. *See Massachusetts*, 549 U.S. at 524. Similarly, the agencies' conclusion that conventional pollutants will not create "high" impacts is unsupported by the record. According to the Environmental Impact Statement, the SAFE Rule will increase emissions of most criteria and toxic pollutants through 2050. NHTSA-2018-0067-12459_4-35, 4-44.[53] In particular, emissions of precursors to ozone—which can cause respiratory conditions—will see the biggest rise at oil refineries. 85 Fed. Reg. at 25,061-65; EPA-HQ-OAR-2018-0283-7671_2131. The Environmental Impact Statement explains that "large differences [in emission levels] could lead to changes in ambient pollutant concentrations"—but does not draw a line between "large" and "small" differences, let alone specify on which side of the line the projected impacts will fall. NHTSA-2018-0067-12459_4-36, 4-46. The agencies have therefore failed to justify their conclusion that the expansion of greenhouse gases and other pollutants will not be "high."

Second, even if the agencies *were* correct that the SAFE Rule's adverse impacts are not "high," they misconstrued the analysis required. The Department of Transportation's Environmental Justice Order 5610.2(a) clarifies that "disproportionately high and adverse effect" means "an adverse effect that . . . will

[53] This analysis underestimates the SAFE Rule's contributions to air pollution for reasons stated in Petitioners' briefs at xx.

be suffered by the minority population and/or low-income population and is appreciably more severe or greater in magnitude than the adverse effect that will be suffered by the non-minority population and/or non-low-income population." 77 Fed. Reg. at 27,537; *see also* Environmental Justice Guidance Under the National Environmental Policy Act (CEQ Dec. 10, 1997) (instructing agencies to consider whether the risk or rate of environmental hazard to environmental justice community "appreciably exceeds . . . the risk or rate to the general population").

The question is not whether the impacts will be "high and adverse" in absolute terms, but rather, whether they will be both adverse and "appreciably" higher in environmental justice communities. Adverse impacts need not be a great deal higher to implicate agencies' environmental justice obligations; the difference must merely be "capable of being measured and perceived." *Black's Law Dictionary* (11th ed. 2019) (defining "appreciable").

The impacts of the SAFE Rule are clearly adverse. The SAFE Rule will contribute to climate change, which invites threats such as extreme heat, sea-level rise, and worsened air pollution; and increase criteria and toxic pollutants, leading to even more immediate public health threats. *See supra* Sections 1, 2; 85 Fed. Reg. at 25,112, 25,262; NHTSA-2010-0067-12636_1627-28, 1633. Moreover, as the agencies recognized, numerous studies have "measured and perceived" the extent to which these expected harms tend to fall disproportionately on

environmental justice communities, and therefore, have demonstrated that adverse impacts will be "appreciably" higher in such communities. *See Black's Law Dictionary* (11th ed. 2019); 85 Fed. Reg. at 25,258-25,262.

The agencies acted arbitrarily and capriciously by making a conclusory finding that the SAFE Rule will not disproportionately harm environmental justice communities rather than grappling with these facts.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to grant the State and Local Government and Public Interest Petitioners' petitions for review.

Dated: January 21, 2021

Respectfully Submitted,

/s/

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Jan. 13, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Cir. R. 32(e)(2)(C), I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and D.C. Cir. R. 32(e)(3) because it contains 6392 words, excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(e)(1). Further, this brief complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared using 14-point Times New Roman font, a proportionately spaced typeface.

Dated: January 21, 2021 /s_____

Jan. 13, 2021

CERTIFICATE OF SERVICE

I certify that the foregoing brief was served today on all registered counsel in these consolidated cases via the Court's CM/ECF system.

Dated: January 21, 2020 /s_____