

CASE NO. 24-1087 & consolidated cases
(oral argument not yet scheduled)

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

COMMONWEALTH OF KENTUCKY, et al.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On petition for review from the
United States Environmental Protection Agency

BRIEF OF AMICUS CURIAE
GROWTH ENERGY
IN SUPPORT OF PETITIONERS

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September 13, 2024

RULE 28(A)(1) STATEMENT

Pursuant to Circuit Rule 28(a)(1), Growth Energy provides the following list of parties to this case, rulings under review, and related cases:

(A) Parties and Amici

All parties in this Court are listed in the petitioners' opening briefs. In addition to this amicus brief, the following groups have filed an amicus brief as of this filing: the Buckeye Institute, the Pacific Legal Foundation, and the Center for Environmental Accountability.

(B) Rulings Under Review

References to rulings under review appear in petitioners' briefs.

(C) Related Cases

References to related cases appear in petitioners' briefs.

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RULE 29 STATEMENT ON SEPARATE BRIEFING, AUTHORSHIP, AND FINANCIAL CONTRIBUTION

Pursuant to Circuit Rule 29(d), Growth Energy certifies that a joint brief is not practicable because no other amicus will address Growth Energy's unique perspective regarding biofuels. This brief was not authored in whole or in part by counsel for any party. No party or counsel for a party, and no person other than Growth Energy or its counsel, contributed money to fund this brief's preparation or submission.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Growth Energy makes the following disclosure:

Growth Energy is a non-profit trade association within the meaning of Circuit Rule 26.1(b). Its members are ethanol producers and supporters of the ethanol industry. It operates to promote the general commercial, legislative, and other common interests of its members. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

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GLOSSARY

BTEX	benzene, toluene, ethylbenzene and xylenes
EPA	Environmental Protection Agency
EV	electric vehicle
E10	gasoline with 10 percent ethanol
E85	gasoline with 85 percent ethanol
GHG	greenhouse gases
RFS	Renewable Fuel Standard program

INTRODUCTION

As Congress recognized when it enacted the RFS almost twenty years ago, biofuels offer numerous climate and other benefits. When compared with petroleum, corn ethanol emits only about half as much GHGs, and cellulosic ethanol, made from the waste components of crops, emits even less. Ethanol and other biofuels also emit less particulate matter and other pollutants harmful to human health. And all these benefits are readily available right now, all while enhancing energy security and supporting U.S. jobs.

Yet, in EPA's rule *designed to reduce emissions of GHGs and other pollutants* in vehicles for model years 2027 and later (the "Rule"), EPA repeatedly ignored biofuels and their enormous, congressionally recognized benefits. EPA's analyses treated vehicles that operate on biofuels the same as vehicles that operate exclusively on fossil fuels. EPA failed to consider using or incentivizing higher biofuel blends in vehicles as a way to reduce emissions. And EPA's cost-benefit analysis looked only at the employment and energy security impacts of the petroleum industry, disregarding the biofuels industry entirely. For the agency that Congress entrusted to *promote* biofuels, EPA's total failure to acknowledge biofuels in the Rule is arbitrary and capricious.

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The impact of EPA's oversights is amplified by another arbitrary aspect of the Rule: EPA inaccurately inflated the benefits of EVs by failing to consider the emissions of electricity generation. Light-duty vehicles are more than just a motor; they are a system that includes the engine and the fuel or electricity that powers it. For EVs, EPA ignores half of that system, with dramatic results. While a passenger car running primarily on ethanol would have roughly similar GHG emissions as an EV charged from the current U.S. electricity grid, EPA treats an EV's GHG emissions as *zero* yet treats a car using biofuel as having the *same emissions as a car burning petroleum*.

EPA's barebones justifications for that dichotomy do not hold water. Its explanation for its treatment of biofuels—that the carbon emitted by biofuels has the same atmospheric impacts as carbon emitted from petroleum—is no answer at all. The absorption of carbon by biofuel feedstocks as they grow is equally impactful to global GHG concentrations. EPA's complaint that lifecycle analysis is hard also falls flat—EPA routinely performs complicated lifecycle analyses in other contexts. And if it needs additional time to perform that analysis here, EPA could assign GHG emissions from biofuels a value of zero in the interim. Finally, EPA's claim that it does not need to consider emissions from power plants as

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part of EVs' emissions because it has separate power plant regulations is a red herring. Regardless of how power plants are regulated, EVs use electricity that internal combustion engines do not, and excluding that component from emissions calculations creates an inaccurate comparison between vehicles.

When those flaws in EPA's methodology are combined with the very stringent GHG limits set in the Rule, the result is a mandate for automobile manufactures to rapidly shift to producing mostly EVs. That mandate exceeds EPA's authority under Section 202 of the Clean Air Act to set technology-neutral standards for emissions from motor vehicles. There is no indication in Section 202 that Congress intended to authorize EPA to do away with biofuels. To the contrary, the RFS demonstrates that Congress has instructed EPA to "increase production of clean, renewable fuels."

ARGUMENT

I. The Rule arbitrarily puts a thumb on the scale in favor of EVs and against biofuels.

An agency acts arbitrarily when it has “failed to consider an important aspect of the problem.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Here, EPA has failed to consider two—it has disregarded both the significant *benefits* of using biofuels and the upstream *emissions* of EVs. Those two failures reinforce each other, leading EPA to calculate the emissions of EVs and biofuels in a way that bears no resemblance to reality.

A. EPA ignored significant benefits of biofuels.

1. EPA repeatedly failed to consider the carbon uptake of biofuel feedstocks.

Biofuels are made from crops and other plants that absorb atmospheric carbon dioxide when they grow. In a full lifecycle analysis, then, biofuels significantly reduce GHG emissions as compared with petroleum. A recent analysis by Harvard researchers found that corn ethanol reduces GHG emissions by 46 percent compared to gasoline. *See Scully, et al., Carbon intensity of corn ethanol in the United States: state of the science* 16 *Environ. Res. Lett.* 043001 (2021).

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Biofuels' emissions benefits are only improving. Biofuel production facilities are implementing carbon capture and storage and installing cleaner power sources. Feedstock producers continue to develop "climate smart" agricultural practices that generate higher yields with lower GHG emissions. Comments of Growth Energy on Proposed Rule, EPA-HQ-OAR-2022-0829-0580 ("Growth Comments") at 3.

Unlike other alternatives to fossil fuels, biofuels are available now and are compatible with existing vehicle engines and existing fueling stations. To the extent that some upgrades would be necessary to facilitate storage and fueling with higher biofuel blends, the cost of doing so is minimal compared to the costs of building an entirely new infrastructure for EVs. Growth Comments at 8–9.

EPA turns a blind eye to the readily achievable carbon-reduction benefits of biofuels. Specifically, EPA considers only tailpipe emissions, thus deliberately ignoring biofuels' lifecycle emissions benefits. EPA's blinkered analysis creates inaccurate and arbitrary results that pervade the Rule.

First and foremost, EPA's calculations for the emissions of vehicles with internal combustion engines are plainly incorrect. The vast majority

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of light-duty vehicles with internal combustion engines are currently operated using a blend of biofuels, typically E10 (10% ethanol). Some vehicles can operate at higher blend levels, such as E85 (85% ethanol). Vehicles running on E85 have similar GHG emissions to current EVs on a lifecycle basis,¹ but EPA treats such vehicles *as if they were operated with fossil-fuel-only gasoline*. RTC at 3,271.

EPA's blindspot to biofuels also prevented it from considering ways to incentivize biofuels. EPA could have, for example, established favorable GHG compliance values for flex-fuel vehicles that can use E85, a program that EPA had in place until 2015. *See* 77 Fed. Reg. 62624, 62829-30 (Oct. 15, 2012). But because EPA erroneously treated biofuels as if they offer no GHG emissions benefits, EPA refused to consider whether such an incentive program could drastically cut GHG emissions. Nor did EPA consider whether it could provide any other type of incentive mechanism, such as compliance values based on real-world use of E85, or compliance

¹ *See* Kelly et al., “Cradle-to-Grave Lifecycle Analysis of U.S. Light-Duty Vehicle-Fuel Pathways: A Greenhouse Gas Emissions and Economic Assessment of Current (2020) and Future (2030-2035) Technologies”, report ANL-22/27, June 2022. <https://www.osti.gov/biblio/1875764> (comparing the lifecycle emissions of cars operating on E85 using current technology with lifecycle emissions of average EVs with 200–400 mile ranges).

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values that recognize the GHG benefits of other blends of ethanol or other biofuels.

While EPA has disregarded biofuels in previous iterations of its tailpipe rules, this Rule is fundamentally different (not that past arbitrary actions excuse present arbitrary actions). The Rule is dramatically more stringent than its predecessors, for the first time setting standards that EPA projects could cause 68 percent of new cars to be EVs by 2032. 89 Fed. Reg. at 28,057. As discussed below, the rule permanently assigns EVs emissions of zero grams per mile, ignoring the upstream emissions that electricity generation requires. *See* Section I.B, *infra*. Against that backdrop, EPA's continued decision to disincentivize biofuels through incomplete accounting of their emissions will have a significant negative impact on biofuel use, effectively missing an opportunity at GHG reductions that is readily achievable in the near-term.

EPA did not have to do so. While the Rule, like its predecessors, is often referred to colloquially as a "tailpipe rule," Section 202 does not force EPA to focus myopically on a car's tailpipe and, thus, to ignore the lifecycle emissions of producing, transporting, and combusting fuel and engines. Section 202 authorizes EPA to set "standards" that are "applicable to the emission of any air pollutant from . . . new motor vehicles or

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new motor vehicle engines.” 42 U.S.C. § 7521(a)(1). Such standards can and should consider all factors that affect the vehicle’s emissions. And the carbon dioxide that is absorbed by crops directly effects the overall impact of the carbon dioxide emitted from a vehicle’s tailpipe because 100 percent of what is emitted when combusting biofuels was recently absorbed during the biofuel feedstock’s growing cycle.

EPA has repeatedly acknowledged it is not “legally required” to “exclud[e] upstream GHGs.” 75 Fed. Reg. at 25,437. Indeed, EPA has adopted requirements and credits under Section 202 that go beyond the emissions from car tailpipes, such as credits for efficient air conditioning units, 89 Fed. Reg. 27,918, “off-cycle” credits that encourage automobile manufacturers to install emissions reduction technologies that are not reflected in tailpipe emissions, *id.*, and its now-terminated credits for vehicles that can operate on E85, 77 Fed. Reg. at 62829-30. And, prior to this Rule, EPA repeatedly promised to consider upstream emissions of EVS in the future. 75 Fed. Reg. at 25,437. If EPA can consider upstream emissions, it likewise can consider upstream carbon sinks (effectively, negative emissions) like the carbon absorbed by corn and other crops used in biofuel production.

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EPA also has the technical wherewithal and capacity to account for the GHG reduction benefits of biofuels. Despite EPA's protests that lifecycle analysis here would be too complicated, RTC at 3,268–69, EPA conducts complex lifecycle analyses all the time in other contexts, including in the RFS program. EPA could also use assumptions to either simplify its modeling or at least put biofuels and EVs on a more level playing field than they are now. EPA therefore has two broad options for how it could have treated biofuels in this Rule:

- First, and most accurately, EPA could conduct lifecycle analyses for EVs, petroleum-fueled internal combustion engines, and biofuels. That analysis could make some generalized assumptions, including considering the U.S. electricity market or corn production as a whole rather than tracing the lifecycle emissions of each charge of an EV or tank of biofuel. Even with those assumptions, it would be dramatically more accurate than completely disregarding both the emissions of EVs and the benefits of biofuels.
- Second, EPA could, at a minimum, assign biofuels a compliance value of zero grams per mile in recognition of the fact that all emissions from combusting biofuels are previously absorbed by

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crops. That basic scientific fact is recognized as a component of multiple other regulatory programs, including the RFS and California's Low Carbon Fuel Standard. To the extent it would take EPA additional time to develop a lifecycle analysis and eliminate its zero grams per mile value for EVs, that approach could be used now to at least reduce the extreme disparity between the treatment of EVs and biofuels.

So, EPA doubtlessly could have considered biofuels' GHG benefits in the Rule and simply chose not to. Yet, EPA articulates no valid basis for that choice. The preambles to the proposed and final Rule say nothing about the topic. In its separate response to comments document, EPA offers that it "finds it appropriate to continue this policy of treating all tailpipe CO₂ emissions equivalently, since once they have been emitted to the atmosphere the CO₂ molecules have equivalent impacts on the climate." EPA Response to Comments, EPA-420-R-24-005 at 3,271 (March 2024) ("RTC"), *available* at <https://www.epa.gov/system/files/documents/2024-03/420r24005.pdf>. That truism is no explanation at all. EPA does not explain *why* it is only looking at the CO₂ molecules emitted from the tailpipe after combusting biofuels when it can and does consider air

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conditioning efficiency, “off-cycle” credits, and other factors that impact vehicles’ emissions profile outside of the tailpipe.

What EPA’s non-explanation boils down to is a naked policy choice to disincentivize biofuels and favor EVs. But, EPA is not making that policy choice after doing its homework and meaningfully comparing emissions from biofuels against those from EVs. Instead, EPA intentionally excluded important information in a way that makes biofuels appear worse than EVs. That type of willful failure to consider important information is “one of the hallmarks of arbitrary and capricious reasoning.” *Util. Solid Waste Activities Grp. v. Env’t Prot. Agency*, 901 F.3d 414, 430 (D.C. Cir. 2018).

2. EPA ignored the potential of biofuels to reduce other emissions, create jobs, and enhance energy security.

Using higher blends of biofuels has significant benefits beyond GHG emissions reductions. Ethanol reduces emissions of other pollutants that the Rule purports to minimize, including particulate matter, carbon monoxide, total hydrocarbons, and the toxic benzene, toluene, ethylbenzene,

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and xylene compounds (known collectively as “BTEX”).² Ethanol is a means of enhancing the octane rating of fuel without toxic additives that have historically been used, like lead or methyl tert-butyl ether. Growth Comments at 10, 14–15. And using biofuels made from U.S.-grown crops enhances energy security, promotes jobs, and supports the rural economy. *Id.* Of particular note in light of recent economic conditions, domestic biofuels can help avoid prices in fuel spikes driven by fluctuations in foreign oil supply. *Id.*

EPA completely ignored those benefits in the Rule. EPA incorporated only one type of test fuel for light-duty vehicles, E10 (10% ethanol). 89 Fed. Reg. at 29,240. While that methodology accounts for the benefits of a small portion of ethanol at reducing particulate matter and other pollutants, that methodology ignores that greater biofuel blends will achieve greater reductions. EPA did not consider E85 or higher biofuel blends.

² See MacIntosh, *et al.*, *Response to Proposed Renewable Fuel Standard (RFS) Program Standards for 2023–2025*, Environmental Health & Engineering (Feb. 10, 2023); Karavalakis, Durbin, & Tang, *Final Report, Comparison of Exhaust Emissions Between E10 CaRFG and Splash Blended E15*, prepared for: California Air Resources Board (CARB), Growth Energy Inc./Renewable Fuels Association (RFA), and USCAR (Jan. 2022).

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That decision, with no explanation, was arbitrary. It is particularly arbitrary because the proposed rule considered methods of reducing BTEX compounds in vehicle emissions, 88 Fed. Reg. at 29,401, but it ignored the potential of higher ethanol blends to do so.

EPA also completely ignored biofuels in its cost-benefit analysis. EPA considered the impacts of its proposed rule on employment in the petroleum industry but did not consider impacts on employment in the biofuels industry. *Id.* at 29,393. EPA considered the energy security risks of petroleum demand but did not consider how domestically produced biofuels mitigates those risks. *Id.* at 29,388. And by failing to consider higher blends of biofuels, EPA did not analyze the costs and benefits of achieving GHG reductions through incentivizing biofuels. Glaringly, EPA did not even try to justify these holes in its analysis.

B. EPA did not account for EVs' GHG emissions or other downsides of EVs.

The Rule's mistreatment of biofuels is compounded by its treatment of EVs, which is inaccurate in the opposite direction. EPA ignores the significant upstream emissions associated with the electricity generated by EVs, rendering the rule's comparison of vehicles operated on biofuels to EVs doubly inaccurate.

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This should not be a controversial point. Even EPA acknowledges that the Rule wildly underestimates emissions from EVs. In a previous tail-pipe rule, EPA acknowledged that “the zero grams/mile compliance value for EVs ... does not reflect the increase in upstream GHG emissions for EVs,” which EPA estimated was *120 grams per mile*. 75 Fed. Reg. 25,324. And that estimate of 120 grams per mile for EVs’ upstream emissions does not even account for emissions associated with production of batteries and mining for essential battery components. Obtaining the nickel needed for EV batteries requires significant fossil energy expenditures and GHG emissions associated with land use, including the clear-cutting of rainforest in Indonesia. Growth Comments at 4–5.

Comparing the lifecycle emissions of EVs with the lifecycle emissions of biofuels reveals just how inaccurate EPA’s methodology is. A recent study by researchers at Argonne National Laboratory found that the lifecycle emissions of current cars using E85 are similar to current EVs.³ (And those are just nationwide averages—under some conditions, such as when an EV is particularly heavy, has a large battery, or is operated in an area with electricity generated disproportionately from coal, an EV

³ See Kelly et al., *supra* n. 1.

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would emit more GHGs than a comparable vehicle using E85.) Yet, the Rule treats all EVs as emitting zero GHGs while treating vehicles using E85 as having the same GHG emissions as vehicles using petroleum.

For those reasons, the National Academy of Sciences has criticized the type of tailpipe-only GHG accounting used in the Rule at issue here for failing to “fully capture” emissions from “the total light-duty vehicle system.”⁴ The National Academy noted a tailpipe-only analysis generates inaccurate comparisons between vehicles using different fuels. “[D]eep GHG emissions reductions” require a higher-level of analysis, a system-based approach, that considers “not only onboard vehicle emissions, but also the emissions from related sectors, like electricity (for vehicle charging), and manufacturing (of vehicles and their materials and components).”⁵

EPA’s decision to use its admittedly inaccurate zero grams per mile value for EVs is a pure and unjustified policy choice. In previous rules, EPA acknowledged as much. EPA explained that, while it would eventually phase out its zero grams per mile treatment of EVs, it planned to

⁴ National Academy of Sciences (NAS), *Assessment of Technologies for Improving Light-Duty Vehicle Fuel Economy—2025-2035* at 13-416 (2021).

⁵ *Id.*

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maintain that treatment in the short term because it “acts like a credit” that boosts the EV industry. 75 Fed. Reg. 25,324.

Yet in the Rule, instead of eliminating the artificial zero grams per mile incentive for EVs, EPA retained it, permanently locking in the policy choice. EPA purported to justify that decision in part by noting that upstream sources are governed by stationary source regulations. 89 Fed. Reg. at 27,923. That explanation makes no sense. EPA should have assessed EVs’ upstream emissions because they are material to a complete assessment of the net GHG impact of significantly expanding the number of EVs. Adding EVs to vehicle fleets has the effect of shifting the generation of power from inside of internal combustion engines to the power plants that generate electricity. Of course, if EPA applies more stringent regulations to power plants and thereby lowers carbon emissions from the electrical grid, the emissions profile of EVs on a lifecycle basis will improve. But the manner in which EPA regulates power plants does not change the fact that EVs will require *more* electricity than internal combustion engines, and that electricity usage is ignored in EPA’s final rule.

Failing to account for the impact of that electricity demand is arbitrary and creates an inaccurate comparison between EVs and internal combustion engines, particularly those that run on biofuels. *See GPA*

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Midstream Ass'n v. U.S. Dep't of Transp., 67 F.4th 1188, 1199 (D.C. Cir. 2023) (treating two things the same is arbitrary if they are not “similar in all important respects”). That inaccurate comparison becomes even more pointed when considering that EV emissions are impacted by both the efficiency of the EV and the power plants supplying power to the local grid. The Rule’s approach treats the emissions from someone driving a Hummer EV in an area where electricity is generated primarily from coal as *zero*, even though those emissions would be markedly higher than someone driving an efficient sedan running on biofuel or a high-percent-age biofuel blend.⁶

EPA provides another rationale for keeping zero grams per mile for EVs, which actually illustrates why EPA’s approach in the Rule is wrong. According to EPA, “it is unclear why it would be appropriate” to account for upstream emissions for EVs “but not for all vehicles, including gaso-line-fueled vehicles.” *Id.* Growth Energy agrees. Considering the lifecycle emissions of all vehicles is *exactly* what Growth Energy has advocated—

⁶ Failing to evaluate emissions from vehicles and engines on a lifecycle basis also ignores emissions relevant to other emerging technologies such as hydrogen-powered vehicles; ignoring the carbon intensity of the wildly varying processes through which hydrogen is produced leads EPA to the same flawed conclusions regarding the emissions associated with hydrogen combustion.

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EPA should conduct a lifecycle emissions analysis of EVs and a lifecycle emissions analysis of internal combustion engines. A complete lifecycle analysis, which is what the National Academy of Sciences recommends, is the best way to achieve an accurate comparison of emissions between vehicles using different fuels.⁷

It is not that EPA must assess the lifecycle emissions of every make and model of vehicle on the road. Making assumptions and setting parameters is a key aspect of modeling, and a lifecycle model using some generalized assumptions would still be dramatically more accurate than EPA's current approach. For example, EPA could compare emissions from power generation, oil and gas extraction, and biofuel production broadly—an analysis EPA started in a previous rulemaking, when it found that electricity production adds about 120 grams per mile more emissions than the upstream emissions associated with oil and gas. *See* 75 Fed. Reg. 25,324. EPA could then add a lifecycle assessment of biofuel production, and it would be able to compare on an aggregate basis the

⁷ Or, if EPA instead maintains a tailpipe-only approach, it must at least treat biofuels as emitting zero grams per mile as well because all carbon they emit has been absorbed by the crops from which they are produced. *See* Section I.A, *supra*.

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emissions of EVs and internal combustion engines. EPA could also conserve effort and resources by using lifecycle analyses of biofuels it has already conducted for other regulatory programs, like the RFS.

What EPA cannot do is simply continue to treat EVs as having zero GHG emissions. That failure is not academic; a proper analysis would show that, while EVs are one valuable part of decarbonizing the transportation sector, increased use of biofuels and other efficiency improvements in combustion engines can play a more significant role than the Rule allows.⁸

⁸ In addition to inaccurately assessing EV emissions, EPA also overestimated the ease of rapidly expanding EV infrastructure. EPA used its “HD TRUCS” model to estimate the potential rate of EV adoption, but that model focused mainly on the ability of the auto industry to produce EVs, without sufficient consideration of scaling the infrastructure necessary to support and charge them. Comments of POET, LLC on Proposed Rule, EPA-HQ-OAR-2022-0829-0609 at 12-13. To the extent EPA considered EV infrastructure, it is focused narrowly on costs and ignored issues like the need for electric grid improvements, permitting challenges, and competing local land use priorities. *Id.* at 13. While EPA adjusted its modeling slightly between the proposed and final rule, it still failed to adequately account for major areas of uncertainty regarding EV infrastructure development.

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II. The Rule exceeds EPA's authority under Section 202 of the Clean Air Act and is Inconsistent with the RFS.

EPA's treatment of EVs and biofuels, combined with its stringent standards for GHGs under the Rule, combine to functionally mandate that automobile manufacturers produce EVs. Even if an automobile manufacturer decided to lower GHG emissions by producing cars suited to high biofuel blends, it would receive no credit towards compliance with the Rule for doing so. So, the *only* way for auto manufacturers to comply is to shift rapidly towards producing primarily EVs. EPA lacks authority to require such a switch in vehicle type under Section 202 of the Clean Air Act, which directs EPA to set technology-neutral "standards" for reducing emissions of air pollutants. 42 U.S.C. § 7521(a).

The RFS program, an amendment to the Clean Air Act that was passed as part of the 2007 Energy Independence and Security Act, demonstrates that Congress did not view Section 202 as a mandate for electrification. Under the RFS, refiners and importers of petroleum fuels must blend biofuels into their products and thereby increase the prevalence of biofuels as a component of the domestic market for transportation fuel. *See* 42 U.S.C. § 7545(o). An explicit purpose of the RFS was to "increase production of clean, renewable fuels." Pub L. 110-140 (110th

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Cong. 2017). Congress accomplished that goal with a set of annually increasing volumes of renewable fuel that EPA translates into percentage standards applicable to refiners and importers—a “market forcing policy” designed to “create demand pressure to increase consumption of renewable fuel.” *Americans for Clean Energy v. Env’t Prot. Agency*, 864 F.3d 691, 705 (D.C. Cir. 2017) (internal quotations omitted).

Because the RFS was enacted after Section 202, it indicates that Congress did not understand Section 202 to authorize EPA to phase out all liquid fuels, or it would have legislated differently. Congress passed the Energy Independence and Security Act without identifying any need to amend Section 202, reinforcing what the text of that provision dictates: it is not a license to mandate EVs at the expense of vehicles that can combust biofuels.

CONCLUSION

The Court should vacate the Rule and remand to EPA with instructions to consider the benefits of biofuels and the upstream emissions of EVs.

Respectfully submitted,

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September 13, 2024

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1), I certify that the foregoing meets the type-volume limitations of this court's order regarding briefing schedule because it contains 4,160 words.

/s/ Bryan M. Killian

CERTIFICATE OF SERVICE

I certify that, on September 13, 2024, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the D.C. Circuit. I used the Court's CM/ECF system, which serves registered CM/ECF users. All attorneys in this case are registered CM/ECF users and were served accordingly.

/s/ Bryan M. Killian

CASE NO. 24-1087 & consolidated cases
(oral argument not yet scheduled)

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

COMMONWEALTH OF KENTUCKY, et al.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On petition for review from the
United States Environmental Protection Agency

GROWTH ENERGY'S MOTION FOR
LEAVE TO FILE AMICUS BRIEF
IN SUPPORT OF PETITIONERS

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September 13, 2024

Pursuant to Fed. R. App. P. 29(a)(3) and D.C. Cir. R. 29(b), Growth Energy respectfully moves this Court for leave to file the attached brief as amicus curiae in support of the Petitioners.

Growth Energy is the world's largest association of biofuel producers, representing 93 biorefineries that produce nearly 9 billion gallons annually of low-carbon renewable fuel and 115 businesses associated with the biofuel production process. Growth Energy believes that it can provide the court with a unique perspective that may be helpful to the Court's analysis of the issues in this case. As explained in the attached brief, biofuels are an important means of reducing emissions of greenhouse gases and other pollutants, yet they are disincentivized by and largely ignored in EPA's rule governing emissions from motor vehicles.

All Private Petitioners have consented to the filing of this amicus brief. Counsel for the Commonwealth of Kentucky also indicated that the Petitioners in 24-1087 consent. Counsel for Growth Energy contacted counsel for Respondents on September 13, 2024 but have not yet received a response regarding Respondents' position.

/s/ Bryan Killian

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