

ORAL ARGUMENT NOT YET SCHEDULED

No. 24-1087 and consolidated cases

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

COMMONWEALTH OF KENTUCKY, EL AL.,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.

Respondents.

On Petitions for Review of Action by the U.S. Environmental Protection Agency

**BRIEF OF CONSUMER REPORTS AS *AMICUS CURIAE* IN SUPPORT OF
RESPONDENTS**

David R. Baake
Baake Law, LLC
2131 N. Main Street
Las Cruces, NM 88001
Telephone: (575) 343-2782
david@baakelaw.com

Alexandra Grose
Senior Counsel, Sustainability
Consumer Reports
607 14th St NW #725
Washington, DC 20004
(202) 462-6262
alexandra.grose@consumer.org

Counsel for Amicus Curiae

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. All parties, *amici*, and intervenors appearing in this case are listed in Petitioners' opening briefs, except for the amici supporting Respondents. Consumer Reports is aware of the following amici that intend to file in support of Respondents: (1) International Council on Clean Transportation and the University of California, Davis Institute of Transportation Studies; (2) Institute for Policy Integrity at New York University School of Law; (3) National League of Cities and the U.S. Conference of Mayors; (4) American Thoracic Society, et al., and (5) Margo T. Oge and John Hannon.

B. Rulings under Review. These cases seek review of the final action of the Administrator of the U.S. Environmental Protection Agency ("EPA"), entitled Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, published in the Federal Register at 89 Fed. Reg. 27,842 (Apr. 18, 2024) (the "Rule").

C. Related Cases. All related cases are identified in the Brief of Petitioners.

**STATEMENT REGARDING SEPARATE BRIEFING, AUTHORSHIP, AND
MONETARY CONTRIBUTIONS**

No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). Counsel for Petitioners, Respondents, and Intervenors consent to the filing of this amicus brief. *See* Fed. R. App. P. 29(a)(2).

Consumer Reports is aware that other *amicus* briefs will be filed in support of Respondent. Pursuant to D.C. Circuit Rule 29(d), counsel for Consumer Reports certifies that a separate brief is necessary. Given the significant differences in the memberships of Consumer Reports and the other groups, the distinct interests and expertise of Consumer Reports and the other groups in this case and the distinct issues they intend to brief, it is impracticable to collaborate in a single brief. Consumer Reports believes that the Court will benefit from the presentation of these multiple perspectives.

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C Circuit Rule 26.1, Consumer Reports states that it is an independent, nonprofit member organization that empowers and informs consumers, by producing a widely respected magazine that covers a diverse array of consumer products and consumer-oriented industries, and publishing additional content on its award-winning website. Consumer Reports is an independent nonprofit organization that is not organized as a for-profit corporation, association, joint venture, syndicate, or similar entity. It does not have a parent company, and no other company has an ownership interest in Consumer Reports.

/s/ David R. Baake

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STATEMENT OF INTEREST

Consumer Reports is an independent, nonprofit member organization that empowers and informs consumers, while helping policymakers create a fair and just marketplace for all. Founded in 1936 to provide consumers with credible information necessary to make informed decisions, Consumer Reports boasts more than five million members. It produces a widely respected magazine that covers a diverse array of consumer products and consumer-oriented industries. In addition to publishing the print magazine, Consumer Reports maintains an award-winning website that publishes daily articles related to consumer news and insights, and provides ratings on a number of consumer products. The website averages more than 10 million unique visitors per month and provides subscriber-only resources to nearly half of the organization's members.

From its inception more than eighty years ago, Consumer Reports has published research on new motor vehicles, evaluating characteristics that are important to consumers, including efficiency, reliability, and safety. Consumer Reports operates the largest and most sophisticated independent automobile testing center devoted to the consumer interest anywhere in the world. Consumer Reports anonymously buys all the cars it tests and drives them for a combined total of at least 500,000 miles annually. Consumer Reports also frequently conducts consumer surveys—including surveys about demand for electric and hybrid

vehicles—to learn what product attributes are important for consumers and to assess the landscape of the vehicle market.

In its role as an advocate for consumers, Consumer Reports has provided comments to the U.S. Environmental Protection Agency (“EPA”) in several rulemakings related to vehicle emissions, including the Rule under review here. *See* Consumer Reports, *Comments on EPA’s Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles* (July 5, 2023), docketed at EPA-HQ-OAR-2022-0829-0451 [hereinafter CR Comments].¹ Consumer Reports writes here to provide relevant research and data regarding the market for electric and other low emission vehicles, which is experiencing robust demand due to a proliferation of new models, technological advances, increased consumer familiarity with the benefits these vehicles provide, and other factors.

Our research strongly supports EPA’s conclusion that its emissions standards are achievable through a consumer-driven shift to more electric, hybrid, and low emission conventional vehicles, and makes clear that EPA is not forcing a transformation of the automobile industry that otherwise would not occur.

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¹ Available at: <https://tinyurl.com/3rt834w4>.

INTRODUCTION AND SUMMARY OF ARGUMENT

In establishing multi-pollutant emissions standards for light- and medium-duty vehicles produced in model years 2027 through 2032 (the “Rule”), EPA carefully considered the applicable statutory factors, 42 U.S.C. § 7521(a)(2), to establish standards that are achievable at reasonable cost using technologies that are already in widespread use. *See* 89 Fed. Reg. 27,897 (April 18, 2024).

Although the Rule is technologically neutral, EPA predicted that many of the auto manufacturers would demonstrate compliance by selling an increased number of vehicles powered at least partially by electricity (including battery electric vehicles and plug-in hybrids, collectively “electric vehicles”). *See id.* at 27,845–46.

Although Petitioners attempt to recast EPA’s reasonable assessment of existing trends in the automobile industry as an unlawful attempt to force unwilling manufacturers and consumers to embrace electrification, the evidence does not support their argument. To the contrary, the administrative record and the facts on the ground demonstrate that consumer demand for electric, hybrid, and other low emission vehicles is growing rapidly, at a rate easily sufficient to achieve the Rule’s emission reduction goals. As Consumer Reports explained in its comments, consumers have consistently expressed a preference for vehicles that cost less to fuel. This longstanding preference for lower fuel costs is driving demand for electric vehicles, which have significantly lower fuel costs than vehicles powered

exclusively by traditional fuels. *See* 89 Fed. Reg. at 27,861, nn. 161, 162. As EPA explained, 9.3% of new light-duty vehicles sold in the U.S. in 2023 were electric—a significant increase from prior years—and industry analysts expect that percentage to grow to at least 40% by 2030 even before accounting for this Rule. *See id.* at 27846–47. Surveys conducted by Consumer Reports confirm a large and increasing consumer demand for electric vehicles in the United States.

Automakers have responded to the increased demand for electric vehicles by ramping up production and making substantial capital investments.² In the Rule, EPA appropriately accounted for the consumer-driven shift towards electric and other low emission vehicles to set emissions targets that are achievable in light of the real-world trends. The Court should uphold EPA’s well-supported Rule.

ARGUMENT

A. Consumers Have Consistently Expressed a Preference for Fuel Savings.

For decades, consumers have reported that fuel costs are a major factor in their car buying decisions.³ *See* CR Comments at 6–7, 12–13. In 2022, Consumer

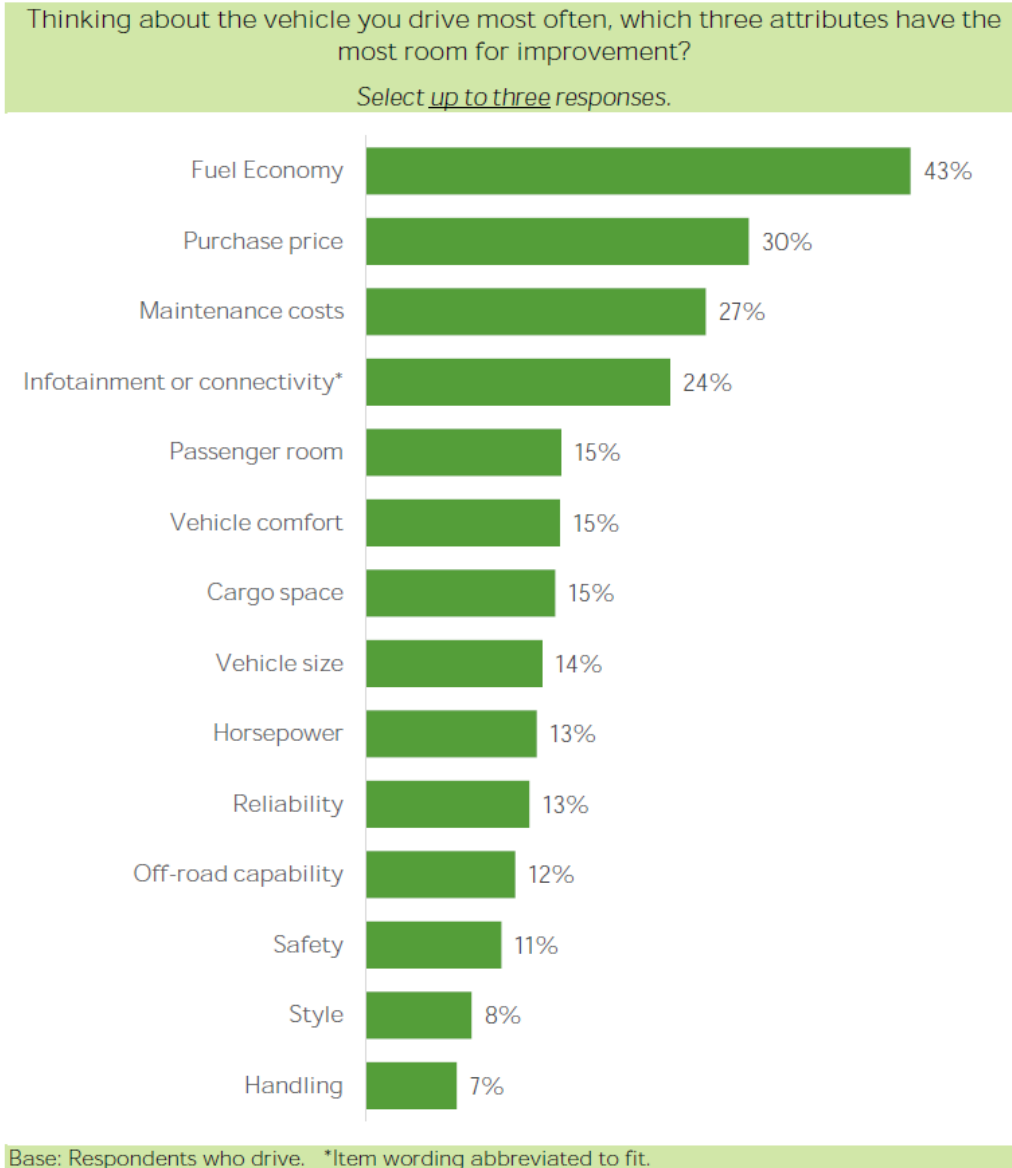
² *See* Coral Davenport & Jack Ewing, *Automakers to Trump: Please Require Us to Sell Electric Vehicles*, NY TIMES (Nov. 21, 2024) (noting that “Ford, G.M., Stellantis and others have invested about \$146 billion over the past three years in the design, engineering and manufacturing of electric vehicles,” and “virtually all auto executives expect electric vehicles to displace gasoline cars over time”), <https://tinyurl.com/5437jt45>.

³ While this brief focuses primarily on electric vehicles, the use of cost-effective hybrid technology (which also results in fuel savings) is expected to be an

Reports conducted a survey of over 2,000 adults, and found that seven in ten American drivers said that fuel economy⁴ was either “very important” or “extremely important” to them when considering what vehicle to purchase or lease. *See id.* at 12–13. In addition, when asked which attribute of their vehicle had the most room for improvement, 43% of drivers selected fuel economy:

important component of many automakers’ compliance strategies for this technology-neutral performance standard. *See* Chris Harto, *EPA Standards will Deliver Huge Consumer and Climate Benefits – While Preserving Consumer Choice*, CONSUMER REPORTS (Apr. 9, 2024), <https://tinyurl.com/yejbxate> (“electric vehicles will only make up between 15% and 19% of the light-duty vehicle fleet by the end of 2032” under the most likely compliance scenario for the Rule, and “could be as low as 10% under the Heavy Hybrid scenario”).

⁴ In gasoline-fueled vehicles, fuel costs inversely correlate with the vehicle’s fuel economy—a higher fuel economy means more fuel savings.



See CR Comments at 13.

While electric vehicles do not have “fuel economy,” this longstanding preference for lower fuel costs is one of the key reasons that consumers are increasingly choosing electric vehicles. A study conducted by Consumer Reports in early 2022 showed that fuel savings—i.e., the fact that it costs less to charge an electric vehicle than to fuel a gas-powered vehicle—was the number one reason

consumers would consider purchasing or leasing an electric vehicle.⁵ Consumers also selected factors relating to environmental impact—avoiding the use of gasoline and eliminating tailpipe emissions—as attributes that would encourage them to switch to an electric vehicle.⁶

B. Demand for Electric Vehicles is Strong and Growing.

Consumer demand for electric vehicles is growing at a rapid pace. In 2020, Consumer Reports conducted a nationally representative survey of over 3,000 U.S. residents with a valid driver's license.⁷ Four percent of drivers stated that they were definitely planning to purchase an electric vehicle as their next vehicle and an additional 27% stated that they would consider it. Two years later, Consumer Reports conducted a nationally representative survey of over 8,000 adults in the United States, and interest levels had shot up.⁸ The 2022 survey results indicate that 14% of Americans would definitely buy or lease an electric vehicle if they were buying a vehicle today (up from 4% in 2020), 22% would seriously consider

⁵ See Consumer Reports, *Battery Electric Vehicles & Low Carbon Fuel Survey* (Apr. 2022), <https://tinyurl.com/yd8y78f8>, docketed at EPA-HQ-OAR-2022-0829 [hereinafter “April 2022 Study”].

⁶ See *id.*

⁷ See Consumer Reports, *Electric Vehicles and Fuel Economy: A Nationally Representative Multi-Mode Survey* (Dec. 2020), <https://tinyurl.com/3y6wzwhn>.

⁸ See April 2022 Study, *supra* n.5.

it, and 35% might consider it at some point in the future.⁹ This growing interest in electric vehicles was strong across a range of demographic variables.¹⁰

Sales data confirm the growing demand for electric vehicles. As EPA explained in the Rule, electric vehicles reached 9.8% of monthly sales in January 2024 and were 9.3% of all light-duty vehicle sales in 2023, up from 6.8% in 2022 and 3.2% the year before. EPA concluded that this “robust growth” combined with vehicle manufacturers’ plans to expand production “strongly suggests that [the electric vehicle] market share will continue to grow rapidly.” 89 Fed. Reg. at 28,027. EPA found that the number of models available to consumers was rapidly increasing, meeting consumers’ demand for a variety of body styles and price points. Specifically, the number of electric vehicle models available for sale in the U.S. “has increased from about 24 in [model year] 2015 to about 60 in [model year] 2021 and to over 180 in [model year] 2023, with offerings in a growing range of vehicle segments.” *Id.*

Over time, consumer demand for electric vehicles is likely to continue to grow. In 2022, Consumer Reports found that consumers with the most direct

⁹ *See id.*

¹⁰ *See* Consumer Reports et al., *Survey Says: Considerable Interest in Electric Vehicles Across Racial, Ethnic Demographics* (Sept. 2022), <https://tinyurl.com/4e7bfd5v>, docketed at EPA-HQ-OAR-2022-0829.

experience with battery electric vehicles were almost ten times as likely to say they would “definitely buy” a battery electric vehicle today as consumers with no experience (58% vs 6%). *See* CR Comments at 11. Significant public investment in electric vehicle charging infrastructure and new state and federal tax incentives that reduce the upfront cost of purchasing an electric vehicle are likely to contribute to further growth.¹¹

As Consumer Reports explained in its comments on the Rule, barriers to electric vehicle adoption are steadily being addressed: “purchase cost for [electric vehicles] is declining, charging infrastructure is expanding, consumers are gaining more experience with [electric vehicles], and automakers are investing in new models and increased production.” CR Comments at 11. These trends “tend to reinforce one another in a virtuous cycle to create even more demand for these vehicles.” *Id.* EPA agreed that this “virtuous cycle” would lead to continued increases in electric vehicle adoption, noting that its own literature review, conducted alongside researchers from the Lawrence Berkeley National Laboratory, came to a similar conclusion. *See* 89 Fed. Reg. at 28,026. In addition, EPA cited a

¹¹ *See generally* Peter Slowick et al., *Analyzing the Impact of the Inflation Reduction Act on Electric Vehicle Uptake in the United States*, INT’L COUNCIL ON CLEAN TRANSPORT. (Jan. 2023), <https://tinyurl.com/b29dxnrf>; Keith Barry, *More SUVs, Teslas Now Qualify for the New Electric Vehicle Tax Credit*, CONSUMER REPORTS (Feb. 2023), <https://tinyurl.com/bp5bmvxp>.

2023 study which found that “even if all purchase incentives were entirely phased out, [battery electric vehicles] could still have a market share of about 50 percent relative to combustion vehicles by 2030, based on consumer choice alone.” *Id.* at 28,026–27.¹² Collectively, the record evidence shows that significant growth in the electric vehicle market “is not only possible ... but likely to occur.” *Id.* at 28,028.

C. Manufacturer Commitments to Electric Vehicles Are Commensurate with Increasing Consumer Demand.

In its role as an advocate for consumers, Consumer Reports keeps close tabs on trends in the automotive industry, including the decisions vehicle manufacturers are making about the next generation of vehicles. Vehicle manufacturers are moving rapidly to develop the capacity to meet both current and anticipated future demand for electric vehicles. As EPA noted, announcements by individual automakers confirm the industry’s embrace of electrification. *See* 89 Fed. Reg. at 27,848 (describing manufacturer announcements). EPA noted announcements by General Motors, Volvo, Volkswagen, Honda, Ford, Fiat, Mercedes-Benz, Stellantis, Toyota, and Subaru concerning plans to substantially increase electric vehicle production, including several manufacturers’ plans to convert entirely to electric vehicles. *See id.* Automakers have been moving aggressively to meet their

¹² To support this proposition, EPA cited Connor R. Forsythe, et al., *Technology Advancement is Driving Electric Vehicle Adoption*, PNAS (2023), <https://www.pnas.org/doi/10.1073/pnas.2219396120>.

own objectives—including objectives pre-dating the Rule—by introducing new electric models and developing the necessary manufacturing infrastructure.¹³ As explained in Consumer Reports’ comments, recent analysis shows that vehicle manufacturers and battery makers plan to invest \$860 billion in transitioning to electric vehicles by 2030, including \$210 billion in the United States.¹⁴

Both sets of petitioners suggest that manufacturers are cutting back on commitments to produce electric vehicles, citing two press reports that post-date issuance of the Rule. *See* Br. of Kentucky et al. at 19 (citing an August 21, 2024, *Wall Street Journal* article); Br. of Private Petitioners at 15 (citing a July 18, 2024, *New York Times* article). EPA considered similar suggestions and found that “these recent announcements do not reflect a significant change in manufacturer intentions regarding [electric vehicles] generally or specifically through the 2027–2032 timeframe of this rule.” 89 Fed. Reg. at 27,849. EPA noted, for instance, that “at about the same time as Ford announced the delay, Toyota announced an \$8 billion increase in investment in its North Carolina plant” that produces electric

¹³ *See* Jeff S. Bartlett & Ben Preston, *Automakers Are Adding Electric Vehicles to Their Lineups. Here’s What’s Coming*, CONSUMER REPORTS (Jan. 6, 2023), <https://tinyurl.com/4zkthemk>.

¹⁴ *See* CR Comments at 8, n.10 (citing Noah Gabriel, *\$210 Billion of Announced Investments in Electric Vehicle Manufacturing Headed for the U.S.*, EV HUB (Jan. 12, 2023), <https://tinyurl.com/39y2vd2s>).

vehicle batteries. *Id.* EPA reasonably found that, in light of the unprecedented rate and size of recent investment activity in electric vehicle technology, “adjustments to previously announced plans would ordinarily be expected to occur,” and these short-term adjustments do not undermine the broader trend towards electrification. *Id.* at 27,850.

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The U.S. market was already rapidly transitioning to electric vehicles to meet strong consumer demand when the Rule was promulgated, and is poised to continue that trend due to the increasing variety and desirability of available electric vehicles, expanding consumer familiarity with this technology, expanding charging infrastructure and the incentives contained in state and federal laws. Both foreign and domestic manufacturers have made significant investments to produce more electric vehicles to satisfy increasing world-wide demand. Based on these well-documented trends, EPA reasonably determined that “[w]hile manufacturers may choose any compliance pathway that meets the final standards,” many would choose to comply by increasing the number of electric vehicles in their fleet. 89 Fed. Reg. at 28,058. As the agency explained:

This choice would be made not because of an EPA regulatory mandate (since EPA does not mandate any particular technology for compliance), but rather in order to maximize profits and remain economically competitive within the vehicle manufacturing sector.

Id.

Accordingly, there is no merit to petitioners' contentions that EPA is somehow "asserting the extraordinary power" to require "a stunning remaking of the automobile market in under a decade" (Br. of Kentucky et al. at 13-14) or that it sought to "reverse-engineer[] a *de facto* electric vehicle mandate," Br. of Private Parties at 1. The Rule applies the same basic approach that EPA has taken in countless other rulemakings over five decades of implementing the Clean Air Act's motor vehicle emission standard program, analyzing automakers' current and anticipated progress in developing and deploying new technologies to set emission targets that are feasible in light of real-world industry trends. The Court should uphold EPA's well-supported Rule.

CONCLUSION

For the foregoing reasons, this Court should deny the petitions.

Respectfully submitted this 6th day of December 2024,

/s/ _____
David R. Baake
Baake Law, LLC
2131 N. Main Street
Las Cruces, NM 88001
Telephone: (575) 343-2782
david@baakelaw.com

Alexandra Grose
Senior Counsel, Sustainability

Consumer Reports
607 14th St NW #725
Washington, DC 20004
(202) 462-6262
alexandra.grose@consumer.org

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the Federal Rule of Appellate Procedure 32(g) along with the Court's scheduling Order because it contains less than 6,500 words and was prepared using 14-point font using a proportionally spaced typeface.

/s/ David R. Baake

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2024, I electronically filed the foregoing brief with the Clerk of the Court of the U.S. Court of Appeals for the D.C. Circuit by using the CM/ECF system, which caused all cases who are registered CM/ECF users to be served electronically.

/s/ David R. Baake