IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT
21865 Copley Drive
Diamond Bar, CA 91765

BAY AREA AIR QUALITY MANAGEMENT DISTRICT
375 Beale Street, Suite 600
San Francisco, CA 94105

SACRAMENTO METROPOLITAN AIR QUALITY MANAGEMENT DISTRICT
777 12th Street
Sacramento, CA 95814

Plaintiffs,

v.

ELAINE L. CHAO, in her official capacity as Secretary, United States Department of Transportation
1200 New Jersey Avenue SE
Washington, DC 20590

JAMES C. OWENS, in his official capacity as Acting Administrator, National Highway Traffic Safety Administration
1200 New Jersey Avenue SE
Washington, DC 20590

UNITED STATES DEPARTMENT OF TRANSPORTATION
1200 New Jersey Avenue SE
Washington, DC 20590

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION
1200 New Jersey Avenue SE
Washington, DC 20590

UNITED STATES OF AMERICA
c/o United States Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Defendants.

Civil Action No. 1:19-cv-03436

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This is a lawsuit for declaratory and injunctive relief challenging the legality of a final rule of the National Highway Transportation Safety Administration (NHTSA), adopting regulatory text to assert federal preemption under the Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871 (EPCA), *recodified at* 49 U.S.C. § 32901 *et seq*. The regulations were published for codification at 49 C.F.R. Parts 531 and 533 and their Appendices. 84 Fed. Reg. 51,310, 51,361-63 (September 27, 2019) (Preemption Rule) (Exhibit A).

2. This action alleges violations of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-706. Defendants' actions in promulgating the Preemption Rule were "arbitrary, capricious, an abuse of discretion," and "otherwise not in accordance with law" under 5 U.S.C. § 706(2)(A); they were "contrary to constitutional right, power, privilege, or immunity" under 5 U.S.C. § 706(2)(B); they were "in excess of statutory jurisdiction, authority, or limitations or short of statutory right" under 5 U.S.C. § 706(2)(C); and they were "without observance of procedure required by law" under 5 U.S.C. § 706(2)(D), including the failure to observe procedures required by the National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 (1970) (NEPA).

3. Plaintiffs South Coast Air Quality Management District (South Coast District), Bay Area Air Quality Management District (Bay Area District), and Sacramento Metropolitan Air Quality Management District (Sacramento Air District) ask this Court to declare unlawful and set aside the Defendants' actions through an order vacating the Preemption Rule and enjoining its implementation or application.

JURISDICTION AND VENUE

4. This Court has federal question jurisdiction over this action under 28 U.S.C. § 1331. It has the authority to issue declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201, 2202; 5 U.S.C. §§ 705, 706(1), 706(2)(A)(B)(C) & (D); and its general equitable powers.

5. The APA provides a cause of action for parties adversely affected by final agency action when "there is no other adequate remedy in a court." 5 U.S.C. § 704. That condition is met in this case because there is no other adequate remedy available in any other court.

6. Defendants or intervening parties may argue that exclusive subject matter jurisdiction to review the Preemption Rule lies in the federal courts of appeals under 49 U.S.C. § 32909(a). That is mistaken. Section 32909(a) confers original jurisdiction in the courts of appeals of the United States only to review challenges to regulations prescribed in carrying out sections 32901-32904 or 32908 of Title 49, but this jurisdictional provision is not applicable. In these circumstances, the law of this Circuit compels that Plaintiffs "go first to district court rather than to a court of appeals." *See Delta Const. Co., Inc. v. EPA*, 783 F.3d 1291 (D.C. Cir. 2015) (*quoting Int'l Bhd. Of Teamsters v. Pena*, 17 F.3d 1478, 1481 (D.C. Cir. 1994)) (dismissing a claim against NHTSA for lack of original jurisdiction because the agency's action did not prescribe a regulation under the provisions enumerated in the direct review statute).[1]

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[1] Because the part of the Rule's preamble addressing judicial review asserts "any challenges to NHTSA's regulation should also be filed in the United States Court of Appeals for the D.C. Circuit" on the ground that the regulation is "intertwined" with an EPA action reviewable in that court (84 Fed. Reg. at 51314), and out of an abundance of caution to preserve Plaintiffs' rights,

7. Venue is proper in this district under 28 U.S.C. § 1391(b) and (e) because a substantial part of the events or omissions giving rise to the claim occurred in this judicial district, and Defendants are officers or agencies of the United States residing in this district.

PARTIES

8. Plaintiff South Coast District is a political subdivision of the State of California responsible for comprehensive air pollution control in the Los Angeles metropolitan area and parts of surrounding counties that make up the South Coast Air Basin. *See* Cal. Health & Safety Code § 40410. South Coast's District's jurisdictional area spans approximately 10,743 square miles, and is home to approximately 16 million people burdened with the most extreme ozone pollution conditions in the country. South Coast District is authorized to commence civil actions to protect its rights and interests. *See* Cal. Health & Safety Code §§ 40701 (giving authority "to sue and be sued in the name of the district"); 40412 (conferring duty to represent citizens when actions of another agency will adversely impact air quality in the basin). South Coast District submitted comments on the proposed Preemption Rule on September 21, 2018 and October 25, 2018.[2] Because of the Preemption Rule's substantial similarities to an earlier proposed rule—a

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Plaintiffs anticipate filing a subsequent protective petition for review in the D.C. Circuit. Despite NHTSA's declared preference, Plaintiffs are firmly of the view that judicial review is available only under the APA in the district courts.

[2] *Comments of the South Coast Air Quality Management District*, Dkt. Nos. NHTSA-2018-0067-5722 and NHTSA-2017-0069-0532.

proposal published at 73 Fed. Reg. 24,352 (May 2, 2008), that was never finalized or withdrawn—South Coast District also requested that its comments to that older docket receive their "rightful responses" from NHTSA.[3]

9. Plaintiff Bay Area District is a political subdivision of the State of California responsible for comprehensive air pollution control in the San Francisco Bay Area air basin. *See* Cal. Health & Safety Code § 40200. Bay Area District's jurisdictional area spans nine counties, and it was the first regional air pollution agency to be created in the United States. Bay Area District is authorized to commence civil actions to protect its rights and interests. *See* Cal. Health & Safety Code § 40701 (giving authority "to sue and be sued in the name of the district"). Plaintiff Bay Area District submitted comments on the proposed Preemption Rule on September 24, 2018 and October 24, 2018.[4]

10. Plaintiff Sacramento Air District is a political subdivision of the State of California responsible for comprehensive air pollution control in Sacramento County. *See* Cal. Health & Safety Code § 40960. Sacramento Air District is authorized to commence civil actions to protect its rights and interests. *See* Cal. Health & Safety Code §§ 40701 (giving authority "to sue and be sued in the name of the district"). Sacramento Air District participated in the drafting and

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[3] *Comments of the South Coast Air Quality Management District*, Dkt. No. NHTSA-2008-0089-0151.

[4] *Comments of the Bay Area Air Quality Management District*, Dkt. Nos. NHTSA-2018-0067-12304 and EPA-HQ-OAR-2018-0283-3659.

submission of comments by the National Association of Clean Air Agencies (NACAA) on the proposed rule dated October 26, 2018.[5]

11. The United States Department of Transportation is an authority of the Government of the United States, headquartered in Washington, D.C.

12. Elaine L. Chao is the Secretary of Transportation. Secretary Chao is the highest-ranking official of the United States Department of Transportation, and she is sued in her official capacity.

13. NHTSA is "an administration in the [United States] Department of Transportation," 49 U.S.C. § 105(a), headquartered in Washington, D.C.

14. James C. Owens is NHTSA's Acting Administrator and is signatory to the Preemption Rule being challenged in this action. Acting Administrator Owens is the highest-ranking official of NHTSA, *see* 49 C.F.R. § 501.4(a), and he is sued in his official capacity.

15. The United States Department of Transportation and NHTSA are "agencies" within the meaning of 5 U.S.C. § 551(1). In this Complaint, the term "NHTSA" refers to both NHTSA and the United States Department of Transportation.

16. The United States of America is named as a party defendant pursuant to 5 U.S.C. § 702.

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[5] *Comments of the National Association of Clean Air Agencies*, Dkt. No. EPA-HQ-OAR-2018-0283-4185.

FACTS

A. Statutory and Regulatory Background

17. In the United States federal system, states and their political subdivisions traditionally have wielded police powers to make laws on matters of health and public safety. The federal government may preempt those local laws if Congress declares them preempted in the course of making laws of its own, i.e., as specified in a "preemption clause." Congress also may enact laws that declare an express intent *not* to preempt local laws, i.e., through a "savings clause."

18. Plaintiff South Coast District exercises authority to adopt rules and regulations to address extreme air pollution in its jurisdictional area by imposing control requirements that, "in general, are more expensive and technologically advanced, and apply to smaller emitters" than controls found in other areas of the country. *See* 62 Fed. Reg. 1150, 1153 (January 8, 1997). Plaintiffs exercise local, primary responsibility for control of air pollution from all sources *other than* motor vehicles. Cal. Health & Safety Code § 40000. However, because Plaintiffs are obligated to protect public health and welfare regardless of the source of air pollution, they also must depend on emission reductions from motor vehicles that are achieved by means of mobile source measures promulgated or approved by EPA under Title II of the Clean Air Act. *See* 63 Fed. Reg. at 1154. Those measures work to reduce the mobile source tailpipe emissions that are major contributors to smog formation, and they also can reduce emissions from other types of sources connected to fuel-based transportation (e.g., refineries and gas dispensing facilities).

19. While EPA and the California Air Resources Board (CARB) have certain, exclusive authorities to set emissions standards for new motor vehicles, South Coast District also seeks to promote or require vehicular emission reductions within recognized limitations on its authority over those sources. For example, nearly twenty years ago, South Coast District adopted "Fleet

Rules" to shift public agencies and certain private operators to procuring lower-emitting vehicles when replacing older vehicles or expanding their fleets. *See*, *e.g.*, *Engine Mfrs. Ass'n. v. South Coast Air Quality Mgmt. Dist*., 541 U.S. 246 (2004) (remanding for hearing on whether Clean Air Act section 209(a) preempted the district's "Fleet Rules" *in toto*), *aff'd*, 498 F.3d 1031 (9th Cir. 2007) (upholding the Fleet Rules, in part, under the market participant doctrine as to their regulation of the vehicle purchasing and leasing decisions of state and local governments).

20. To meet their air quality goals, Plaintiffs also rely on zero-emission vehicle (ZEV) standards, the first of which was adopted by California in 1990 and was granted an EPA waiver under Section 209(b) of the Clean Air Act. 58 Fed. Reg. 4166 (January 13, 1996). Most recently, California ZEV standards were approved as enforceable federal law by their adoption into the California State Implementation Plan (SIP), as is required for plans to comply with the National Ambient Air Quality Standards. 81 Fed. Reg. 39,424 (June 16, 2016); 42 U.S.C. § 7502(c)(1).

21. Emissions reductions from mobile source measures necessarily count in the inventory of emissions that is legally demanded for state and local planning to meet federal air quality standards. *See* 42 U.S.C. § 7502(c)(3). For the mobile source portion of an emissions inventory, EPA designates and oversees the use of computer models to calculate estimates for mobile source tailpipe emissions and their associated effects on other emissions. *See, e.g.,*80 Fed. Reg. 77,337-38 (December 14, 2015) (approving updated data for the EMFAC model specific to California, including "reductions associated with CARB's Advanced Clean Cars regulations"). The emissions inventory is used to quantify appropriate control measures. Eliminating or weakening any control measure in the inventory -- as would occur under the Preemption Rule --

can force the reworking of a plan to demand compensating reductions elsewhere, even when those reductions may not be as sensible or achievable, or even possible.

22. Under the Constitution, the power to decide whether a federal law preempts any state or local law belongs to the judiciary, absent the unique circumstance of Congress conferring that role on a federal agency. Congress knows how to empower a federal agency to make regulations on the scope of preemption, or otherwise to render legally effective determinations or decisions on preemption. This point is demonstrated, for example, by certain federal statutes, unrelated to those at issue in the case at hand, giving such a role to Defendant Secretary of Transportation. *See, e.g.,* 49 U.S.C. § 5125(d) (authorizing the Secretary of Transportation to decide whether a state or local statute that conflicts with the regulation of hazardous waste transportation is preempted); 49 U.S.C. § 31141 (authorizing the Secretary of Transportation to decide whether a law or regulation on commercial motor vehicle safety is preempted).

23. Wholly independent of those laws that reduce vehicular emissions to protect health and welfare, EPCA (as amended by the Energy Independence and Security Act of 2007, Pub. L. 110-140, 121 Stat. 1492) requires the Secretary of Transportation to prescribe by regulation corporate average fuel economy (CAFE) standards for automobiles. 49 U.S.C. §32902(a). CAFE standards are to be set "for at least 1, but not more than 5, model years" at a time. *Id*. § 32902(b)(3)(B). The Secretary of Transportation has delegated rulemaking responsibility for setting CAFE standards to NHTSA, along with all other authority vested in the Secretary under chapter 329 of Title 49, U.S.C, except for 49 U.S.C. § 32916(b). 49 C.F.R. § 1.95(a).

24. Fuel economy standards under EPCA represent the number of miles that the average car in a manufacturer's fleet could travel on a given amount of fuel. For these purposes, EPCA

defined "fuel" to exclude electricity, limiting it to "gasoline," "diesel oil," or, in certain circumstances, other "liquid" or "gaseous" fuel. 49 U.S.C. § 32901(a)(10).

25. EPCA requires NHTSA to set fuel economy standards taking into account, *inter alia*, "other motor vehicle standards of the Government." 49 U.S.C. § 32902(f). Any motor vehicle emissions standard issued by the EPA, as well as any California motor vehicle emissions standard for which EPA has granted a waiver is a " standard[] of the Government," whose effect on fuel economy must be considered by NHTSA in setting fuel economy standards.

26. EPCA also prohibits NHTSA from considering the fuel economy of automobiles that operate solely on electricity or other alternative fuels in setting fuel economy standards. 49 U.S.C. § 32902(h)(1); *see also id.* § 32901(a)(1), (8).

27. CAFE standards only pertain to automobiles as they are specifically defined in EPCA. *Compare* 49 U.S.C. § 32901(a)(3) (defining "automobile" under EPCA) *with* 42 U.S.C. § 7550 (defining the term "motor vehicle" under the Clean Air Act to cover "any self-propelled vehicle" used on a street or highway).

28. NHTSA lacks general authority to decide matters of statutory preemption. EPCA contains a preemption clause at 49 U.S.C. § 32919 that preempts state laws "relating to fuel economy standards or average fuel economy standards applicable to automobiles covered by" an average fuel economy standard prescribed under EPCA. Congress nowhere provided the Secretary of Transportation or NHTSA with a role to promulgate regulations on preemption, or to sit in broad judgment on matters of preemption.

29. With EPCA's 2007 amendment by the Energy Independence and Security Act of 2007, the updated provisions for setting CAFE standards also fall under a savings provision that was codified at 42 U.S.C. § 17002:

> Except to the extent expressly provided in this Act or an amendment made by this Act, nothing in this Act or an amendment made by this Act supersedes, limits the authority provided or responsibility conferred by, or authorizes any violation of any provision of law (including a regulation), including any energy or environmental law or regulation.

The savings provision vests no authority in, and assigns no functions to the Secretary of Transportation or to NHTSA. Moreover, NHTSA has no delegation of authority that cites or is predicated upon this provision. 49 C.F.R. § 1.95(a).

30. NHTSA does not have a legal mechanism under EPCA to make legally effective, generally applicable decisions on preemption.

31. NHTSA previously has acknowledged its own lack of authority to decide matters of preemption. In *Center for Biological Diversity v. NHTSA*, 538 F.3d 1172 (9th Cir. 2007), the Court noted that NHTSA, both in briefing and at oral argument, had conceded that its "discussion" and "assertion" of preemption, which was not embodied in final rule language, did not have the legal force to constitute a reviewable, final agency action. *Id.* at n. 1. To avoid review, NHTSA in fact had urged that its discussion of preemption was something to be considered "in the context of a concrete legal dispute, such as the *Central Valley* case." *See* U.S. Br. 130, *Center for Biological Diversity v. NHTSA*, 538 F.3d 1172 (9th Cir. 2007) (No. 06-71891).

32. NHTSA's reference to the *Central Valley* case pertained to then-pending litigation that later progressed to a decision from the United States District Court for the Eastern District of California. That decision held that EPCA did not preempt greenhouse gas standards for vehicles when the effects on fuel efficiency are incidental to the purpose of protecting health and welfare. *Central Valley Chrysler-Jeep, Inc. et al. v. Goldstene*, 529 F.Supp.2d 1151, 1176 (E.D.Cal.2007). Relatedly, after a sixteen-day bench trial, the United States District Court for the District of Vermont held that vehicle emission standards authorized pursuant to an EPA

waiver authorized by federal law would not be subject to EPCA preemption. *Green Mountain Chrysler Plymouth Dodge Jeep, et al. v. Crombie*, 508 F.Supp.2d 295, 343-350 (D.Vt.2007). The *Green Mountain* court also held that even in the absence of a waiver, greenhouse gas emissions standards for vehicles were not preempted because they do not "relate to" fuel economy standards or otherwise conflict with the purposes and objectives of EPCA. *Id.* at 350-355, 398.

33. By means of its Preemption Rule, NHTSA effectively seeks to overturn the considered judgments of these two federal district courts. NHTSA's disagreement with these court decisions, along with its sense of its arguments being "ignored" by the courts, was declared to be "among the reasons that NHTSA is formalizing its views in a regulation." 84 Fed. Reg. at 51323.

34. Various plaintiffs in the *Central Valley* and *Green Mountain* cases in fact had cited to NHTSA's past-stated positions on preemption. The two district courts no more ignored NHTSA's past-stated positions on preemption than the Supreme Court of the United States ignored the Solicitor General when he unsuccessfully argued that greenhouse gas emission limits for vehicles "would function in practical effect as fuel economy regulations." U.S. Br. at 24, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120). In *Massachusetts v. EPA*, the Supreme Court held that EPA's obligation to protect the public's "health" and "welfare" under the Clean Air Act was "a statutory obligation wholly independent of DOT's mandate to promote energy efficiency." *Id.* at 1462. The Supreme Court thus rejected the Government's argument that "[a]ny attempt by EPA to mandate reductions of greenhouse gas emissions from new motor vehicles would subvert Congress's determination that the EPCA fuel-economy standards should be exclusive." U.S. Br. at 24-25.

35. Following *Massachusetts v. EPA*, the D.C. Circuit held that there is nothing in NHTSA's regulatory authority that would make it lawful for EPA to "decline to regulate," "refuse to regulate," or "defer regulation" of carbon dioxide emissions from new motor vehicles. *See Coal. For Responsible Regulation v. EPA*, 684 F.3d 102, 127 (D.C. Cir. 2012). The D.C. Circuit went on to explain that EPA is not required to treat NHTSA regulations as "establishing a baseline," observing that such standards can provide "benefits above and beyond those resulting from NHTSA's fuel economy standards." *Id*.

36. The State of California is empowered to adopt and enforce motor vehicle emissions standards to further its inherent police power to protect the public's "health" and "welfare," when EPA grants a waiver under Clean Air Act section 209(b); 42 U.S.C. § 7543(b). EPA action under section 209(b) waives the application of federal preemption that otherwise would apply for "any standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a). This waiver of Clean Air Act preemption permits California to regulate emissions from new motor vehicles, which is commensurate to the authority of EPA.

37. States and political subdivisions exercise authority to otherwise control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles. 42 U.S.C. § 7543(d). EPCA confers no authority on the Secretary of Transportation or NHTSA relating to the use, operation, or movement of vehicles.

38. The Secretary of Transportation has "general powers," under which she "may prescribe regulations to carry out the duties and powers of the Secretary." 49 U.S.C. § 322(a). By regulation (49 C.F.R. § 1.81), the Secretary of Transportation also has delegated to NHTSA "the authority vested in the Secretary to prescribe regulations under 49 U.S.C. 322(a) with respect to statutory provisions for which the authority is delegated by" 40 C.F.R. § 1.95. Nothing in 49

U.S.C. § 322(a) or 40 C.F.R. § 1.95 confers authority on the Secretary of Transportation or NHTSA to make regulations with respect to preemption.

39. NEPA requires the preparation of a detailed statement of environmental impacts for any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). "Major Federal action" includes "[a]doption of official policy, such as rules, regulations, and interpretations." 40 C.F.R. § 1508.18(b)(1).

40. NHTSA's regulations identify various types of actions that should "ordinarily be considered" to be major actions significantly affecting the environment, and therefore requiring an environmental impact statement. 49 C.F.R. § 520.5(b). These include actions that "involve[] inconsistency with any Federal, State, or local law or administrative determination relating to the environment," *id.* § 520.5(b)(6)(i), that "may directly or indirectly result in a significant increase in the energy or fuel necessary to operate a motor vehicle," *id*., § 520.5(b)(8); or that "may directly or indirectly result in a significant increase in the amount of harmful emissions resulting from the operation of a motor vehicle." *Id*., § 520.5(b)(9).

41. NHTSA's regulations also require preparation of an environmental impact statement for "any proposed action which is likely to be controversial on environmental grounds," *id*., § 520.5(a)(2), and for "any proposed action which has unclear but potentially significant environmental consequences." *Id*., § 520.5(a)(3). These standards apply to all "[r]ulemaking and regulatory actions." *Id*. § 520.4(b)(3).

42. NEPA does not provide a cause of action for an agency's failure to comply with its requirements. Claims that an agency violated NEPA must be brought pursuant to the APA. *See Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1295 (D.C. Cir. 2007).

B. The Preemption Rule

43. NHTSA proposed the Preemption Rule as part of a joint EPA-NHTSA rulemaking package published in the Federal Register on August 24, 2018. 83 Fed. Reg. 42,986. As part of that same package, NHTSA proposed to weaken the existing fuel economy standard for model year 2021 so that it would be no more stringent than the model year 2020 level. NHTSA also proposed to set new fuel economy standards at that same level for model years 2022–2026. EPA proposed to weaken existing federal greenhouse gas standards for model years 2021–2025, and set new and equally weak standards for model year 2026, so that they likewise would be frozen at model year 2020 levels, and to revoke in part California's waiver for its Advanced Clean Cars Program.

44. NHTSA's final Preemption Rule was signed on September 19, 2019 and published on September 27, 2019. 84 Fed. Reg. 51,310 (Sept. 27, 2019). The final Preemption Rule was not accompanied by any action changing or setting NHTSA fuel economy standards or EPA's greenhouse gas standards, although these actions were proposed together as discussed above. However, the Preemption Rule was published alongside EPA's final decision to revoke the waiver for the California standards. *Id*. at 51,328. EPA's decision expressly relies on the Preemption Rule as a basis for revocation of the waiver. *Id*. at 51,337–38.

45. This suit challenges only NHTSA's final action promulgating the Preemption Rule, which includes regulatory text for codification at Title 49 of the Federal Code of Regulations, Sections 531.7 and 533.7; Appendix B to part 531 and Appendix B to part 533.

46. The Preemption Rule asserts that laws of states and their political subdivisions regulating or prohibiting tailpipe carbon dioxide emissions are both expressly and implicitly preempted by EPCA. 84 Fed. Reg. at 51,362-63. It further says that all state laws with the "direct or

substantial effect of" regulating or prohibiting tailpipe carbon dioxide emissions likewise are expressly and implicitly preempted by EPCA. *Id.* NHTSA asserted that a state regulation prohibiting "all tailpipe emissions" is preempted by EPCA, because "carbon dioxide emissions constitute the overwhelming majority of tailpipe carbon [sic] emissions." 84 Fed. Reg. at 51,314.

47. The Preemption Rule also "finalize[d]" NHTSA's conclusion that "ZEV mandates are preempted by EPCA" because such laws "directly and substantially affect fuel economy standards by requiring manufacturers to eliminate fossil fuel use in a portion of their fleet." *Id.* at 51,314. NHTSA further stated that "ZEV mandates also directly conflict with the goals of EPCA as they apply irrespective of the Federal statutory factors the Secretary of Transportation (through NHTSA) is required to consider in setting fuel economy standards[.]" *Id*.

48. In promulgating the Preemption Rule, NHTSA cited a provision of the Clean Air Act that requires State Implementation Plans to have "enforceable emission limitations" to question the validity of completed EPA actions to approve ZEV mandates or greenhouse gas standards into plans. 84 Fed. Reg. at 51324 and n. 162 (citing Clean Air Act, 42 U.S.C. §7410(a)(2)(A)). NHTSA has no authority to interpret or enforce the provisions of the Clean Air Act.

49. In promulgating the Preemption Rule, NHTSA declared that it was "finaliz[ing]" its view that preempted standards are void *ab initio*, based on "longstanding Supreme Court case law, as cited by the proposal." 84 Fed. Reg. at 51,324.

50. In promulgating the Preemption Rule, NHTSA ignored comments challenging its proposed regulatory text for being overbroad and ambiguously general, and instead offered that NHTSA "does not believe it should be difficult for States or local governments to determine if their laws or regulations have the direct effect or substantial effect of regulating or prohibiting

tailpipe carbon dioxide emissions from automobiles or automobile fuel economy." 84 Fed. Reg. at 51318.

51. Plaintiff South Coast District submitted a comment letter specifically requesting that NHTSA acknowledge that state and local governments retain the authority to prescribe requirements for nongovernmental entities who are parties to contracts with governments involving automobiles in the provision of governmental or public goods and services. NHTSA failed to respond to the comment or to affirm that its Preemption Rule would leave such requirements unaffected.

52. The Preemption Rule declares that laws of a state are preempted even when they pertain to automobiles that are not "covered by an average fuel economy standard," or even "when an average fuel economy standard prescribed under [EPCA]" is not "in effect." *See* 84 Fed. Reg. 51,318-19. In so doing, NHTSA's final action ignores and overrides certain restrictions that are clearly included in the text of EPCA's preemption provision. 49 U.S.C. § 32919(a).

53. The Preemption Rule declares that laws of a state are preempted even when those laws apply to "used vehicles." 84 Fed. Reg. at 51,318 n. 6. Used vehicles are far outside the concern and enforcement purview of the CAFE program, which regulates only the manufacture and sale of new automobiles.

54. NHTSA did not prepare an environmental impact statement or environmental assessment for its Preemption Rule, and simply stated that "NEPA does not apply to this action." 84 Fed. Reg. at 51,314.

55. By statute, publication in the Code of Federal Regulations is limited to rules "having general applicability and legal effect." 44 U.S.C. § 1510.

56. The Preemption Rule is a "final agency action" within the meaning of 5 U.S.C. § 704, and therefore is immediately subject to challenge in this Court.

STANDING

57. Plaintiffs South Coast District, Bay Area District and Sacramento Air District each exercise state power under a longstanding statutory mandate to adopt and enforce rules to achieve and maintain state and federal ambient air quality standards in the areas under their respective jurisdictions. Cal. Health & Safety Code § 40001. Plaintiffs must enforce all applicable provisions of federal law, including locally-adopted rules that meet air pollution control requirements prescribed by the Clean Air Act, 42 U.S.C. § 7401 *et seq*. *See e.g*., 40 C.F.R. Part 52, Subpart F (identifying dozens of Plaintiffs' respective rules approved over past decades as part of the California State Implementation Plan). South Coast District also is responsible for preparing that portion of the State Implementation Plan required under the Clean Air Act 42 U.S.C. § 7410, applicable to its geographic jurisdiction. Cal. Health & Safety Code §§ 40460-40470.

58. The challenged Preemption Rule purports to declare "void" existing and future state and local laws—even state and local laws that already are federally approved—that clash with NHTSA's finalized determinations on the "preemptive sweep of EPCA." 84 Fed. Reg. at 51316.

59. The challenged Preemption Rule takes pains to declare invalid ZEV mandates, including a rule regarding ZEVs on which Plaintiffs depend for their air quality planning, that EPA previously had approved as enforceable Federal law. 81 Fed. Reg. 39,424 (June 16, 2016). This ZEV mandate's invalidation will lead to air pollution increases in the South Coast, Bay Area and Sacramento air basins, most particularly through additional tailpipe criteria pollutant emissions and their precursors, and net upstream emission increases attributable to increased fuel

production and distribution. These pollution increases directly and adversely affect the Districts, as they make more difficult and onerous each District's task of devising plans to meet applicable air quality standards, imposing increased regulatory burdens on Plaintiffs. Injury sufficient to confer standing is demonstrated when air pollution control authorities must impose additional controls in order to have an adequate plan. *See National Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1227-1228 (D.C. Cir. 2007).

60. Plaintiffs South Coast District, Bay Area District and Sacramento District do not impose standards on manufacturers relating to new vehicles emissions. However, they do assert historic power to adopt use and operation regulations to control emissions from fossil-fuel combustion. Cal. Health & Safety Code §§ 40716, 40717; *see* 42 U.S.C. § 7543(d). For example, in 1995, Plaintiff South Coast District first adopted District Rule 2202, entitled "On-Road Motor Vehicle Mitigation Options," which is designed to reduce mobile source emissions from employee commutes. Under this rule, employers are entitled to credits toward emission reduction targets for employees and carpools arriving to work using a ZEV. Additionally, employers may elect to implement commute reduction strategies that may include incentives for employees to acquire and use ZEVs in their commutes. Any failure to implement an emission reduction program, including strategy components relating to ZEVs, is subject to enforcement. The purported reach of the Preemption Rule presents concrete injury to Plaintiff South Coast District's interest in the continued enforceability of District Rule 2202. *Alaska v. U.S. Dept. of Transportation*, 868 F.2d 441, 443 (D.C. Cir. 1989) ("It is common ground that States have an interest, as sovereigns, in exercising 'the power to create and enforce a legal code.'").

61. Plaintiff South Coast District asserts its right to enforce Rule 1194, entitled "Commercial Airport Ground Access," as it applies to private entities under contract to state or local public

entities. In submitting its public comments on the proposal for the Preemption Rule, South Coast District pointedly requested that NHTSA acknowledge that EPCA preemption does not disturb local governmental authority to impose requirements on nongovernmental parties contracted to provide governmental or public goods and services. Rule 1194 applies, *inter alia*, to certain private fleet operators that provide passenger transportation services under contract to a governmental airport authority. The Rule requires fleet operators to procure or lease cleaner vehicles; vehicles certified to meet ZEV emissions standards are a compliance option to meet the rule's fleet purchase requirement. NHTSA ignored South Coast District's comment. The purported reach of the Preemption Rule presents concrete injury to Plaintiff South Coast District's interest in the continued enforceability of Fleet Rule 1194.

62. Plaintiffs assert authority to adopt an "indirect source review program" under Clean Air Act section 110(a)(5)(A)(i), 42 U.S.C. § 7410(a)(5)(A)(i). An indirect source is defined as a "facility, building, structure, installation, real property, road, or highway which attracts or may attract, mobile sources of pollution." 42 U.S.C. § 7410(a)(5)(C); Cal. Health & Safety Code § 40716. Mobile source activities at indirect sources are subject to regulation, and such regulations may require or incentivize the use of zero emission technologies, including ZEVs. Plaintiff South Coast District has an avowed planning need for reliance on this authority (or for voluntary substitute reductions) as set forth in its 2016 air quality management plan to meet federal ambient air quality standards for ozone and particulate matter. *See* South Coast Air Quality Management District, Final 2016 Air Quality Management Plan (March 2017), pgs. 4-25 to 4-29, EPA-R09-OAR-2019-0051. The possibility of future preemption can constitute injury-in-fact so long as it is not too speculative or nebulous. Given Plaintiff South Coast District's known, declared need to secure emissions reductions from facility-based mobile source

measures, it is not too speculative or nebulous to trace injury to the challenged Preemption Rule. The purported reach of the Preemption Rule causes injury to Plaintiff South Coast District's authority to reduce or mitigate emissions from indirect sources.

63. Plaintiffs have an economic and proprietary interest in having efficacious incentive programs to promote the commercial adoption and use of ZEVs. With respect to South Coast District, these programs include an existing incentive pilot program to offset the cost of hardware for residential electric vehicle charging, and an existing program known as "Replace Your Ride" that provides funds to income-eligible vehicle owners who elect to replace their older vehicles with electric vehicles. With respect to Bay Area District, these programs include funding for light, medium and heavy-duty electric vehicles, electric vehicle charging stations, and hydrogen fueling stations. At Sacramento Air District, these programs include an existing incentive pilot program to offset the cost of hardware for electric vehicle charging or hydrogen fueling infrastructure, an existing program known as "CleanCars4All" that provides funds to income-eligible vehicle owners in Sacramento County who elect to replace their older vehicles with ZEVs, and a program known as "OurCommunityCarShare" that provides ZEVs for sharing among residents of participating communities. The challenged Preemption Rule purports to eliminate a legal inducement for automobile manufacturers to make electric vehicle replacement options available to consumers, by declaring California's ZEV mandates to be expressly and impliedly preempted. Plaintiffs' incentive programs are meant to work in conjunction with ZEV mandates in order to further encourage and accelerate consumer adoption of ZEVs to bring about air quality improvements. The challenged Preemption Rule undermines these incentive programs and their projected environmental benefits, causing injury to Plaintiffs.

64. Based upon extensive prior analysis and study, Plaintiff South Coast District expects that the future attainment of the National Ambient Air Quality Standards in its geographic area will depend on the adoption of ZEV mandates for vehicles other than automobiles, including heavy-duty vehicles. The existing ZEV mandate for light-duty vehicles approved in the State Implementation Plan works, in part, to help develop the technology and infrastructure that will be needed to realize the promise of emission reductions from other categories of mobile sources. By purporting to declare the ZEV mandate a nullity, the Preemption Rule harms the prospects for future adoption of ZEV mandates for other categories of mobile sources that are essential for air quality improvements in the South Coast Air Basin.

65. Plaintiffs also assert procedural injury. Specifically, Plaintiff South Coast District submitted comments objecting to NHTSA's failure to disclose that a virtually identical prior proposed rule was never withdrawn, and that it received many adverse comments still preserved in Docket No. NHTSA-2008-0089. NHTSA did not respond to South Coast District's 2008 comment letter on the prior proposal. The failure to respond to the comment is significant in that it reveals that the challenged Preemption Rule was not based on a consideration of all relevant factors. Most significantly, South Coast District's comment concurred in a comment submitted by several State Attorneys General identifying how NHTSA's prior proposal contradicted positions argued by NHTSA itself in a brief filed in the U.S. Court of Appeals for the Ninth Circuit in *Center for Biological Diversity v. NHTSA*, 508 F.3d 508 (9th Cir. 2007). These contradictions remain. NHTSA's Preemption Rule causes injury to Plaintiff South Coast District by violating Plaintiff's right to participate in the rule making and by failing to respond to Plaintiff's comments.

66. Plaintiff Bay Area District asserts injury to its proprietary and pecuniary interests as NHTSA's Preemption Rule will cause increases in greenhouse gas emissions, and Plaintiff Bay Area District has set a goal by Resolution 2013-11 of its Board of Directors to reduce greenhouse gas emissions to 80 percent below 1990 levels by 2050, and a nearer-term goal to reduce greenhouse gas emissions 40 percent below 1990 levels by 2030 in the Bay Area District's 2017 Clean Air Plan. By increasing greenhouse gas emissions, NHTSA's Preemption Rule will make it more challenging and costly for Bay Area District to meet its goals. Bay Area District plans to meet its goals both by relying on existing local, state and federal regulations, such as the ZEV mandate that NHTSA's Preemption Rule purports to preempt, and non-regulatory measures including, for example, a robust incentive program. In 2018, one of Bay Area District's incentive programs, its Climate Protection Grant Program, awarded $4.5 million to 15 Bay Area regional public agencies for 17 projects reducing greenhouse gases from existing buildings, and/or fostering innovative strategies for long-term greenhouse gas reduction. The increase in greenhouse gas emissions caused by the Preemption Rule will require Bay Area District to divert scarce resources from other air pollution control programs to programs providing for greenhouse gas emissions reductions, including its Climate Protection Grant Program, and spend more money on greenhouse gas reduction programs in order to meet its climate protection goals.

67. Plaintiffs also asserts pecuniary injury related to an increase in staffing and consultant costs caused by the challenged Preemption Rule. Plaintiffs' staffs conduct emissions modeling in order to make projections about future levels of air pollution. Staff utilize tools such as the EMFAC model, which was approved by EPA and includes projected future criteria pollutant and greenhouse gas emissions reductions from vehicles attributed to the ZEV mandate. NHTSA's Preemption Rule purporting to preempt the ZEV mandate renders the EMFAC model inaccurate.

NHTSA's action injures Plaintiffs by requiring them to revisit all projects that they have completed or are in the process of completing relying on the EMFAC model in order to calculate revised emissions projections and develop new plans. For Bay Area District, this also includes Bay Area District's 2017 Clean Air Plan and Owning Our Air, the West Oakland Community Action Plan and accompanying environmental analyses.

68. Plaintiff Sacramento Air District also asserts injury to its proprietary and pecuniary interests as NHTSA's Rule will cause increases in greenhouse gas emissions. Rather than undertaking a rulemaking, Plaintiff Sacramento Air District has worked cooperatively with the county and city jurisdictions in setting goals to reduce greenhouse gas emissions with target dates in 2020, 2035 and 2050. Targets vary by jurisdiction, but generally are 50% by 2035 and 80% by 2050. By increasing greenhouse gas emissions, NHTSA's Rule will make it more challenging and costly for Plaintiff Sacramento Air District to assist the jurisdictions in meeting these goals. Plaintiff Sacramento Air District plans to assist jurisdictions meeting their goals both by relying on existing local, state and federal regulations, such as the ZEV mandate that NHTSA's Rule purports to preempt, and non-regulatory measures including, for example, a robust incentive program.

69. The challenged Rule injures Plaintiffs' informational and procedural interests by depriving them of a NEPA-required analysis of the impact of preempting state and local air pollution laws and the ability to comment on such an analysis.

70. Plaintiffs have suffered and will suffer legal wrongs and concrete injuries as a result of NHTSA's Preemption Rule. Declaring the Preemption Rule unlawful and setting it aside will redress these harms suffered by Plaintiffs.

CLAIMS

Count 1: Agency Action In Excess of Statutory Authority, Contrary to Constitutional Power in Violation of the APA

71. Plaintiffs incorporate by reference the preceding allegations of this Complaint.

72. The Preemption Rule was promulgated "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," in violation of 5 U.S.C. § 706(2)(C), because neither the Department of Transportation nor NHTSA has authority make regulations with respect to preemption.

73. The Preemption Rule is "contrary to constitutional right, power, privilege, or immunity" in violation of 5 U.S.C. § 706(2)(B), because, among other things, it contravenes the structural safeguards of federalism and separation of powers. In the Preemption Rule, NHTSA purports to shift preemptive authority from Congress to itself, and assumes a judicial role that it was never assigned by Congress or the Constitution. NHTSA also ignores the precept that competing state and federal interests can only be reconciled in a concrete case.

Count 2: Agency Action that is Arbitrary, Capricious, an Abuse of Discretion, Otherwise Not in Accordance with Law in Violation of the APA.

74. Plaintiffs incorporate by reference the preceding allegations of this Complaint.

75. The Preemption Rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of 5 U.S.C. § 706(2)(A), because, among other things, the Rule is unsupported by law, unsupported by the evidence that was before the agency, and is not consistent with the plain language of EPCA. NHTSA's findings fail to include a limiting principle that preserves meaningful areas of state regulatory authority, including areas of authority that are encouraged or demanded by other areas of federal law. In this way, the

Preemption Rule turns preemption into a weapon against laws that are critical to the protection of public health and welfare.

Count 3: Agency Action that is Without Observance of Procedures Required by Law in Violation of the APA.

76. Plaintiffs incorporate by reference the preceding allegations of this Complaint.

77. The Preemption Rule was promulgated "without observance of procedure required by law," in violation of 5 U.S.C. § 706(2)(D), because, among other things:

a) Defendants subverted the required notice-and-comment process required by 5 U.S.C. § 553 by not responding to any of the significant comments submitted in the docket for its substantially-related, never-withdrawn prior proposal, including by failing to respond to any part of the past comments submitted by Plaintiff South Coast District.

b) Defendants failed to observe procedures required by NEPA by not undertaking any review and determination of the environmental impacts of the Preemption Rule, even though the Preemption Rule is a federal action that demands adherence to NEPA and applicable regulations.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests the following relief:

1. A declaration that the Preemption Rule is invalid because it is contrary to the APA, Clean Air Act, EPCA, and NEPA;

2. An order vacating the Preemption Rule and permanently enjoining the United States and its agencies and officers from relying on or enforcing the rule;

3. An award of Plaintiffs' reasonable costs and attorney fees in this matter; and

4 Any other relief that this Court deems proper and just.

Dated: November 14, 2019

Respectfully submitted,

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*Motion for admission *pro hac vice* to be filed