

No. 22-1144

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

STATES OF TEXAS, ARKANSAS, INDIANA, KENTUCKY, LOUISIANA, MISSISSIPPI,
MONTANA, NEBRASKA, OHIO, SOUTH CAROLINA, and UTAH,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION; STEVEN CLIFF, in
his official capacity as Administrator of the National Highway Traffic Safety
Administration; U.S. DEPARTMENT OF TRANSPORTATION; AND PETE
BUTTIGIEG, in his official capacity as Secretary of the U.S. Department of
Transportation,

Respondents.

**BRIEF FOR *AMICI CURIAE* STATE OF WEST VIRGINIA
AND 7 OTHER STATES IN SUPPORT OF PETITIONERS**

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GLOSSARY

CAFECorporate Average Fuel Economy

DRCDemocratic Republic of the Congo

NdFeB..... Neodymium-Iron-Boron

NHTSA National Highway Traffic Safety Administration

ZEVZero-Emission Vehicle

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INTERESTS OF THE *AMICI CURIAE*

The automobile has been called “a central constitutional feature of American life.” KURT BROWN, *DRIVE, THEY SAID: POEMS ABOUT AMERICANS AND THEIR CARS* xv (1994). That might be a bit of a poetic overstatement, but not by much. Americans depend on affordable vehicles to ferry them to work and play, church and school, friends and families. Trucks, meanwhile, help Americans do the hard work of hauling and towing. Pickup trucks and cars, in short, are critical. The States thus have an interest in ensuring that federal regulations do not make vehicles so prohibitively expensive to buy and drive that state residents can no longer freely enjoy the open road.

Unfortunately, the National Highway Traffic Safety Administration’s 2024-2026 fuel economy standards threaten to squeeze out the promise of affordable transportation. *See* Corporate Average Fuel Economy Standards for Model Years 2024-2026 Passenger Cars and Light Trucks, 87 Fed. Reg. 25,710 (May 2, 2022) (“Final Rule”). These standards are so aggressive, for instance, that just two pickup truck models can presently hope to meet them. And cars, trucks, and sport utility vehicles will become pricier all around.

Here, the *amici* States describe some of the reasons why the Final Rule exceeds NHTSA’s authority and ignores essential (and statutorily mandated) considerations. The States write with the hope that the Court will return NHTSA to its statutory confines and remind the agency of its responsibility to confront *all* the facts before it. “[D]riving an automobile [is] a virtual necessity for most Americans.” *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

NHTSA should not be permitted to make that necessity harder through unlawful agency action.

INTRODUCTION

This petition for review concerns a rule from the National Highway Traffic Safety Administration with a fundamental problem: NHTSA had no authority to issue it. Although Congress empowered NHTSA to determine maximum feasible average fuel economy standards, it also prohibited the agency from considering electric vehicles when doing so. *See* 49 U.S.C. § 32902(h)(1). Despite that prohibition, NHTSA used California’s Zero-Emission Vehicle (or “ZEV”) Program—a program that starts and ends with electric vehicles—to determine what fuel-efficiency standards manufacturers could achieve across the country. NHTSA’s backdoor maneuver offends Congress’s stated intent. NHTSA also ignored a separate preemption clause, too. Under the Energy Policy and Conservation Act, States are prohibited from “adopt[ing] or enforc[ing] a law or regulation related to fuel economy standards.” 49 U.S.C. § 32919(a). In creating the ZEV Program, California has done just that. And by implementing the Final Rule, NHTSA has now endorsed that unlawful act and incorporated it into its own regime. California does not have the right to set national energy policy, even when a federal agency shows it is willing to subjugate itself to that particular State. And a federal agency has no power to contravene Congress’s will. “[A]gencies may act only pursuant to the authority delegated to them by Congress.” *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017).

NHTSA’s out-of-bounds rulemaking would be reason enough for this Court to vacate the Final Rule—but NHTSA also arbitrarily failed to consider the important problem of energy security. Congress has said that energy security needs to be a front-and-center consideration for rules like these. But by forcing auto manufacturers to produce more electric vehicles, NHTSA will force the United States to become beholden to foreign interests; those interests control the materials and components that electric vehicles need. Not only that, but more electric vehicles will burden national electric grids that may not be up to the task of taking on so much new demand. Even so, NHTSA arbitrarily concluded that these damaging implications were not “entirely ripe” for consideration—instead offering an empty assurance that “NHTSA [would] continue to monitor the[] issue[] going forward.” 87 Fed. Reg. at 25,994. Reasoned decision-making requires an agency to do more than watch. NHTSA needed to give “thoughtful consideration duly attentive to comments received[] and formulate[] a judgment which rationally accommodates the facts capable of ascertainment and the policies slated for effectuation.” *Int’l Ladies’ Garment Workers’ Union v. Donovan*, 722 F.2d 795, 822 (D.C. Cir. 1983).

Because NHTSA exceeded its statutory authority and “failed to consider an important aspect of the problem,” *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), the Court should vacate the Final Rule.

SUMMARY OF THE ARGUMENT

“An agency’s action must be within its lawful authority, and the process by which it reaches that result must be logical and rational.” *Farrell v. Blinken*, 4 F.4th 124, 137 (D.C. Cir. 2021) (cleaned up). The Final Rule fulfills neither requirement.

I. The Final Rule exceeds NHTSA’s statutory authority. Congress prohibits NHTSA from considering electric vehicles when determining the maximum fuel economy standards. And although NHTSA insists that it did not expressly consider electric vehicles in issuing the Final Rule, it included California’s ZEV Program in its baseline for building what minimum the country could meet. Indirectly using electric vehicles to shape the standard is just as wrong as using them directly. And by employing California’s standards, NHTSA has also indulged the idea that California can regulate fuel economy standards—even though Congress has said it cannot. Worse still, NHTSA has fashioned a form of reverse preemption, allowing California’s preferences to reign over federal law. And by favoring one State over all others, NHTSA has violated the principle of equal sovereignty; other States have been effectively forced into California’s scheme.

II. NHTSA also acted arbitrarily and capriciously, as the Final Rule undermines America’s energy independence and security. If the Final Rule goes into effect, then the United States will become tied to politically fraught nations that largely control the mining, processing, and manufacturing of electric vehicle batteries and motors. NHTSA recognized the dependence that

follows from increased vehicle electrification. But it declined to consider that problem because NHTSA is precluded from considering electric vehicles in setting fuel economy standards—even though the agency considered those vehicles anyway. Here and now, data shows that the United States depends on often hostile foreign countries for electric-vehicle-related minerals and other inputs. By pushing to electrify fleets fast, the Final Rule will only worsen present supply-chain problems. And a push to electrify vehicles will also overwhelm a power grid that is already vulnerable. NHTSA did not adequately consider any of these concerns, and the record does not support its decision to set them aside.

ARGUMENT

I. NHTSA exceeded its authority in issuing the Final Rule.

Under the Administrative Procedure Act, reviewing courts must “set aside” any final “agency action” that is either “not in accordance with law” or “in excess of statutory jurisdiction, authority, or limitations.” 5 U.S.C. § 706(2)(A), (C); *see also Am. Bankers Ass’n v. NCUA*, 934 F.3d 649 (D.C. Cir. 2019). “Merely because an agency has rulemaking power does not mean that it has delegated authority to adopt a particular regulation.” *N.Y. Stock Exch. LLC v. SEC*, 962 F.3d 541, 554 (D.C. Cir. 2020). For instance, “[i]f Congress has forbidden an agency from taking an action, the agency cannot so act.” *Judge Rotenberg Educ. Ctr., Inc. v. FDA*, 3 F.4th 390, 399 (D.C. Cir. 2021). And “an agency may not circumvent specific statutory limits on its actions by

relying on separate, general rulemaking authority.” *Air All. Hous. v. EPA*, 906 F.3d 1049, 1061 (D.C. Cir. 2018).

Unfortunately, NHTSA attempted to circumvent two separate statutory limits from Congress in the Final Rule.

A. NHTSA impermissibly considered electric vehicles.

Congress directed the Secretary of Transportation to prescribe “average fuel economy standards” that reflect “the maximum feasible average fuel economy level” that auto manufacturers can achieve. 49 U.S.C. § 32902(a). But Congress prohibited the Secretary from “consider[ing] the fuel economy of dedicated automobiles” when determining the maximum feasible level—in other words, he “may not” do so. *Id.* § 32902(h)(1). A “dedicated automobile” is defined as one that “operates only on alternative fuel,” *id.* § 32901(a)(8), and electricity is one of those alternative fuels, *id.* § 32901(a)(1)(J). So the net effect is straightforward: NHTSA may not consider electric vehicles when it determines the “maximum feasible average fuel economy level.”

The statute’s prohibition against “considering” electric vehicles contains no exceptions. *See States’ Br.* 27-35. “May not” is a strict, prohibitory phrase. *See, e.g., United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1620-21 (2021). And the word “consider” broadly implies that the agency cannot take any “heed[.]” of electric vehicles when it makes its decision. *See Sec’y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 611-12 (1950) (construing a statute directing an agency to “take into consideration” certain factors); *cf. Neb. Dep’t of Revenue v. Loewenstein*, 513 U.S. 123, 128 (1994) (explaining that a state

tax “considers” a federal obligation when it is “taken into account” or “included”). So NHTSA should have stayed away from electric vehicles entirely, as “[a]gencies are not empowered to carve out exceptions to statutory limits on their authority.” *In re Sealed Case*, 237 F.3d 657, 670 (D.C. Cir. 2001).

But rather than respect its statutory limits, NHTSA incorporated electric vehicles into its standards in at least two ways. Although NHTSA seems to believe it has found a novel route to doing what Congress said it cannot do, no agency has the “power to do indirectly what it cannot do directly.” *Civ. Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 328 (1961).

First, NHTSA inappropriately considered electric vehicles by looking to California’s ZEV Program. That program is part of a bigger package of state policies purportedly aimed to give California “long-term solutions to improve air quality and reduce the state’s impact on climate change.” *Zero-Emission Vehicle Program*, CAL. AIR RES. BD., <http://bit.ly/3ArCT9R> (last visited Nov. 30, 2022). Under it, automakers must produce a certain number of “full battery-electric, hydrogen fuel cell, and plug-in hybrid-electric vehicles.” *Id.* Seventeen other States have adopted California’s emission regulations under Section 177 of the Clean Air Act. 42 U.S.C. § 7507; CAL. AIR RES. BD., STATES THAT HAVE ADOPTED CALIFORNIA’S VEHICLE STANDARDS UNDER SECTION 177 OF THE FEDERAL CLEAN AIR ACT (2022), <https://bit.ly/3Gmt7JV>. And when California’s waiver ability was recently challenged, California found a way around the waiver with the Framework Agreements: purportedly

voluntary agreements with six automakers to stay the course of the original ZEV Program and “substantially electrify their respective fleets.” Press Release, Cal. Air Res. Bd., Framework Agreements on Clean Cars (Aug. 17, 2020), <http://bit.ly/3DXiV7D>.

NHTSA “considered and accounted for” these programs “in developing the baseline” for the Final Rule. 87 Fed. Reg. at 25,722. Indeed, the agency extensively modeled and simulated how the ZEV Program and its related agreements would affect compliance outcomes. *Id.* at 25,762-65. This “important[.]” part of NHTSA’s baseline was supposedly included to better “reflect[.] the state of the world without the revised [Corporate Average Fuel Economy] standards.” *Id.* at 25,722. But this reasoning misunderstands the task the agency had before it. Of course electric vehicles exist in the world. What matters is what exists in the statute.

Congress commanded the agency to remove the electric vehicle part of the market from its thinking when calculating these fuel efficiency standards. *See, e.g., Pub. Citizen, Inc. v. NHTSA*, 374 F.3d 1251, 1258-59 (D.C. Cir. 2004) (describing how NHTSA had appropriately looked at the language of the statute in setting performance requirements rather than “real world protection” levels). NHTSA might think that command creates a distorted picture of the “world.” *See, e.g.,* 87 Fed. Reg. at 25,899 (calling it an “absurd result” to build a “fictional baseline” that did not account for electric vehicles). But the agency’s disagreement does not allow it to push Congress’s contrary judgment aside. If NHTSA “disagrees with the [Act’s] requirements, it should

take its concerns to Congress. In the meantime, it must obey the [law] as written by Congress and interpreted by this court.” *Nat. Res. Def. Council v. EPA*, 643 F.3d 311, 323 (D.C. Cir. 2011) (cleaned up); *see also, e.g., Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) (explaining that an agency’s belief that a reading of a statute would produce “absurd results” does not “license [the agency] to rewrite the statute”).

And as a matter of fact, although the “world” may be more heavily electrified in California and the handful of States that have mirrored its standards, that reality might not characterize the “world” throughout much of the rest of America. States like West Virginia might have good reason not to see their vehicle fleets become electrified. (More on that below.) But by making the ZEV Program part-and-parcel of its standards, NHTSA has shunted those reasons, and that “world,” aside—all without reasoned analysis. Given California market’s size, and given how the State has used that market power to extract “voluntary” agreements from the largest automakers, NHTSA’s view of the world seems to be little more than an endorsement of one favored and politically powerful State over many others. (More on that below, too.) But at bottom, statutory mandates from Congress should not be viewed as mere “difficult[ies]” to be overcome so as to enable NHTSA to impose its preferred vision of a “world” in which the “U.S. light-duty fleet” has “complete[ly] transition[ed]” “to full electrification.” 87 Fed. Reg. at 25,994.

Second, although NHTSA said it excluded electric vehicles “during [model year]s 2024—2026” that manufacturers produce in “response to CAFE

standards,” it included new battery-electric vehicle models “outside of” those years *and* any increased production of those vehicles that isn’t directly prompted by the standards—all the way through model year 2029. 87 Fed. Reg. at 25,922. Let’s be plain about what NHTSA tries to do in this part of its work: It has construed the congressional prohibition on “considering” electric vehicles in an implausible way, reasoning that Congress would allow it to consider increased electric vehicle production so long as NHTSA is not affirmatively compelling it during the specific compliance period under consideration.

The problem, again, is the statute. NHTSA’s constricted construction runs right into the text’s broad terms. *See Shays v. FEC*, 414 F.3d 76, 105 (D.C. Cir. 2005) (finding an agency’s “narrow interpretation” of a statutory term “implausible” given Congress’s use of a broader word). And it creates problems with the words that *are not* there, too, as NHTSA “add[s] words to the law to produce what is thought to be a desirable result.” *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015). The statute does not say that NHTSA may not consider electric vehicles over “x years” or produced for “y purposes.” Whether NHTSA’s work is creative bookkeeping, “shenanigans,” *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 275 (2016), or otherwise, the agency cannot tweak Congress’s words by unreasonably redefining them.

B. NHTSA impermissibly allowed California to set national vehicle emission policy.

By using California's ZEV Program (and its related agreements) as part of its baseline, NHTSA overstepped another statutory restraint: Congress's prohibition on state emission-related standards. NHTSA's choice allows California to usurp federal control and infringe on state sovereignty.

1. Under the Energy Policy and Conservation Act, when a national average fuel economy standard is in effect, States are prohibited from “adopt[ing] or enforc[ing] a law or regulation *related to* fuel economy standards.” 49 U.S.C. § 32919(a) (emphasis added). The Supreme Court has “repeatedly recognized” that the phrase “related to” in preemption provisions is “deliberately expansive.” *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (collecting cases). A state law is thus related to the federal law “if it has a connection with, or reference to” it. *Id.* (citation omitted).

Twice in the last two decades, NHTSA has correctly decided that a state regulation limiting carbon-dioxide emissions is “related to” fuel economy standards because carbon dioxide is the end product of burning gasoline. 84 Fed. Reg. 51,310, 51,314 (Sept. 27, 2019); 71 Fed. Reg. 17,566, 17,654 (Apr. 6, 2006). Thus, any state regulation of carbon dioxide emissions should be preempted under 49 U.S.C. § 32919(a). So as others have explained at greater length elsewhere, California's ZEV Program—which aims to reduce greenhouse gas emissions from passenger vehicles—should be preempted. *See, e.g.*, Br. for Ohio et al. at 33-41, *Ohio v. EPA*, No. 22-1084 (D.C. Cir. Nov.

2, 2022), 2022 WL 16697794; Br. for Intervenors at 14-20, *Union of Concerned Scientists v. NHTSA*, No. 19-1241 (D.C. Cir. Oct. 27, 2020), 2020 WL 6319153; *see also* 84 Fed. Reg. at 51,314.

NHTSA has nevertheless embraced the preempted Program's standards through incorporation. 87 Fed. Reg. at 25,722. NHTSA pretends not to comment on whether California's ZEV Program is preempted. 87 Fed. Reg. at 25,983. Instead, it reasons it can incorporate the ZEV Program into its baseline assessment because they functionally bind automakers, even if they are not found to be the sort of "other motor vehicle standards of the Government" that the statute requires NHTSA to consider. *Id.* (quoting 49 U.S.C. § 32902(f) (requiring NHTSA to consider such governmental standards in determining maximum average fuel economy)). But the label that NHTSA might use for the program is beside the point. State standards are not meant to prevail in this specific context. And an illegal program is an illegal program. Yet NHTSA has endorsed, ratified, and incorporated a state-law-based regulatory regime that it admits may be unlawful.

NHTSA's approach turns the Energy Policy and Conservation Act's preemption policy on its head. Federal law is the "supreme Law of the Land," U.S. CONST. art. VI, cl. 2, and when Congress acts within its bounds, it "may impose its will on the States" through preemption, *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). But here, NHTSA has effectively adopted a California-centric notion of "reverse preemption"—the idea that States are "given extraordinary power" and considered supreme over federal law. Ann E.

Carlson & Andrew Mayer, *Reverse Preemption*, 40 *ECOLOGY L.Q.* 583, 583 (2013); *see, e.g., In re Grand Jury Proc.*, 450 F. Supp. 2d 115, 116 (D. Me. 2006) (describing “a kind of reverse preemption” in which “stricter” state standards would prevail over federal ones in the medical-privacy context); Joseph Sanderson, *Don't Bury the Competition: The Growth of Occupational Licensing and A Toolbox for Reform*, 31 *YALE J. ON REG.* 455, 469 n.90 (2014) (describing a “qualified or conditional reverse preemption” in which state standards become the “baseline” for federal antitrust standards). By accepting and deferring to California’s regulations as “the state of the world,” 87 Fed. Reg. at 25,722, NHTSA has abdicated its role as the decider of fuel-efficiency standards and promoted California to the position instead. California law gets written into the Federal Register.

And make no mistake: If California’s ZEV Program is to serve as an “important” part of the baseline, then the federal government will no longer own an area of the law that Congress expressly expected NHTSA would lead. California can impose more and more aggressive measures, and NHTSA will in turn impose ever more aggressive fuel-efficiency standards to reflect them—all the while claiming to be an observer of the California-led effort. California law will thus become the floor. Input from other States will fall by the wayside, as NHTSA will be able to dismiss their views as inconsistent with the “state of the world.” At the same time, the California standards will upset the balancing that Congress intended for NHTSA to undertake when setting these standards. And federal law will serve no real function other than a

rubberstamp. All that is contrary to the intent behind a field-preemption provision like the one found in 49 U.S.C. § 32919(a). After all, field preemption is “intended to foreclose any state regulation in the area, irrespective of whether state law is consistent or inconsistent with federal standards.” *Nat’l Ass’n of Regul. Util. Comm’rs v. FERC*, 964 F.3d 1177, 1187 (D.C. Cir. 2020) (cleaned up). But NHTSA’s approach very nearly does the opposite.

2. By embracing California’s ZEV Program, NHTSA also created a constitutional problem—it ignored the equal sovereignty doctrine. “[T]here is ... a fundamental principle of equal sovereignty among the States.” *Shelby Cnty. v. Holder*, 570 U.S. 529, 544 (2013) (cleaned up). And a federal law offends it when it gives special treatment to some States. *See id.* (reasoning that the Voting Rights Act violated the equal sovereignty doctrine because it only applied to nine States, forcing those uniquely burdened States to “wait[] months or years” to implement their laws). Obviously, Congress need not provide equal benefits to all the States at all times. *See* Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1148 (Mar. 2016). So federal laws that merely “have a disparate impact on some states” can still be valid. *Id.* at 1150. But the equal sovereignty doctrine “*would be* implicated by a federal law that provided that State A is permitted to regulate in a particular area, but State B is not.” *Id.* at 1154 (emphasis in original).

The Final Rule is this sort of law. NHTSA has given California a special privilege of regulating in this area. No other State has purported to set its own standards in this way. Nor could it, for only California enjoys a special

carveout from a Clean Air Act provision that would otherwise prevent even California from launching its ZEV Program. *See* 42 U.S.C. § 7543(b)(1). Other States have explained why that California carveout is itself unconstitutional. *See* Br. of Ohio et al., *supra*, at 11. But the Court need not resolve that separate argument here. It is enough to say for now that every State has a great concern with the fuel economy of its residents' vehicle fleet, so Congress decided to address the problem nationally. NHTSA has upended that choice and put California in the driver's seat. Lacking any "showing" that some California-specific need called for that unique treatment, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009), the Final Rule cannot stand.

NHTSA considered things it shouldn't have and gave away authority to California it had no power to give. The Court should vacate the Final Rule and confine the agency to its statutory mandate.

II. NHTSA failed to consider energy security and independence.

The Administrative Procedure Act does not limit itself to actions beyond agency authority; the Court may also step in when final agency action is "arbitrary" or "capricious." 5 U.S.C. § 706(2)(A). An action fits that description if the agency "failed to consider an important aspect of the problem" or when the "explanation for its decision [] runs counter to the evidence before [it]." *State Farm*, 463 U.S. at 43. Although the Court shows the agency deference, it does not "turn a blind eye when government officials

fail to discharge their duties.” *Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001).

Here, in exercising reasoned decision-making, the Secretary of Transportation must consider several factors, including “the need of the United States to conserve energy.” 49 U.S.C. § 32902(f). And in the Final Rule, “NHTSA recognizes that the need of the United States to conserve energy must include serious consideration of the energy security risks.” 87 Fed. Reg. at 25,721. NHTSA at least got that right. Energy security—that is, “the assurance of reliable supplies of energy, the ability to protect those supplies, and the ability to deliver enough energy to meet operational needs”—is “critical for national security.” Becky Norton Dunlop, *Economic Markets and Technological Advancements*, 7 FIU L. REV. 29, 35 (2011). By securing the “low vulnerability” of “vital energy systems,” Aleh Cherp & Jessica Jewell, *The Concept of Energy Security: Beyond the Four As*, 75 ENERGY POL’Y 415, 418 (2014), America can protect both our nation’s continued safety and its future economic growth. Reasoned environmental policy, then, must account for energy security. See David B. Spence, *Regulation and the New Politics of (Energy) Market Entry*, 95 NOTRE DAME L. REV. 327, 335 (2019) (explaining how American energy policy has balanced affordability, reliability, and environmental performance). And in fact, Congress has emphasized the need to consider energy security at many times and in many contexts. See, e.g., 42 U.S.C. §§ 13401(1), 13571(1), 15927(b)(1), 17285(4); see also Michael Burger, *Recovering from the Recovery Narrative: On Glocalism, Green Jobs and*

Cyborg Civilization, 46 AKRON L. REV. 909, 919 (2013) (cataloguing “[s]everal federal statutes” that “inscribe the nation’s pursuit of energy security [and] energy independence ... into law”).

NHTSA recognized the need to consider energy-security impacts, but then it botched the issue. The Final Rule goes as far as to say that the “[energy security] benefit is the original purpose behind the CAFE standards.” 87 Fed. Reg. at 25,885. It even catalogued some of the energy-security risks that can arise from increasing electrification. *Id.* at 25,993-94. Yet NHTSA concluded that the Final Rule creates an “energy security benefit” merely by its “reduction in oil consumption,” *id.* at 25,885, and then declared that the broader energy security question was not “entirely ripe,” *id.* at 25,994. *See also* 87 Fed. Reg. at 25,888 (refusing to consider “the ancillary costs of electric vehicles,” such as the costs of “improving the grid”). By ignoring the other aspects of this “multi-faceted” issue, NHTSA issued an arbitrary and capricious rule. *See* Justin W. Evans, *A New Energy Paradigm for the Twenty-First Century: China, Russia, and America’s Triangular Security Strategy*, 39 IND. L. REV. 627, 627 (2006).

NHTSA’s quick-hit energy security analysis suffers from many deficiencies. But the agency unreasonably overlooked at least two particularly obvious ones: increased dependence on foreign sources to power electric vehicles and increased vulnerability of our country’s power grids.

A. The Final Rule will make American more energy dependent on foreign countries.

Electric vehicles require minerals and magnets. By forcing a fast transition to electric vehicles when domestic sources are unable to meet even current demand for those elements, the Final Rule will make automakers unreasonably dependent on foreign-controlled supply.

Batteries for electric vehicles contain minerals like lithium, cobalt, copper, and nickel, as well as rare earths like neodymium. Jessica Alcott Yllemo, *Electrification and Critical Minerals*, AM. SEC. PROJECT (Apr. 7, 2022), <https://bit.ly/3FXkbu3>. The Final Rule creates greater need for these minerals through forced electric-vehicle production. In doing so, it generates substantial energy-security risks.

Take cobalt, for example. The Department of the Interior has designated it a critical mineral, and the United States is import-reliant to supply it. Final List of Critical Minerals 2018, 86 Fed. Reg. 23,295 (May 18, 2018); U.S. DEP'T OF COM., A FEDERAL STRATEGY TO ENSURE SECURE AND RELIABLE SUPPLIES OF CRITICAL MINERALS (2019), <https://bit.ly/3Uz0igR>. Many of the world's cobalt reserves are in the Democratic Republic of the Congo. See THE WHITE HOUSE, BUILDING RESILIENT SUPPLY CHAINS, REVITALIZING AMERICAN MANUFACTURING, AND FOSTERING BROAD-BASED GROWTH: 100-DAY REVIEWS UNDER EXECUTIVE ORDER 14017 (2021), <https://bit.ly/WH100day> (June 2021). Sadly, the DRC has a “history of political instability and poor infrastructure.” Aaron Schwabach, *A Hole in the*

Bottom of the Sea: Does the Unclos Part Xi Regulatory Framework for Deep Seabed Mining Provide Adequate Protection Against Strip-Mining the Ocean Floor?, 40 VA. ENV'T L.J. 39, 47 (2022). Even that description might be an underestimation, as the DRC's cobalt mining "is tied to armed conflict, illegal mining, human rights abuses, and harmful environmental practices." Lauren Fricke, *The Long-Term Problem with Electric Vehicle Batteries: A Policy Recommendation to Encourage Advancement for Scalable Recycling Practices*, 12 SEATTLE J. TECH., ENV'T & INNOVATION L. 27, 36 (2022).

Worse yet, China dominates the cobalt industry, "with 84 percent of the DRC's 2019 cobalt exports" destined there. *Building Resilient Supply Chains*, *supra*, at 104. This dominance allows China to control the global supply of battery-ready cobalt. Major Gen. John Wharton, *Why Electric Vehicle Manufacturing is a National Security Imperative*, INT'L BUS. TIMES (July 10, 2022, 3:38 PM), <https://bit.ly/3fIM0vr>. Armed "with such leverage, China can begin to exert the same kind of global influence that the United States and its Middle Eastern allies have sought to impose as a result of their domination in the oil and gas industries." Mitra V. Yazdi, *The Digital Revolution and the Demise of Democracy*, 23 TUL. J. TECH. & INTELL. PROP. 61, 77 (2021). China's control of the global cobalt supply thus gives it the "ability to deny access to cobalt," which risks "creat[ing] a national security vulnerability." Sean Carberry, *United States Seeking Alternatives to Chinese Cobalt*, NAT'L DEF. MAG. (Aug. 3, 2022), <https://bit.ly/3Ug80So>. And with cobalt supply deficits projected as soon as 2024, this vulnerability seems well

on its way. Jacqueline Holman, *Cobalt, Lithium to Move Into Deficit by 2024, 2025*, S&P GLOBAL (Apr. 28, 2021, 2:22 PM), <http://bit.ly/3zjCsO8>.

These security problems are no secret. Recently, the White House graded cobalt “the lowest ‘quality’ supply chain score” because of the “alleged mining conditions in the Democratic Republic of Congo” and “cobalt refining in China.” *Building Resilient Supply Chains, supra*, at 96. Yet the Final Rule tells American manufacturers they must entangle themselves even deeper in this political and economic mess.

Cobalt is just one example of how increasing the need for the minerals that make up electric-vehicle batteries threatens major energy-security concerns. Lithium is another; one study predicts a “serious lithium supply deficit” starting in 2027. Joshua S. Hill, *EVs May Face Production Delays from 2027 as Lithium Mining Lags*, THE DRIVEN (Apr. 16, 2021), <https://perma.cc/5PXS-NUSG>. Nickel is a problem, too—only one nickel mine operates domestically, and an Indonesian government that is often hostile to foreign involvement in its nickel industry controls the majority of the world’s supply. See Isabelle Huber, Commentary, *Indonesia’s Nickel Industrial Strategy*, CTR. FOR STRATEGIC & INT’L STUDIES (Dec. 8, 2021), <http://bit.ly/3FjwDUF> (discussing Indonesia’s nickel ore export ban). Rare-earth elements—which NHTSA never mentions—present another headache, as China “produces almost all of the world’s rare earths used in EV batteries.” Sam Kalen, *Mining Our Future Critical Minerals: Does Darkness Await Us?*, 51 ENV’T L. REP. 11006, 11007 (2021); accord INT’L ENERGY AGENCY,

THE ROLE OF CRITICAL MINERALS IN CLEAN ENERGY TRANSITIONS 153 (2021), <https://bit.ly/3FkuWGE>; *see also* Private Pets.’ Br. 30-31. Even humble copper poses problems: China has been tightening its “stranglehold on the electric vehicle supply chain” by snatching up copper assets across the globe. *Charts: China’s Overseas Copper Mining Scramble*, MINING.COM (June 29, 2021, 11:25 AM), <http://bit.ly/3NdATqS>.

Nor are batteries the only component of electric vehicles with latent national security risks flowing from the Final Rule’s forced demand increase. Neodymium-Iron-Boron (NdFeB) magnet motors are used in “up to 95 percent of electric vehicles.” U.S. DEP’T OF COM., BUREAU OF INDUS. AND SEC., OFF. OF TECH. EVALUATION, THE EFFECT OF IMPORTS OF NEODYMIUM-IRON-BORON (NDFEB) PERMANENT MAGNETS ON THE NATIONAL SECURITY 39 (2022), <https://bit.ly/NdFeB>. But the United States is “[100] percent dependent on imports of sintered NdFeB magnets and is highly dependent on imports of bonded NdFeB magnets.” *Id.* at 96. And China is—again—the leading importer here, providing the United States with 75 percent of its sintered NdFeB magnets. *Id.* So here too, the Final Rule necessarily increases the United States’ dependence on China, which in turn threatens national security. *Id.* at 98. In fact, Congress has also recognized the threat of foreign NdFeB magnets to national security by statutorily barring our military from purchasing these very magnets from China and certain other nations. *See* 10 U.S.C. § 4872; 84 Fed. Reg. 18,156 (Apr. 30, 2019). But the Final Rule ignores this national-security risk and instead compels our

country's automotive fleet to do the opposite: import more magnets from China.

These energy security issues are not new to NHTSA. Several commenters (including Petitioners) expressed their concerns during the comment period that the stringent fuel economy standards would trade the United States' current energy independence for dependence on foreign countries to produce electric vehicles' batteries. *See* Am. Fuel & Petrochem. Mfrs., Comment Letter on Proposed CAFE Standards for Model Years 2024—2026 Passenger Cars and Light Trucks, 86 Fed. Reg. 49,602 (Oct. 26, 2021), at 13-16, *available at* <http://bit.ly/3E1BL9M>; *see also, e.g.*, Valero Energy Corp., Comment Letter on Proposed CAFE Standards for Model Years 2024—2026 Passenger Cars and Light Trucks, 86 Fed. Reg. 49,602 (Oct. 26, 2021), *available at* <http://bit.ly/3UsSkX3>. NHTSA's response swept the issue under the rug. After spending a full page laying out how China dominates the mining, refining, and manufacturing of batteries and conceding the United States “has very little capacity in mining and refining any of the key raw materials,” NHTSA simply said it would “continue to monitor these issues going forward.” 87 Fed. Reg. at 25,993-94. NHTSA then excused its lack of consideration for the electric-battery supply chain because it “is prohibited from considering the fuel economy of electric vehicles in setting the standards” and “[the] issue is [not] entirely ripe in this rulemaking.” *Id.* So despite relying on California's ZEV Program to determine the “state of the world” regarding electric vehicles, 87 Fed. Reg. at 25,722, NHTSA decided to

turn a blind eye to electric vehicles when they pose a direct energy security risk that even NHTSA must acknowledge warrants “serious consideration,” 87 Fed. Reg. at 25,721. That will not do.

B. The Final Rule will undermine American energy security by increasing demand and strain on the power grids.

Energy to power our vehicles is not the only energy security risk deserving consideration but not getting it. NHTSA also unreasonably ignored the Final Rule’s threats to our nation’s electricity grids. *See* 87 Fed. Reg. at 25,994 (recognizing that “[a]nother security-related consideration of increasing fleet electrification is electricity supply,” but offering no response to that concern). No one can dispute that the increased electric-vehicle use the Final Rule creates will affect our nation’s electricity grids. That effect is a bad one.

As one expert explained, “[p]ower grids are already strained as we deal with a greater [renewable energy] share and the challenge of more intermittent energy supply.” Luis Avelar, *The Road to An EV Future Still Has a Few Potholes. Here’s How To Fix Them*, WORLD ECON. FORUM (Jan. 31, 2022), <http://bit.ly/3gEVgRj>. Indeed, this Court recognized earlier in the year that winter weather alone will likely bring “fuel energy security risks” from “stress” to the Northeast region’s “electricity grid.” *Belmont Mun. Light Dep’t v. FERC*, 38 F.4th 173, 177 (D.C. Cir. 2022). Energy crises in California and Texas have already landed above the fold in recent years. *See The Twin Challenges of Increased Electrification*, ENERGY FAIRNESS (Oct.

28, 2011), <http://bit.ly/3FmtxPM>. In short, our grids are “overloaded and running on an antiquated delivery system established several decades ago.” Gina S. Warren, *Hotboxing the Polar Bear: The Energy and Climate Impacts of Indoor Marijuana Cultivation*, 101 B.U. L. REV. 979, 982 (2021); see also Matthew Hutton & Thomas Hutton, *Legal and Regulatory Impediments to Vehicle-to-Grid Aggregation*, 36 WM. & MARY ENV'T L. & POL'Y REV. 337, 338 (2012) (“The electrical grid in the United States faces formidable and interrelated challenges, and the challenges are expected to intensify in the coming years.”).

“Increased adoption” of electric vehicles piles on to this by “add[ing] further electricity load.” Avelar, *supra*. Electric-vehicle use in just Texas is expected to add “about 17,000 megawatts of demand to the state’s grid” over the next few years, “which is nearly a quarter of its peak demand.” James Downing, *Federal Funding Will Speed Up Grid Modernization, Utility Officials Say*, CQ ROLL CALL (Oct. 12, 2022), 2022 WL 6905896. Texas is not alone: California and other States will face similar energy strains from increased electric-vehicle market penetration. See F. Todd Davidson, et al., *Is America’s Power Grid Ready For Electric Cars?*, CITYLAB (Dec. 7, 2018), <https://perma.cc/N3BZ-F9K4>. And to account for already-expected demand jumps (setting aside for now the Final Rule’s push toward electric vehicles), Texas, California, and the rest of the country would need to invest “as much as \$125 billion in the grid to allow it to handle electric vehicles.” Will Englund, *Plug-In Cars Are The Future. The Grid Isn’t Ready*, WASH. POST. (Oct. 16,

2021, 4:06 p.m.), <http://bit.ly/3SEDPkh>. Nothing suggests that level of spending is coming any time soon. So “[t]he electrification of the transportation sector will,” to put it mildly, “catch most utilities a little bit off guard.” Nichola Groom & Tina Bellon, *EV Rollout Will Require Huge Investments In Strained U.S. Power Grids*, REUTERS (Mar. 5, 2021, 7:07 AM), <http://bit.ly/3szNQ4x>.

Nor are increased load levels the only engineering challenges the Final Rule’s fondness for electrification compounds. Distribution is another. Because electric vehicles charge from the low-voltage distribution network, the electricity to power them must flow through hundreds of miles of transmission and distribution lines and several substations. Costly upgrades would thus be needed. Systems could also break down as new electric-vehicle drivers continue to place peak demand at the same hours current drivers do—right when they get home from work. See Alex Brown, *Electric Cars Will Challenge State Power Grids*, PEW CHARITABLE TRS. (Jan. 9, 2020), <http://bit.ly/3sFjn53>; see also *Electric Cars Could Break The Grid If Future Drivers Stick To Today’s Routines*, NATURE (Sept. 27, 2022), <https://bit.ly/3szPaEx>. In the end, the increased electric-vehicle use the Final Rule produces leaves our national energy grids less reliable—and as a result our nation less energy secure.

NHTSA acknowledged that “the final standards would ... increase electricity consumption (as the percentage of electric vehicles increases over time) by about 180 terawatts.” 87 Fed. Reg. at 25,736. But NHTSA calculated

that estimated increase by comparing expected “levels ... under the baseline standards.” *Id.* Remember: whatever NHTSA might say, those baselines are not “the state of the world,” but the state of California. *Id.* at 25,722; *see supra* Part I. So the increase is probably an undershot, as electric vehicle penetration will have to increase at a much higher rate in other markets. Yet NHTSA provides no estimate of what the increased electricity consumption would be *sans* California. The Final Rule thus lacks an accurate accounting of how badly it will threaten the American energy grid.

But that math problem is a small-fry issue compared to the bigger one: NHTSA outright refused to engage with these concerns. Even California spoke up and told NHTSA that “any future discussion around energy security would benefit from considering the availability of a sufficient supply or availability of electricity as well as petroleum.” Cal. Air Res. Bd., Comment Letter on Proposed CAFE Standards for Model Years 2024—2026 Passenger Cars and Light Trucks, 86 Fed. Reg. 49,602 (Oct. 26, 2021), at 11, *available at* <http://bit.ly/3fTgsD8>. NHTSA’s unexplained response about “ripeness” is not reasoned decision-making. The facts are what they are, and if NHTSA is anxious to force electrification now, then it must address the problems that come with that choice now, too. But the agency failed to give “thoughtful consideration” to them. *Int’l Ladies*, 722 F.2d at 822.

All together, the Final Rule undermines our nation’s energy security by increasing the United States’ dependence on foreign counties and destabilizing

power grids already facing substantial infrastructure challenges. NHTSA acted unreasonably in disregarding both problems.

CONCLUSION

The Court should vacate and remand the Final Rule.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, this brief contains 6,495 words, excluding the parts of the document exempted by Rule 32(f), and complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6), as required by Rule 27(d)(1)(E), because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point CenturyExpd BT font.

/s/ Lindsay S. See

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