

CASE NO. 24-7001 & consolidated cases

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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*IN RE: NATIONAL HIGHWAY TRAFFIC SAFETY  
ADMINISTRATION DEPARTMENT OF TRANSPORTATION,  
CORPORATE AVERAGE FUEL ECONOMY STANDARD  
FOR PASSENGER CARS AND LIGHT TRUCKS  
FOR MODEL YEARS 2027 AND BEYOND AND  
FUEL EFFICIENCY STANDARDS FOR HEAVY DUTY PICKUP  
TRUCKS AND VANS FOR MODEL YEARS 2023 AND BEYOND  
89 FED. REG. 52540, PUBLISHED ON JUNE 24, 2024*

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On petition for review from the  
United States Environmental Protection Agency

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BRIEF OF AMICUS CURIAE  
GROWTH ENERGY  
IN SUPPORT OF PETITIONERS

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November 26, 2024

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## INTEREST OF AMICUS CURIAE

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. Biofuels are an important means of enhancing energy security and reducing emissions, yet, as explained in further detail in the brief, NHTSA's rule both ignores opportunities to promote biofuel use and actively disincentivizes biofuels by functionally mandating increasing EV production.

All parties have consented to the filing of this brief.

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## STATEMENT REGARDING AUTHORSHIP

No party's counsel authored this brief in whole or in part, and no person other than amicus and their counsel contributed money intended to fund the preparation or submission of this brief.

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Growth Energy makes the following disclosure:

Growth Energy is a non-profit trade association. 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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# CONTENTS

Interest of Amicus Curiae .....	ii
Statement Regarding Authorship .....	iii
Corporate Disclosure Statement .....	iv
CONTENTS .....	v
AUTHORITIES .....	vi
GLOSSARY .....	vii
INTRODUCTION .....	1
ARGUMENT .....	4
I.    The Rule’s assumptions regarding EV usage are inconsistent with both EPCA and the RFS. ....	4
II.   The Rule arbitrarily failed to consider mechanisms for incentivizing biofuel use. ....	6
A.   NHTSA ignored significant benefits of biofuels. ....	7
B.   NHTSA did not consider a conversion factor for mid-level biofuel blends. ....	11
CONCLUSION .....	13
CERTIFICATE OF COMPLIANCE.....	14
CERTIFICATE OF SERVICE.....	15

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## AUTHORITIES

### Cases

<i>Metropolitan Taxicab Bd. of Trade v. City of New York</i> , 615 F.3d 152 (2d Cir. 2010) .....	5
<i>Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983) .....	6

### Statutes

49 U.S.C. § 32902 .....	4, 6, 10, 7, 11
49 U.S.C. § 32919 .....	5
Pub. L. 94–163, 89 Stat. 871 (94th Cong. 1975) .....	1
Pub. L. 110–140, 121 Stat. 1492 (110th Cong. 2007) .....	5, 6

### Other Authorities

40 C.F.R. 600.510-12 .....	11
89 Fed. Reg. 52540 (June 24, 2024) .....	4, 10

## GLOSSARY

CAFE	Corporate Average Fuel Economy
EISA	Energy Independence and Security Act
EPA	Environmental Protection Agency
EPCA	Environmental Policy and Conservation Act
EV	Electric Vehicle
GHGs	Greenhouse Gases
NHTSA	National Highway Traffic Safety Administration
RFS	Renewable Fuel Standard

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## INTRODUCTION

As Congress recognized when it enacted the RFS almost twenty years ago, biofuels offer numerous climate and energy security benefits. They enhance energy security by providing an abundant source of domestically produced fuel that can be used in existing engines without modification or extensive infrastructure changes. When compared with petroleum, corn ethanol emits only about half as much GHGs. Cellulosic ethanol, made from the waste components of crops, emits even less. And ethanol and other biofuels have numerous other benefits, including reducing emissions of other pollutants that harm human health, supporting the rural economy, and creating well-paying jobs.

In its Corporate Average Fuel Economy standards for 2027 and beyond (“CAFE standards” or “the Rule”), NHTSA ignored all of those benefits. In so doing, it lost sight of Congress’s purposes in enacting EPCA, which included both “increase[ing] domestic energy supplies and availability” and “restrain[ing] energy demand.” Pub. L. 94–163.

That disregard of the potential of biofuels is part of the current administration’s efforts, in this rule and in multiple rules promulgated by EPA, to prioritize EVs over all other types of vehicles. While EVs undoubtedly have advantages, that one-track focus on EVs leads to rules



## INTRODUCTION

2

that are arbitrary, inconsistent with law, and miss important benefits of other technologies while also failing to minimize costs.

As a result, there are two key flaws in the Rule here:

*First*, NHTSA assumed a heightened “baseline” adoption of EVs, despite EPCA’s prohibition on considering EVs when determining the fuel economy of vehicles. While NHTSA argues that it is only considering EV adoption that would happen without its standards, the problem is that NHTSA’s estimates are inherently uncertain. If real-world EV use in the absence of the CAFE standards turns out to be lower, even by a small amount, the standards will have the effect of materially excluding non-EVs from the market, including vehicles capable of running on bio-fuels or biofuel blends. And real-world EV use may be *much* lower if the state EV mandates on which NHTSA premised its estimates are invalidated. That result would be inconsistent with not only EPCA but also the RFS, which was passed by Congress expressly to increase production of renewable fuels.

*Second*, NHTSA arbitrarily failed to consider actions it could have taken to meet Congress’s goals through greater biofuel adoption. In particular, NHTSA did not even assess whether to account for the non-petroleum portion of “mid-level” blends of 30 or 50 percent ethanol and

## INTRODUCTION

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3

petroleum. NHTSA already accounts for vehicles that can use high-level ethanol blends by counting only the petroleum portion of the fuel in those vehicles, but it did not articulate any basis for refusing to extend that treatment to mid-level blends. In so doing, NHTSA unjustifiably rejected an opportunity to enhance our nation's energy security and reduce emissions.

For those reasons and those set forth in further detail below, the Rule should be vacated.

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## ARGUMENT

### I. The Rule’s assumptions regarding EV usage are inconsistent with both EPCA and the RFS.

#### A. EPCA

As explained further in the brief of industry and state petitioners, ECF No. 102-1, the Rule violates EPCA, which specifies unequivocally that NHTSA may not “consider the fuel economy” of electric vehicles when setting fuel-economy standards. 49 U.S.C. 32902(h)(1). NHTSA protests that it is only considering EV adoption in a “baseline” and then assessing the degree to which incremental improvements can be achieved by ICE engines, *see, e.g.*, 89 Fed. Reg. 52545, but that does not make its actions lawful, for several reasons.

*First*, the plain text of Section 32902(h)(1) categorically prohibits NHTSA from considering EV fuel economy. There is no exception for a “baseline”—indeed, there are no exceptions at all. Considering whether EVs will be part of the anticipated increase in EV adoption—and using that baseline to build the standards—is inherently “considering” EV fuel economy. Practically speaking, whether NHTSA characterizes EVs as part of their baseline estimate or part of the incremental increase, they both increase the standards by the same amount.

*Second*, that inconsistency with the statutory text is exacerbated because NHTSA’s baseline assumption is likely to be an overestimate of EV adoption. The Rule’s baseline includes the anticipated impacts of state electric vehicle mandates that are currently being challenged as preempted by federal law. EPCA prohibits states from adopting any “law or regulation related to fuel economy standards or average fuel economy standards for automobiles,” 49 U.S.C. § 32919(a), and courts have found analogous state laws incentivizing hybrid taxi use to be sufficiently “related to” fuel economy that they are preempted. *See, e.g., Metropolitan Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 157 (2d Cir. 2010).

#### B. The RFS

Incorporating an EV baseline into CAFE standards in such a way that they are effectively an EV mandate is also inconsistent with another statute: the Energy Independence and Security Act (“EISA”), which established the RFS program. The central goal of the RFS is “increase the production of clean, renewable fuels.” Pub. L. No. 110–140, 121 Stat. 1492 (110th Cong. 2007). That goal, when read in context with EPCA’s prohibition on considering EV adoption, demonstrates a consistent interest of

## ARGUMENT

6

Congress in preserving a diverse supply of fuel sources, including a role for liquid fuels (and biofuels in particular).

EISA was passed decades after EPCA and was therefore enacted against the landscape of EPCA’s statutory prohibition against “consider[ing] the fuel economy of automobiles, like EVs, that operate “only on alternative fuel.” 49 U.S.C. 32902(h)(1). Given Congress’s strong interest in promoting renewable fuel growth through the RFS, it would have made no sense for it to leave unamended a law on the books that was understood to authorize the eventual phase out biofuels in favor of EVs. Indeed, Congress amended other portions of EPCA in EISA. *See, e.g.*, Pub. L. 110–140 (e.g., making amendments related to NHTSA’s treatment of credits from overcompliance). Congress’s decision to not to make other modifications demonstrates that it understood EPCA just as its text dictates: a statute that plainly does not allow NHTSA to factor in EV adoption to its standards in any way.

## II. The Rule arbitrarily failed to consider mechanisms for incentivizing biofuel use.

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, NHTSA has

## ARGUMENT

7

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repeatedly failed to consider biofuels—both by ignoring their benefits and by failing to examine the potential for biofuels to be used in vehicles in different blend levels.

A. NHTSA ignored significant benefits of biofuels.

In setting the CAFE Standards, NHTSA is directed by EPCA to consider, among other factors, “the need of the United States to conserve energy.” 49 U.S.C. 32902(f). Increasing the nation’s use of biofuels meets that goal, by both providing another source of fuel that reduces the nation’s demand for petroleum fuels and by reducing GHG and other emissions.

To begin with, ethanol and other biofuels significantly enhance energy security because of their flexibility—they can be used in existing ICE vehicles and fueled at existing gas stations. Consumers and operators of fleets around the country therefore have the ability to use more biofuels. To the extent that some upgrades are necessary to facilitate storage and fueling with higher blends, the marginal cost of doing so is minimal.

## ARGUMENT

8

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In contrast, it is not as simple to convert to EV technology. Doing so at scale requires massive investments in both charging infrastructure and the electric power sufficient to support massive new electricity demand. Developing sufficient charging infrastructure can be difficult in rural areas and in locations where there are competing land uses. And developing additional electric power faces multiple challenges—the country will need significantly more electric capacity and, for EVs to have their intended GHG reduction benefits, that additional electric generation will need to be relatively low-carbon.

Ethanol's benefits in reducing both GHG and other emissions are also significant. A recent meta-analysis by Harvard researchers that accounted for all aspects of the lifecycle emissions of corn ethanol concluded that ethanol reduces GHG emissions by 46 percent compared to gasoline.<sup>1</sup> Recent developments in the biofuels industry, such as the increasing use of carbon capture and storage and clean power sources at biofuel production facilities, are helping to drive lifecycle emissions from biofuels

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<sup>1</sup> Scully, et. al., *Carbon intensity of corn ethanol in the United States: state of the science* 16 Environ. Res. Lett. 043001 (2021).

## ARGUMENT

9

even lower.<sup>2</sup> Ethanol also boosts octane in fuel without the harmful impacts of alternative octane-boosting fuel additives such as aromatics.<sup>3</sup> Decreasing aromatics in fuel has direct impacts on tailpipe emissions, with higher-ethanol fuels resulting in lower emissions of black carbon (BC), particle number (PN), benzene, toluene, ethylbenzene, m/p-xylene and o-xylene (BTEX), and olefins.<sup>4</sup>

But despite those benefits, the Rule and its preamble barely mention ethanol or any other biofuels. NHTSA did not assess whether it could or should do more to incentivize greater use of biofuels in a way that promotes EPCA's goal of conserving energy. Nor did it consider the negative impacts on energy security that would occur as a result of the

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<sup>2</sup> Growth Energy, *Putting Carbon to Work: Biorefineries' Critical Contributions to Net-Zero*, <https://growthenergy.org/wp-content/uploads/2022/06/GROW-22019-Issue-Brief-Carbon-Capture-2022-06-22-R8.pdf>.

<sup>3</sup> Kazemiparkouhi et al., *Comprehensive US database and model for ethanol blend effects on regulated tailpipe emissions*. 812 *Science of The Total Environment* 151426, (Mar. 2022).

<sup>4</sup> MacIntosh, et al., *Response to Proposed Renewable Fuel Standard (RFS) Program Standards for 2023–2025*, Environmental Health & Engineering (Feb. 10, 2023).



## ARGUMENT

10

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Rule functionally mandating EV usage and thereby shrinking the market for biofuels.

Indeed, NHTSA's most substantive discussion of biofuels in its preamble is its suggestion that comments from biofuels interests were "misguided" because NHTSA considered certain uses of biofuels in its baseline and, according to NHTSA, it would need to *stop* considering dedicated biofuel vehicles in its baseline if it stopped including EVs. 89 Fed. Reg. at 52,565. That is entirely beside the point. Growth Energy (and to Growth Energy's knowledge, other biofuels interests) are not concerned with how dedicated biofuel vehicles are counted in NHTSA's baseline. What Growth Energy has advocated concerns the incentives for biofuel use provided by the CAFE standards' compliance calculation. Specifically, as discussed below, Growth Energy supports expanding to additional blend levels of ethanol that calculation's exclusion of the biofuel portion of fuel blends.<sup>5</sup> NHTSA's failure to consider that option—as well

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<sup>5</sup> Doing so would not run afoul of Congress's prohibition on considering the "fuel economy" of dedicated vehicles 49 U.S.C. § 32902(h)(1) because it is focusing only on the quantity of petroleum used in the vehicles. To the contrary, it is consistent with the very next sentence in the statute that NHTSA "shall consider

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as its general disregard of the value of biofuels to achieving the goals of EPCA—render the Rule arbitrary and capricious.

**B. NHTSA did not consider a conversion factor for mid-level biofuel blends.**

The Rule continues NHTSA’s longstanding treatment of “flex fuel vehicles” that can run on high blends of biofuels—assessing their fuel use based solely on the petroleum portion of the fuel. Specifically, vehicles that are capable of using 85 percent or more of ethanol are assigned a volumetric conversion factor (“VCF”) of 0.15, meaning that they are counted as using only 15 percent as much fuel. 40 C.F.R. 600.510-12(c)(2)(v). That treatment of flex-fuel vehicles is appropriate and consistent with EPCA’s instruction that “a gallon of a liquid alternative fuel used to operate a dedicated automobile is deemed to contain .15 gallon of fuel” and in accordance with EPCA’s goals of reducing petroleum usage and enhancing energy security. *See, e.g.*, 49 U.S.C. 32902(f).

The problem with the Rule is that it arbitrarily failed to consider any mechanism for an appropriate calculation for blends of ethanol or other biofuels of less than 85 percent. That ignores the potential of mid-

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dual fueled automobiles to be operated only on gasoline or diesel fuel.” *Id.* § 32902(h)(1).

## ARGUMENT

12

level ethanol blends. There is significant interest in using blends of ethanol blends such as E30 (thirty percent ethanol) or E50 (fifty percent ethanol), in part because the properties of ethanol increase the octane rating of fuel. Greater use of mid-level ethanol blends would enhance energy security by ensuring that a greater portion of the gasoline supply consists of ethanol, while simultaneously allowing automakers to optimize engines to improve efficiency by making engines smaller and increasing the use of turbocharging. Yet, the Rule treats mid-level blends the same as petroleum fuels for purposes of the CAFE standards, disincentivizing their further development, and thereby running counter to the goals of EPCA.

Implementing a mid-level blend VCF would be straightforward—NHTSA could assign the VCF based on the petroleum portion of the fuels on which a manufacturer's engines are designed to operate. So, for example, an engine optimized for use with E30 could be assigned a VCF of .70. A mid-level blend VCF is therefore a simple way to achieve a win-win outcome—furthering the goals of EPCA by both by incentivizing more ethanol use and by facilitating more efficient engines—that NHTSA completely and arbitrarily failed to address. That failure was arbitrary and capricious.

## CONCLUSION

The Court should vacate the Rule and remand to EPA with instructions to reconsider its treatment of EVs and its calculations for biofuel-compatible vehicles.

Respectfully submitted,

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## 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 2,218 words.

/s/ Douglas A. Hastings

## CERTIFICATE OF SERVICE

I certify that, on November 26, 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/ Douglas A. Hastings