

[ORAL ARGUMENT NOT YET SCHEDULED]

No. 22-1031 and consolidated cases

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

STATES OF TEXAS, ALABAMA, ALASKA, ARKANSAS, ARIZONA,
INDIANA, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA,
NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, AND UTAH,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN,
IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR, U.S. ENVIRONMENTAL
PROTECTION AGENCY,

Respondents.

On Petitions for Review of a Rule
of the U.S. Environmental Protection Agency

Brief of Amicus Curiae Consumer Reports in Support of Respondents

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Petitioners' and Respondent EPA's briefs list all parties, intervenors, and amici except for the following additional amici for Respondents who have filed briefs or notices of intent as of the date of this certification: the American Thoracic Society, American Medical Association, American Public Health Association, American College of Occupational and Environmental Medicine, American Academy of Pediatrics, American Association for Respiratory Care, Climate Psychiatry Alliance, American College of Physicians, American College of Chest Physicians, Academic Pediatric Association, and American Academy of Allergy, Asthma and Immunology; the Institute for Policy Integrity at New York University School of Law; Senator Thomas R. Carper and Representative Frank Pallone, Jr.; The National League of Cities and The U.S. Conference of Mayors; and Consumer Reports, appearing in this brief.

B. Ruling Under Review

Respondent EPA's brief accurately references the agency action at issue.

C. Related Cases

All related or consolidated cases are identified in Respondent EPA's brief.

/s/ Hyland Hunt

Hyland Hunt

CORPORATE DISCLOSURE STATEMENT

Under Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, amicus curiae Consumer Reports submits the following corporate disclosure statement:

Consumer Reports, Inc. is a nonprofit, non-stock organization incorporated in New York. Consumer Reports has no parent corporation and, because it issues no stock, no publicly held corporation owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE¹

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 six 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 also maintains an award-winning website that publishes daily articles related to consumer news and insights. The website averages more than 15 million unique visitors monthly 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. It currently evaluates characteristics that are important to consumers, including efficiency, reliability, and safety. Every year, Consumer Reports disseminates a “Best and Worst Cars, Trucks, and SUVs” issue that has long helped consumers identify the best vehicle for their needs, at an affordable price and with all the latest safety features. As part of its testing regime,

¹ No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae, its members, or its counsel contributed money that was intended to fund this brief's preparation or submission. *See* Fed. R. App. P. 29(a)(4)(E). Consumer Reports filed its notice of its intent to participate as amicus curiae on March 2, 2023. All parties have consented to the filing of this brief.

Consumer Reports purchases approximately fifty vehicles each year to evaluate at the organization's 327-acre facility in Connecticut.

Consumer Reports' ratings on operating costs, reliability, safety, and other attributes are relied upon as authoritative, in large part because it tests vehicle performance, handling, and off-road capability. Consumer Reports also frequently conducts consumer surveys—including surveys about demand for electric vehicles like those that inform this brief—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 EPA in several rulemakings related to vehicle emissions, including the rulemaking under review here. Comments of Consumer Reports (Sept. 27, 2021), <https://www.regulations.gov/comment/EPA-HQ-OAR-2021-0208-0602>. Consumer Reports writes here to inform the Court about the state of the electric vehicle market, which is experiencing off-the-charts demand. This reality strongly supports the EPA's conclusion that its emission standards are achievable, including through a shift to electric vehicles that is well underway.

INTRODUCTION AND SUMMARY OF ARGUMENT

In establishing greenhouse gas emission standards for 2023-2026 light duty vehicles, EPA conducted an extensive review of the availability and cost of emission-reducing technologies and determined that the standards are achievable, as the

statute requires. 42 U.S.C. § 7521(a)(2); 86 Fed. Reg. 74,434, 74,492–500 (Dec. 30, 2021). EPA provided formulae for model-specific standards, *id.* at 74,450–51, and several compliance options for automakers—who are not challenging the rule.

Beyond model-specific emission standards, the rule also allows manufacturers to average emissions across their entire fleet and to offset excess emissions from some models with lower-than-required emissions from others or with credits purchased from another manufacturer. *Id.* at 74,453–56. EPA determined that compliance would primarily be achieved through ongoing improvements in the efficiency of vehicles powered by internal combustion engines, but that manufacturers would also opt to use fleetwide averaging and credits. *Id.* at 74,485. The upshot: EPA predicted that at least some emissions reductions relied on by manufacturers to demonstrate compliance would come from increasing sales of vehicles powered either entirely or partially by electricity. *Id.*

EPA's prediction that vehicle manufacturers would opt to rely in part on electric vehicle sales is fully consistent with the administrative record. This prediction reflects market realities and does not transform EPA's reasonable assessment into a regulatory sea change implicating a major question. Petitioners' challenge implicitly assumes that the predicted levels of electric vehicle sales would be forced on unwilling manufacturers and consumers by EPA's rule.

That assumption is unfounded. If anything, EPA *underestimated* both the level

of consumer demand for electric vehicles and automakers' willingness and ability to meet that demand. Surveys carried out by Amicus Consumer Reports show a large and rapidly increasing consumer demand for electric vehicles, and a corresponding decline in the demand for gas-powered vehicles. The rising sales of electric vehicles, accelerating in 2021 and 2022, prove the demand is real. So does the unprecedented number of pre-orders for electric vehicles—including the record number of consumers willing to tie up their hard-earned cash in deposits while waiting for their preferred electric vehicles.

Consumers care greatly about fuel savings and are increasingly willing to shift to electric vehicles because of it. Data show a mere fraction of consumers desiring to buy an electric vehicle today would need to actually buy one over the next four years to equal EPA's projected sales level. Automakers are not blind to this explosion of demand. They have committed to meeting it, backing up their commitment with substantial capital investments. Consumer demand and manufacturer choices, not EPA rules, are driving the shift to electric vehicles.

ARGUMENT

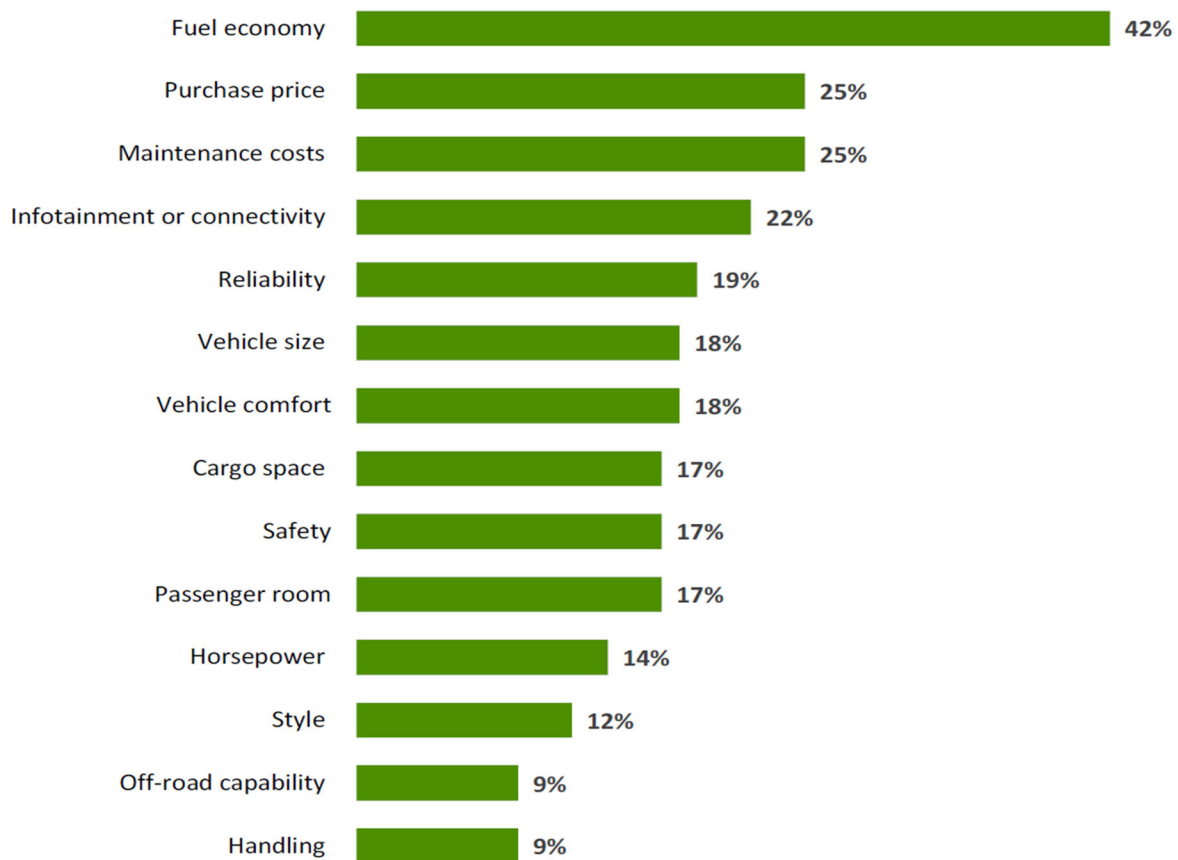
I. The Market For Electric Vehicles Is Being Driven By Consumer Demand.

Consumer Reports' surveys have consistently demonstrated that fuel consumption (as a significant contributor to operating costs) is a major factor in consumers' car buying decisions. Consumer Reports Comments, *supra*, at 6-7. And

Consumer Reports studies demonstrate the significant reduction in operating costs (*i.e.*, fueling and maintenance costs) associated with electric vehicles.²

The following chart, part of the record in this case, shows the importance of fuel economy to consumers' buying decisions.³

Thinking about your current vehicle, which three attributes have the most room for improvement?



² See, e.g., Chris Harto, Consumer Reports, *Electric Vehicle Ownership Costs: Today's Electric Vehicles Offer Big Savings for Consumers* (Oct. 2020), <https://tinyurl.com/ehupvz6n>.

³ Consumer Reports Comments, at 7; also available at Consumer Reports, *Consumer Attitudes Towards Fuel Economy: 2020 Survey Results*, at 4 (Feb. 2021), <https://tinyurl.com/yshwfytm>.

Consumer Reports has also conducted surveys to examine how consumers' interest in fuel savings might translate into their interest in purchasing or leasing electric vehicles. Survey results show that consumers are very interested, and their interest in electric vehicles is growing rapidly.

In 2020, Consumer Reports conducted such a nationally representative survey of more than 3,000 U.S. adults with a valid driver's license residing in the United States.⁴ Four percent of licensed drivers stated that they were definitely planning to purchase an electric vehicle as their next vehicle and an additional 27 percent stated that they would consider it. *Id.* at 4. 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.⁵ The 2022 survey results indicate that 14 percent of Americans would definitely buy or lease an electric vehicle if they were buying a vehicle today (up from 4 percent in 2020), 22 percent would seriously consider it, and 35 percent might consider it at some point in the future, but not today. *Id.* at 5.

⁴ Consumer Reports Comments, *supra*, Atch. 5, also available at Consumer Reports, *Consumer Interest and Knowledge of Electric Vehicles: 2020 Survey Results* (Dec. 2020), <https://tinyurl.com/53xcpsbm>.

⁵ Consumer Reports, *Battery Electric Vehicles & Low Carbon Fuel Survey* (Apr. 2022), <https://tinyurl.com/yd8y78f8>.

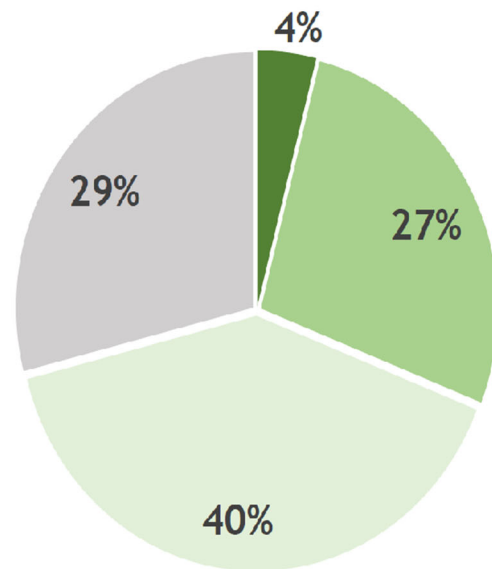
This growing interest in electric vehicles was strong across a wide range of demographic variables.⁶

Based on these survey results, the percentage of Americans who in 2022 would definitely choose to buy an electric vehicle (14 percent) is already double the electric vehicle sales level that EPA projected would help manufacturers comply with the model year 2023 standards (7 percent) and nearly at the level projected for model year 2026 (about 17 percent). 86 Fed. Reg. at 74,485.

2020 Survey Results:

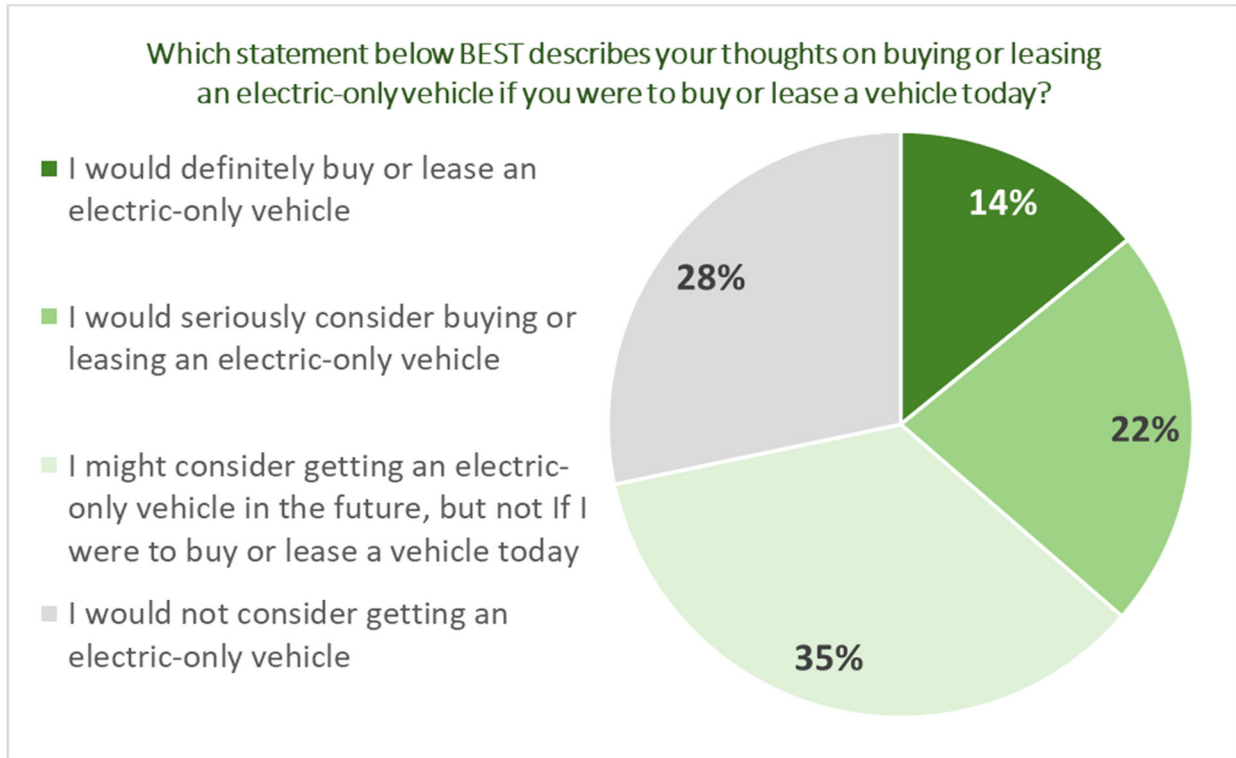
Which of the following statements best describes your thoughts on buying or leasing a plug-in electric vehicle?

- I definitely plan on getting an EV for my next vehicle
- I would consider getting an EV as my next vehicle
- I have some interest in getting an EV in the future, but not for my next vehicle
- I have no interest in ever getting an EV



⁶ Consumer Reports et al., *Survey Says: Considerable Interest in Electric Vehicles Across Racial, Ethnic Demographics* (Sept. 2022), <https://tinyurl.com/4e7bfd5v>.

2022 Survey Results:



Given the 2020 United States adult population of 258 million,⁷ these representative surveys indicate that if Americans were to buy or lease a new vehicle in 2022, 36 million Americans would definitely get an electric vehicle and an additional 57 million Americans would seriously consider it. EPA's projection of the total volume of battery electric and plug-in hybrid vehicle sales for the model years 2023 to 2026 is approximately 8 million vehicles.⁸ Only a fraction (just over a

⁷ Stella U. Ogunwole et al., U.S. Census Bureau, *Population Under Age 18 Declined Last Decade* (Aug. 12, 2021), <https://tinyurl.com/jcydxds3>.

⁸ This value is calculated based on the volume of sales projected by EPA for these four model years in the Regulatory Impact Analysis, Revised 2023 and Later Model Year Light-Duty Vehicle GHG Emissions Standards: Regulatory Impact Analysis, at

fifth) of the 36 million Americans who said they would “definitely buy an electric vehicle today” would need to actually purchase one over the next four years to equal EPA’s projected sales level.

Given the rapid growth in consumers’ interest in buying electric vehicles between 2020 and 2022, and a corresponding decrease in their desire to buy vehicles powered by internal combustion engines,⁹ there can be little doubt that EPA’s projected 2026 level of demand will be exceeded as well. Vehicle manufacturers believe so too. *See* Comments of the Alliance for Automotive Innovation, at 7–8 (Sept. 27, 2021), <https://www.regulations.gov/comment/EPA-HQ-OAR-2021-0208-0571> (“According to recent estimates shared by IHS Market in August 2021, auto manufacturers are planning sales of battery electric and plug-in hybrid electric vehicles to reach approximately 23 percent of new light vehicle sales in the U.S. market in 2026.”). These survey results paint a clear picture of the market responding

8-10 (Dec. 2021), <https://www.regulations.gov/document/EPA-HQ-OAR-2021-0208-0849>, and the percent of electric vehicles projected for each of these model years, 86 Fed. Reg. at 74,485.

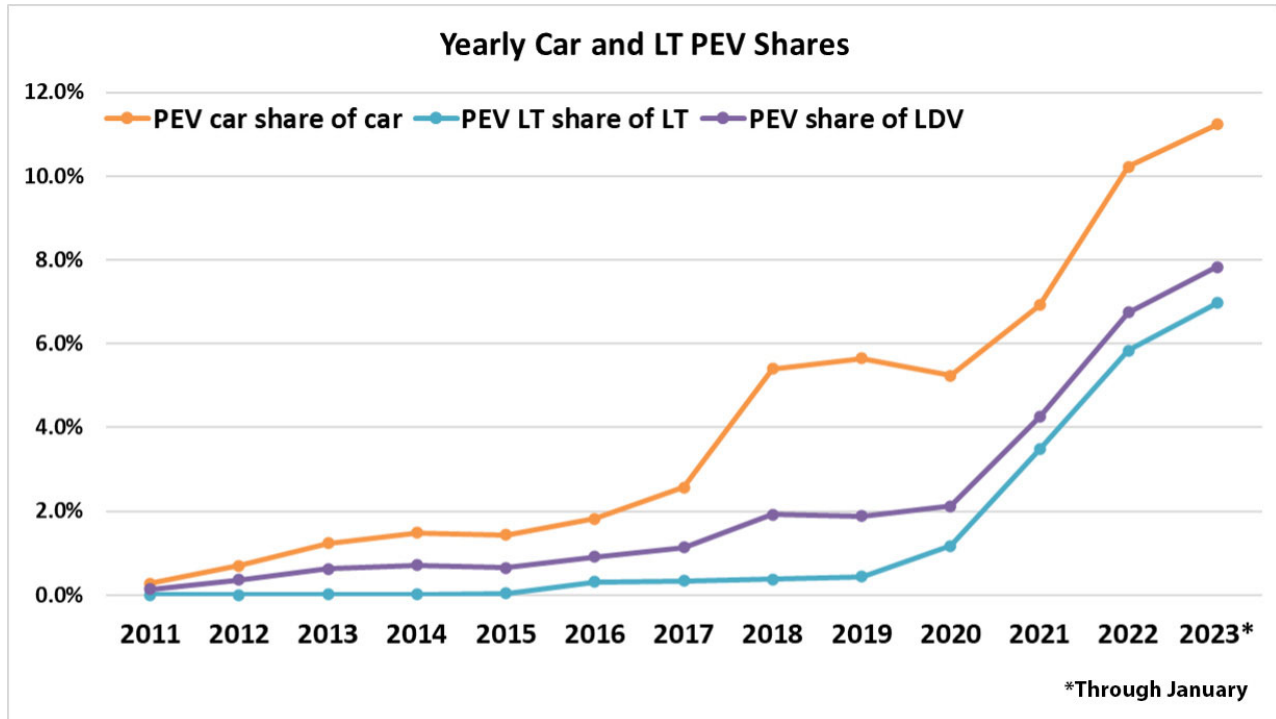
⁹ Internal analysis of a 2022 Consumer Reports nationally representative survey of over 2,000 U.S. adults shows that 30 percent of licensed drivers who were then currently in the market to buy or lease a vehicle, and who were considering only new (not used) vehicles, were not even considering a conventional non-hybrid vehicle. *See generally* Consumer Reports, *Car Buying: A Nationally Representative Multi-Mode Survey: 2022 Results* (May 2022), <https://tinyurl.com/ax8vh83b>.

to consumer demand, and not one being dragged along by regulatory requirements as Petitioners assert.¹⁰

This conclusion is further supported by the robust sales and pre-orders for existing models of electric vehicles. In 2022, sales of battery electric vehicles in the United States increased to over 800,000 vehicles. Cox Automotive, *In a Down Market, EV Sales Soar to New Record* (Jan. 13, 2023), <https://tinyurl.com/3chwknpp>. This is 5.8 percent of vehicle sales, up from 3.2 percent in 2021. *Id.*; see also EPA, *The 2022 EPA Automotive Trends Report*, at 74 (Dec. 2022), <https://tinyurl.com/5n9av44u> (preliminary report that electric vehicle sales, including both battery and plug-in hybrid electric vehicles, were 7.2 percent of total sales in 2022). In California, nearly 20 percent of automobile sales in 2022 were electric vehicles. Office of Governor Gavin Newsom, *California ZEV Sales Near 19% of All New Car Sales in 2022* (Jan. 20, 2023), <https://tinyurl.com/27mr62z4>. The accelerating increase in electric vehicle sales has continued into 2023. Argonne National Laboratory, *Light Duty Electric Vehicles Monthly Sales Updates*, Fig. 3 (visited Mar. 2, 2023), <https://tinyurl.com/583as5bb>.

¹⁰ A 2022 consumer survey by the American Automobile Association similarly found that 25 percent of Americans would be likely to buy an electric vehicle for their next automobile purchase, with concern about fuel costs a major consideration. Brittany Moye, Am. Auto. Ass'n, *Americans Reveal Fresh Thoughts on Electric Vehicles* (July 13, 2022), <https://tinyurl.com/mrxsx6v4>.

The chart from Argonne National Laboratory tracking electric vehicle sales is reproduced below:¹¹



Pre-orders (many of which require a deposit) confirm the overwhelming demand. In June 2022, at least 2 million Americans were on waitlists or waiting for reservations for an electric vehicle. Liz Najman, *Everything to Know About EV Reservations & Pre-orders*, Recurrent (June 2022), <https://tinyurl.com/ywh9h55d>. This high level of consumer interest has continued into 2023. For example, the Dodge Ram 1500 REV reached its maximum number of pre-orders in five days after reservations were opened on February 12, 2023. Peter Johnson, *Ram closes*

¹¹ In this chart, PEV stands for plug-in electric vehicle, a category that includes both battery and plug-in hybrid electric vehicles. Each line depicts electric vehicle share of total sales for cars, light trucks (“LT”), and light duty vehicles (“LDV”).

reservations for its first electric truck, the 1500 REV, after 5 days, Electrek (Feb. 17, 2023), <https://tinyurl.com/5x6hmsvp>.

The rapid growth in the sale of electric vehicles is likely not only to continue, but to accelerate. In the Inflation Reduction Act of 2022, Pub. L. No. 117-169, Congress enacted several provisions that will make purchasing electric vehicles even more attractive to consumers, including tax credits and support for charging infrastructure. *See generally* Peter Slowick et al., *Analyzing the Impact of the Inflation Reduction Act on Electric Vehicle Uptake in the United States* (Jan. 2023), <https://tinyurl.com/b29dxnrf>; Keith Barry, Consumer Reports, *More SUVs, Teslas Now Qualify for the New Electric Vehicle Tax Credit* (Feb. 2023), <https://tinyurl.com/bp5bmvxp>.

II. Manufacturers' Commitments To Electric Vehicles Are Commensurate With Consumer Demand.

Vehicle manufacturers are moving rapidly to develop the capacity to meet both current and anticipated future demand. In its comments on the proposed rule, the Alliance for Automotive Innovation—which “represents the manufacturers producing nearly 99 percent of cars and light trucks sold in the U.S.,” Alliance for Automotive Innovation Comments, *supra*, at 1 n.1—stated that automakers worldwide had committed to investing more than 330 billion dollars in manufacturing electric vehicles. *Id.* at 3. More recent analysis published in January 2023 found that vehicle manufacturers and battery makers plan to invest \$860 billion

dollars in transitioning to electric vehicles worldwide, of which \$210 billion dollars will be invested in the United States. 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>.¹²

As EPA noted, announcements by individual automakers confirm the industry's strong turn to electric vehicles. 86 Fed. Reg. at 74,486 (describing manufacturer announcements). EPA noted announcements by General Motors, Volvo, Volkswagen, Honda, Ford, Fiat, Mercedes-Benz, and Toyota concerning plans to substantially increase electric vehicle production, including several manufacturers' plans to convert entirely to electric vehicles. *Id.* Automakers are moving aggressively to meet their own objectives—including objectives pre-dating the challenged rule—by introducing new electric models and developing the necessary manufacturing infrastructure. *See* Jeff S. Bartlett & Ben Preston, Consumer Reports, *Automakers Are Adding Electric Vehicles to Their Lineups. Here's What's Coming* (Jan. 6, 2023), <https://tinyurl.com/4zkthemk>.

Automakers' advertising and websites make plain that they see a growing demand for electric vehicles. *See, e.g.*, Ford Motor Co., *Ford Electric Vehicle*

¹² *See also* Initial Brief of Industry Respondent-Intervenor, at 11-14, *Ohio v. EPA*, No. 22-1081 (D.C. Cir. Feb. 13, 2023). “[M]akers of internal combustion vehicles have invested billions in electric vehicles Global automakers have no plans to abandon their extensive and growing financial commitments to electric vehicles.” *Id.* at 12. Ford and other major automakers joined that brief. *Id.* at iii-iv.

Strategy, <https://tinyurl.com/3vt24j7m>; General Motors, *Our Path to an All-Electric Future*, <https://tinyurl.com/bdh4s7bp>; Toyota Motor Sales, *Electrified Makes Everything Better*, <https://tinyurl.com/3fjpt8jt> (all visited Mar. 2, 2023).

Automakers' public commitments to electrification, summarized in the table below, confirm that manufacturers are not being pulled along by rules, but racing ahead to catch up to where consumers already are.¹³

Automaker/Brand	Electric Vehicle Commitment
American Honda Motor Co.	40% electric sales by 2030, 100% by 2040.
Bentley	100% battery or plug-in hybrid electric by 2026 and 100% battery electric by 2030.
BMW North America	Minimum of 50% of global sales electric by 2030.
Ford Motor Company	2 million electric vehicles per year by 2026 and 50% electric sales globally by 2030.
General Motors	100% electric by 2035.

¹³ BMW Group, *BMW Group Announces \$1.7 Billion (USD) Investment to Build Electric Vehicles in the U.S. and Signs Agreement with Envision AESC for the Supply of Battery Cells to Plant Spartanburg* (Oct. 19, 2022), <https://tinyurl.com/2axadn5t>; Peter Johnson, *BMW CFO sees 'very good order' situation with EVs, projects 400,000 pure electric vehicle sales*, Electrek (Sept. 27, 2022), <https://tinyurl.com/2rr4y5ub>; Jaguar Land Rover Automotive, *Reimagine* (visited Mar. 3, 2023), <https://tinyurl.com/2p9yebfh>; Porsche, *Porsche's Ambition for 2030: More than 80 percent all-electric new vehicles* (Mar. 18, 2022), <https://tinyurl.com/2p8ktxx5>; Rolls-Royce Motor Cars, *Rolls-Royce Spectre Unveiled: The Marque's First Fully-Electric Motor Car* (Oct. 18, 2022), <https://tinyurl.com/y4kfyhyh>; Volkswagen, *On the Way to ZERO: the General Strategy* (visited Mar. 3, 2023), <https://tinyurl.com/bdemx63u>; Bartlett & Preston, *supra* (collecting production plans for all others).

Automaker/Brand	Electric Vehicle Commitment
Hyundai Motor Company	100% zero-emission vehicles by 2030.
Jaguar Land Rover	All models will have an electric version by 2030. All Jaguar models will be electric by 2025. Achieve net zero emissions across all vehicles and supply chain by 2039.
Kia Motors America	Goal of 1.2 million annual battery electric vehicle sales globally by 2030.
Lexus	100% electric vehicles by 2030.
Lincoln	Globally 50% zero-emission vehicles by 2025 and 100% electrified by 2030.
Mercedes-Benz USA	All newly launched platforms will be electric only by 2025.
Mitsubishi Motors North America	50% battery or plug-in hybrid electric globally by 2030.
Nissan North America	40% electric vehicle sales in the U.S. by 2030.
Porsche	More than 80% battery electric vehicles by 2030.
Rolls-Royce	100% electric by 2030.
Stellantis North America	50% electric vehicle sales by 2030.
Toyota Motor Sales	3.5 million battery electric vehicles per year worldwide by 2030.
Volkswagen Group of America	More than 50% electric vehicles in North America by 2030.
Volvo Group North America	100% electric vehicles by 2030.

CONCLUSION

Rapidly increasing sales of electric vehicles reflect increasing consumer demand due to electric vehicles' lower operating costs, among other factors, together with automakers' market-driven efforts to meet that demand. EPA's projection that automakers will opt to rely on electric vehicle sales to help them meet emissions standards rightly reflects the rapidly growing demand for electric vehicles, and manufacturers' willingness to meet that demand. Far from steering the market somewhere it wasn't already headed, the Rule is supported by conservative estimates of market trends that are already satisfied by today's reality. EPA has set forth a reasonable regulatory framework for realizing the substantial benefits to consumers of greater access to electric vehicles, and the Petitions for Review should be denied.

Respectfully submitted,

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March 3, 2023

CERTIFICATE OF COMPLIANCE

This amicus curiae brief is in 14-point Times New Roman proportional font and contains 3,032 words as counted by Microsoft Word, excluding the items that may be excluded. The brief thus complies with the type-face, style, and volume limitations set forth in Rule 29(a)(5) and 32(a)(5)–(7)(B) of the Federal Rules of Appellate Procedure.

/s/Hyland Hunt

Hyland Hunt

March 3, 2023

CERTIFICATE OF SERVICE

I hereby certify that, on March 3, 2023, I served the foregoing amicus curiae brief upon all counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system:

/s/ Hyland Hunt

Hyland Hunt