IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ENVIRONMENTAL DEFENSE FUND *et al.*,

Plaintiffs,

v.

ELAINE L. CHAO, in her official capacity as Secretary of the United States Department of Transportation, *et al.*,

Defendants.

No. 1:19-cv-02907-KBJ

PUBLIC-INTEREST ORGANIZATION PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS OR TRANSFER

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INTRODUCTION

This case involves a challenge by nine public interest organizations to regulations of the National Highway Traffic Safety Administration (NHTSA) that declare certain state vehicular emission laws preempted under the Energy Policy and Conservation Act (EPCA), Pub. L. No. 94-163, 89 Stat. 871 (1975). This Court has jurisdiction to review NHTSA's regulations (the Preemption Rule) pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§ 701–706, because no statute confers exclusive jurisdiction on the courts of appeals.

Defendants have offered shifting rationales for their contrary preference that this case proceed directly in the D.C. Circuit. When NHTSA issued the Preemption Rule, it cited only the Clean Air Act's judicial review provision, even though NHTSA has no authority to, and did not purport to, take action under that statute. Defendants now base their jurisdictional argument on EPCA's judicial review provision, 49 U.S.C. § 32909. But Section 32909 does not authorize direct review of the Preemption Rule either.

Section 32909 provides the courts of appeals with jurisdiction to review only those regulations promulgated pursuant to six of the nineteen sections in EPCA's fuel-economy chapter. EPCA's preemption provision, 49 U.S.C. § 32919, is not among those specified. Thus, pursuant to settled precedent addressing analogous judicial review provisions—i.e., those designating only actions taken under specified statutory sections for direct review in the courts of appeals—the Preemption Rule is not covered by Section 32909 and instead must be challenged in the district courts under the APA. The text of Section 32909, its statutory history, and D.C. Circuit precedent interpreting the provision foreclose Defendants' contention that it is meaningfully broader than those analogous direct-review provisions. And while NHTSA invokes inapposite sections of EPCA that (unlike the preemption provision) do appear in Section 32909, those sections would

support direct review only if they at least colorably authorized the Preemption Rule, which they do not.

Accordingly, this Court has jurisdiction, and Defendants' resort to considerations of judicial economy can neither change that fact nor upset Congress's jurisdictional choices. The motion to dismiss or transfer should be denied.

BACKGROUND

The issue currently before the Court is a narrow one. As Defendants acknowledge, the instant motion "raises a purely non-record jurisdictional issue," which can and should be resolved solely by reference to the complaint, the challenged agency decision, and the relevant statutory provisions. *See* Mot. to Postpone Filing Certified Index of Record, ECF No. 18 at 2. While Plaintiffs strongly disagree with many assertions in the background section of Defendants' brief, *see* Mot. to Dismiss or Transfer 3–11 (hereinafter Mot.), those disagreements do not bear on this Court's statutory subject-matter jurisdiction. Plaintiffs therefore confine their presentation to matters relevant to the issue currently before the Court.

A. Statutory Background

In the wake of the 1973–74 oil crisis, Congress enacted EPCA to, among other things, "provide for improved energy efficiency of motor vehicles." Pub. L. No. 94-163, § 2(5), 89 Stat. at 874 (codified at 42 U.S.C. § 6201 (5)). To this end, EPCA established a program governing automobile fuel economy. *Id.* sec. 301, §§ 501–512, 89 Stat. at 901–16 (codified originally at 15 U.S.C. §§ 2001–2012). Congress later recodified the fuel-economy provisions as part of a non-substantive consolidation of transportation statutes in Title 49 of the U.S. Code, where EPCA's fuel-economy chapter remains today. *See* Pub. L. No. 103-272, 108 Stat. 745, 1056–76 (1994) (codified as amended at 49 U.S.C. §§ 32901–32919).

Section 32902 of EPCA's fuel-economy chapter authorizes the Secretary of Transportation to prescribe regulations establishing "average fuel economy standards." 49 U.S.C. § 32902(a). The standards, commonly referred to as corporate average fuel economy (CAFE) standards, are "performance standard[s] which specify[] a minimum level of average fuel economy" that automakers must attain in a model year. *Id.* § 32901(a)(6). In prescribing or amending CAFE standards, the Secretary must "consider technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy." *Id.* § 32902(f). Section 32902 also requires that the Secretary of Transportation "shall consult with the Secretary of Energy in carrying out this section." *Id.* § 32902(i). The Secretary of Transportation has delegated her authority under the fuel-economy chapter to NHTSA. *See* 49 C.F.R. § 1.95(a).

Other sections of EPCA authorize NHTSA and/or the Administrator of the Environmental Protection Agency (EPA) to prescribe regulations addressing various additional aspects of the fuel-economy program. *See, e.g.*, 49 U.S.C. § 32903(f), (g) (authorizing NHTSA to establish trading and transferring programs for compliance credits that automakers earn for exceeding the CAFE minimum standards); *id.* § 32907(b)(1) (authorizing NHTSA and EPA to require automakers to "keep records, make reports, conduct tests, and provide items and information"); *id.* § 32912(c)(1) (authorizing NHTSA to increase the civil penalty for violating CAFE standards); *id.* § 32918(e) (authorizing EPA to establish testing and evaluation procedures for retrofit devices that might improve automobile fuel economy). EPCA also contains a preemption provision, Section 32919, which operates to preempt some state or local laws "related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter." *Id.* § 32919(a).

Finally, EPCA contains a judicial review provision, Section 32909, that gives the courts of appeals jurisdiction to directly review some—but not all—regulations prescribed under the fuel-economy chapter. The first paragraph of Section 32909 authorizes direct review of regulations "prescribed in carrying out any of sections 32901–32904 or 32908." *Id.* § 32909(a)(1). The second paragraph likewise channels review of regulations "prescribed under section 32912(c)(1)" to the courts of appeals. *Id.* § 32909(a)(2). EPCA's preemption provision, Section 32919, is not among the sections specified for direct review in Section 32909.

B. NHTSA's Preemption Rule

On August 24, 2018, NHTSA and EPA published a notice of proposed rulemaking regarding several actions related to new motor vehicles. 83 Fed. Reg. 42,986. Specifically, NHTSA (1) proposed to weaken its model year 2021 CAFE standards for passenger cars and light trucks and to establish new standards for model years 2022 through 2026, *id.* at 42,987, and (2) proposed regulations expressing NHTSA's view that EPCA preempts certain state standards for vehicular emissions of air pollutants, *id.* at 43,232–39. EPA, among other things, (1) proposed replacing its previously established model-year 2021 through 2025 greenhouse gas (GHG) emission standards with weaker standards for model years 2021 through 2026, *id.* at 42,987, and (2) proposed revoking major parts of the Clean Air Act waiver of preemption EPA had granted California in 2013 for its emission standards, *id.* at 43,240–53; *see* Compl. ¶¶ 19–53 (outlining pertinent statutory and historical background for these preemption waivers).

The notice of proposed rulemaking did not explicitly identify the source of NHTSA's claimed authority to promulgate the Preemption Rule. *See, e.g.*, 83 Fed. Reg. at 42,987–43,000, 43,232–39. To the extent the proposal discussed any authority for the rule, it pointed to EPCA's preemption provision, Section 32919, and asserted that Congress "provid[ed] broad preemptive

power established in the language codified at 49 U.S.C. 32919(a)." *Id.* at 43,238. NHTSA also specifically distinguished its "proposed interpretation of 49 U.S.C. 32919" from "the CAFE standards being proposed today under 49 U.S.C. 32902." *Id.* at 43,239.

On September 27, 2019, NHTSA and EPA published a notice of their final actions. 84 Fed. Reg. 51,310. While the agencies deferred finalizing their proposed CAFE and GHG emission standards, NHTSA issued a final Preemption Rule and EPA revoked major parts of California's Clean Air Act preemption waiver. *Id.* at 51,311.

In the preamble to its final Preemption Rule, NHTSA responded to commenters who had questioned its authority to issue the rule. NHTSA observed that "Congress gave the Secretary of Transportation express authorization to prescribe regulations to carry out her duties and powers," *id.* at 51,320 (citing 49 U.S.C. § 322(a)), and that "NHTSA has delegated authority to carry out the Secretary's authority under Chapter 329 of Title 49, which encompasses EPCA's preemption provision," *id.* NHTSA also claimed, for the first time, that the Preemption Rule represented an exercise of the agency's authority under Sections 32901 through 32903, *id.*, because, in its view, preemption was "necessary to maintain the integrity of the [CAFE] program," *id.* at 51,311.

Finally, NHTSA instructed in the preamble that any challenges to the Preemption Rule should be filed in the D.C. Circuit by November 26, 2019, citing only the Clean Air Act's judicial review provision, 42 U.S.C. § 7607(b). *See* 84 Fed. Reg. at 51,310, 51,361.

C. Procedural History

Plaintiffs challenged NHTSA's Preemption Rule on September 27, 2019. *See* Compl. ¶¶ 92–127. Plaintiffs filed suit in this Court because no statute authorizes direct review of the Preemption Rule in the courts of appeals. *See id.* ¶ 60. However, "out of an abundance of caution," *Am. Petroleum Inst. v. SEC* (*API*), 714 F.3d 1329, 1332 (D.C. Cir. 2013), Plaintiffs also

have filed expressly protective petitions for review of the Preemption Rule in the D.C. Circuit. *See Union of Concerned Scientists v. NHTSA*, No. 19-1230 (D.C. Cir. filed Oct. 28, 2019); *Envtl. Def. Fund v. NHTSA*, No. 19-1200 (D.C. Cir. filed Sept. 27, 2019) (unopposed motion to voluntarily dismiss without prejudice filed Oct. 29, 2019). Plaintiffs anticipate soon filing a petition for review challenging EPA's partial revocation of California's Clean Air Act preemption waiver. *See* 42 U.S.C. § 7607(b)(1).

On October 15, 2019, Defendants served the instant motion to dismiss or transfer this case, arguing that the Preemption Rule must be challenged in the courts of appeals pursuant to EPCA's judicial review provision, 49 U.S.C. § 32909(a).

STANDARD OF REVIEW

Whether this Court has statutory subject-matter jurisdiction over this case is a "discrete issue of statutory interpretation." *Nat'l Ass'n of Mfrs. v. Dep't of Def.* (*NAM*), 138 S. Ct. 617, 624 (2018). Courts give "no deference to the executive branch" in construing provisions that govern their jurisdiction. *NetCoalition v. SEC*, 715 F.3d 342, 348 (D.C. Cir. 2013). For transfer to be available under 28 U.S.C. § 1631, "there must be a lack of jurisdiction in the district court." *Ukiah Adventist Hosp. v. FTC*, 981 F.2d 543, 549 (D.C. Cir. 1992).

ARGUMENT

I. This Court has jurisdiction to review the Preemption Rule.

Congress provided in 28 U.S.C. § 1331 that "district courts shall have original jurisdiction" over "all civil actions arising under" federal law. "Because district courts have general federal question jurisdiction under 28 U.S.C. § 1331, the normal default rule is that persons seeking review of agency action go first to district court" pursuant to the APA, 5 U.S.C. §§ 702–704, "rather than to a court of appeals." *Pub. Citizen, Inc. v. NHTSA*, 489 F.3d 1279, 1287 (D.C. Cir.

2007) (Kavanaugh, J.) (citation omitted). "Petitions for review of agency action may not be pursued in the court of appeals in the first instance unless a direct-review statute specifically gives the court of appeals subject-matter jurisdiction" to review that action. *Delta Constr. Co. v. EPA*, 783 F.3d 1291, 1298 (D.C. Cir. 2015) (interpreting 49 U.S.C. § 32909(a)).

Moreover, "[a]n appellate court's jurisdiction under a direct-review statute is strictly limited to the agency action(s) included therein." *NetCoalition*, 715 F.3d at 348. Thus, in construing the Clean Water Act's judicial review provision, a unanimous Supreme Court recently made clear that where a statute authorizes direct review of only certain categories of agency action taken under specified statutory sections, challenges to actions outside of those categories must proceed initially in the district courts. *NAM*, 138 S. Ct. at 626–27. The Supreme Court's opinion in *NAM* is consistent with earlier D.C. Circuit cases holding that, when a statute provides for direct review "only over challenges to rules promulgated pursuant to enumerated sections" of a statute, *API*, 714 F.3d at 1333, any "[c]hallenges to rules implementing *other* sections must begin in district court," *Loan Syndications & Trading Ass'n v. SEC*, 818 F.3d 716, 720 (D.C. Cir. 2016).

The controlling caselaw thus confirms that this Court has jurisdiction over this case because no statute provides the courts of appeals with original jurisdiction to review the Preemption Rule in the first instance. Defendants would prefer that this case proceed directly in the D.C. Circuit, and they now contend that the courts of appeals have exclusive jurisdiction to review the Preemption Rule pursuant to EPCA's judicial review provision, 49 U.S.C. § 32909(a). *See* Mot. 12–18. NHTSA notably did not make this same contention in the Preemption Rule's lengthy preamble, which cited only the Clean Air Act's judicial review provision, 42 U.S.C. § 7607(b)(1), and informed the public that petitions for review of the Preemption Rule would be due 60 days after Federal Register publication. *See* 84 Fed. Reg. at 51,310, 51,361. If Defendants were now

correct that Section 32909 applies, however, any petitions for review would have been due "not later than 59 days after the regulation [wa]s prescribed," 49 U.S.C. § 32909(b), a deadline that does not appear in the rule's preamble.[1]

In any event, Defendants' new contention that EPCA's judicial review provision applies to the Preemption Rule is wrong. In Section 32909, Congress "carefully enumerated" only six specified sections for direct review and omitted more than a dozen others. *NAM*, 138 S. Ct. at 634. "Only rules implementing specific, enumerated sections of the Act are [therefore] entitled to direct review." *Loan Syndications*, 818 F.3d at 718. "The section at issue here"—EPCA's preemption provision, Section 32919—"is not among them." *Id.* And the enumerated sections that Congress *has* specified for direct review in EPCA do not "colorably authorize[]" the challenged rule. *Id.* at 723. Nor can Defendants' appeal to judicial economy deprive this Court of jurisdiction, *see* Mot. 21–23, as courts are "'not at liberty to displace, or to improve upon, the jurisdictional choices of Congress'—'no matter how compelling the policy reasons for doing so.'" *Loan Syndications*, 818 F.3d at 724 (quoting *Five Flags Pipe Line Co. v. Dep't of Transp.*, 854 F.2d 1438, 1441 (D.C. Cir. 1988)). Accordingly, this Court has jurisdiction under 28 U.S.C. § 1331 to review the Preemption Rule in the first instance.

A. EPCA's judicial review provision does not apply to the Preemption Rule.

EPCA's judicial review provision—like similar provisions in other statutes, *see, e.g.*, *NAM*, 138 S. Ct. at 626 (describing Clean Water Act judicial review provision); *Loan Syndications*, 818 F.3d at 718 (describing Securities Exchange Act judicial review provision)—authorizes the courts of appeals to review only regulations promulgated pursuant to specified

[1] In addition to the one-day difference in the EPCA and Clean Air Act filing deadlines, Defendants have argued recently (though unsuccessfully) that EPCA's 59-day filing window opens earlier than the Clean Air Act's and is not subject to equitable tolling. *See NRDC v. NHTSA*, 894 F.3d 95, 105–07 (2d Cir. 2018). Defendants' arguments would therefore mean that a party following NHTSA's instructions—and filing on the 60th day after Federal Register publication—would forfeit all right to judicial review of the Preemption Rule.

sections of the fuel-economy chapter. Specifically, Congress provided the courts of appeals with jurisdiction to review regulations prescribed pursuant to six of the chapter's nineteen sections: Sections 32901–32904, 32908, and 32912. *See* 49 U.S.C. § 32909(a). EPCA therefore provides for direct review of regulations promulgated under *these* sections, including rules prescribing or amending CAFE standards for a given model year, *id.* § 32902(a); rules changing the percentage of ethanol in "alternative fuels," *id.* § 32901(b); rules establishing trading and transferring programs for over-compliance credits, *id.* § 32903(f), (g); rules concerning calculation and testing of fuel economy, *id.* § 32904(c), (d); rules for labeling of new automobiles and development of consumer-education programs, *id.* § 32908(g); and rules increasing the civil penalty for violating CAFE standards, *id.* § 32912(c)(1).

At the same time, Congress did not confer on the courts of appeals original jurisdiction over *all* regulations prescribed under EPCA's fuel-economy chapter. *Cf. API*, 714 F.3d at 1335. Rather, Congress unambiguously "authorized initial appellate review of only certain rules, leaving the rest to be challenged in the district court." *Id.*; *see NAM*, 138 S. Ct. at 633–34. Indeed, Section 32909 leaves out most of the chapter's sections—more than a dozen of them—from the list of those triggering direct review. Given the "text and structure" of Section 32909 and EPCA's fuel-economy chapter, these omissions indicate that "Congress, for whatever reason, intended challenges to … regulations [implementing these other sections] to be brought first in the district court." *Loan Syndications*, 818 F.3d at 720–21 (quoting *API*, 714 F.3d at 1335). And because Section 32909 omits several provisions that specifically confer rulemaking authority under EPCA—*see, e.g.*, 49 U.S.C. § 32907(b) (regulations about manufacturer recordkeeping); *id.* § 32917(b) (regulations about executive-agency automobiles); *id.* § 32918(e) (regulations about

retrofit devices)—Congress clearly "knew it would be sending some cases to the district court." *API*, 714 F.3d at 1337.

Critically for this case challenging the Preemption Rule, EPCA's preemption provision, Section 32919, is "conspicuously unmentioned in the direct review provision." *Nat'l Auto. Dealers Ass'n v. FTC*, 670 F.3d 268, 271 (D.C. Cir. 2012). Because that "substantive provision is not listed" in Section 32909, *API*, 714 F.3d at 1336, any regulation purporting to interpret or apply the preemption provision "may not be challenged in [the court of appeals] in the first instance," *Nat'l Auto. Dealers*, 670 F.3d at 271. And the Preemption Rule, at its core, purports to do just that. *E.g.*, 84 Fed. Reg. at 51,320 ("NHTSA has delegated authority to carry out the Secretary's authority under Chapter 329 of Title 49, which encompasses EPCA's preemption provision."); *id.* ("[T]he statute is clear on the question of preemption, and NHTSA must carry it out.").

Based on a "straightforward reading of Section 32909," *Delta Constr.*, 783 F.3d at 1299, the Preemption Rule "falls outside the ambit" of the direct-review provision, "and any challenges to the Rule therefore must be filed in federal district courts," *NAM*, 138 S. Ct. at 624.

1. The plain text and statutory history of Section 32909 foreclose Defendants' contention that it is meaningfully broader than other review provisions that courts have construed narrowly.

Defendants contest this straightforward application of Section 32909. They principally contend that Section 32909 is a "far broader judicial review provision" than those at issue in *NAM* and similar cases—and is "not limited to particular, discrete agency actions or regulations"—because it applies to regulations that NHTSA adopts in "carrying out" the specified EPCA sections, as opposed to regulations prescribed "under" those sections. Mot. 16–17. Defendants interpret the phrase "carrying out" to mean that Congress gave the courts of appeals jurisdiction to review "*not only* the specific regulations directly promulgated under the provisions cited in Section 32909(a)(1), but also … any regulations NHTSA issues that *more broadly* 'car-

ry[] out' those sections." *Id.* at 13 (emphases added). And based on this premise, Defendants maintain that Section 32909 applies to this case because the Preemption Rule is "directed toward 'carrying out'" EPCA's fuel-economy program, including sections specified in the direct-review provision that provide for CAFE standards. *Id.* at 15. The text of Section 32909, its statutory history, and D.C. Circuit caselaw interpreting it all prove Defendants wrong.

First, if Defendants were correct that Section 32909's use of the phrase "carrying out" swept so broadly as to encompass the Preemption Rule, then essentially *any* regulation prescribed under EPCA's fuel-economy chapter would fall within the provision's ambit. But as noted above, Congress "carefully enumerated" only six specified sections for direct review in Section 32909 and omitted more than a dozen others, leaving challenges to rules promulgated pursuant to those other sections "to the jurisdiction of the federal district courts." *NAM*, 138 S. Ct. at 634. As Defendants acknowledge, "[i]t is a fundamental canon of interpretation that courts do not read a statute in a way that renders any part of it superfluous." Mot. 15 (citing *Agnew v. Gov't of D.C.*, 920 F.3d 49, 57 (D.C. Cir. 2019)). But Defendants' interpretation "renders other statutory language superfluous," *NAM*, 138 S. Ct. at 630, because if Section 32909 broadly covered all regulations "directed toward 'carrying out'" the CAFE standards, as Defendants suggest, Mot. 15, then Congress would not have specified six separate sections for direct review. That is, regulations concerning the trading of CAFE compliance credits, 49 U.S.C. § 32903(f); calculation and testing of fuel economy, *id.* § 32904(c); fuel-economy labeling requirements, *id.* § 32908(g); and increasing the civil penalty for violating CAFE standards, *id.* § 32912(c)(1), are all, in some sense, "directed toward 'carrying out'" the CAFE standards. But under Defendants' theory of "carrying out," Congress would have had no need to separately specify Sections 32903, 32904, 32908, and 32912 in the judicial review provision because—as Defendants implicitly

acknowledge elsewhere in their argument, *see infra* 18–19—each of these regulations would have already been subject to direct review. Courts have consistently refused to construe analogous judicial review provisions in such a manner. *See, e.g.*, *NAM*, 138 S. Ct. at 630–31; *API*, 714 F.3d at 1333–34.[2]

Of course, Congress "could have authorized direct circuit-court review of all nationally applicable regulations" carrying out the EPCA fuel-economy chapter, "as it did under the Clean Air Act." *NAM*, 138 S. Ct. at 633 (citing 42 U.S.C. § 7607(b)(1)). But Congress "chose a different tack" in Section 32909 and "structured judicial review under the Act differently." *NAM*, 138 S. Ct. at 633–34. "[F]or whatever reason," *API*, 714 F.3d at 1335—whether "intentionally or inadvertently," *Five Flags*, 854 F.2d at 1442—Congress specified only six statutory sections for direct review in Section 32909 and omitted many others, including some that expressly confer rulemaking authority. "Courts are required to give effect to Congress' express inclusions and exclusions, not disregard them." *NAM*, 138 S. Ct. at 631. Section 32909 therefore "does not grant courts of appeals original jurisdiction to review many types" of regulations promulgated pursuant to the fuel-economy chapter, *id.* at 633, including the Preemption Rule challenged here.

Second, Defendants are wrong to place so much emphasis on the phrase "carrying out," Mot. 13–17, because the statutory history of changes that Congress enacted in Section 32909 makes clear that a regulation "prescribed in carrying out" an enumerated section is no different from—nothing more, nor less than—a regulation "prescribed under" that section. EPCA's judi-

[2] Defendants erroneously contend that Plaintiffs' interpretation of Section 32909 creates surplusage because Congress "could have deleted the phrase 'carrying out,' leaving the statutory text to provide for court of appeals review of any 'regulations *prescribed in* [~~carrying out~~] sections 32901–32904 or 32908.'" Mot. 15 (emphasis added). But Defendants' hypothetical text is nonsensical. Regulations are necessarily prescribed by an agency under a statute, rather than prescribed directly by Congress "in" a statute itself. *Cf.* 5 U.S.C. § 551(4) (defining "rule" as "an *agency* statement …" (emphasis added)); *NRDC, Inc. v. Perry*, 940 F.3d 1072, 1080–81 (9th Cir. 2019) (noting that, in EPCA's consumer-appliance program, Congress consistently used the term "under" when referencing agency regulations, and "in" when referencing only statutory obligations). Defendants' hypothetical text would thus make Congress responsible for "prescribing" regulations in EPCA and illogically write NHTSA's role out of the statute.

cial review provision originally used the latter phrase, and thus conferred jurisdiction on the courts of appeals to review rules "prescribed under" specified sections of the fuel-economy chapter. *See* Pub. L. No. 94-163, sec. 301, § 504(a), 89 Stat. at 908 (codified originally at 15 U.S.C. § 2004(a)). As Defendants acknowledge, Mot. 16–17, the phrase "prescribed under" in this context means that a rule must be "promulgated 'pursuant to' or 'by reason of the authority of'" those specified sections. *NAM*, 138 S. Ct. at 630; *see also, e.g.*, *St. Louis Fuel & Supply Co., Inc. v. FERC*, 890 F.2d 446, 450 (D.C. Cir. 1989) (R.B. Ginsburg, J.) ("'under' means 'subject or pursuant to or by reason of the authority of'" (internal alterations omitted)); *HealthAlliance Hosps., Inc. v. Azar*, 346 F. Supp. 3d 43, 58 (D.D.C. 2018) (same).

In 1994, when Congress recodified EPCA's fuel-economy chapter as part of its expressly non-substantive consolidation of transportation statutes, it changed "prescribed under" in the judicial review provision to "prescribed in carrying out." Pub. L. No. 103-272, § 1(e), 108 Stat. at 1070 (codified at 49 U.S.C. § 32909(a)(1)). But Congress explicitly instructed that the 1994 revision "may not be construed as making a substantive change." *Id.* § 6(a), 108 Stat. at 1378; *see also* H.R. Rep. No. 103-180, at 5 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 822 (asserting that "this bill makes no substantive change in the law," notwithstanding any "changes in terminology and style"). Indeed, Congress repeatedly stated that it revised and recodified the transportation laws "without substantive change." Pub. L. No. 103-272, §§ 1(a), 6(a), 108 Stat. at 745, 1378; *accord Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 n.1 (1995). NHTSA itself clearly acknowledged this in its proposed rule here. *See* 83 Fed. Reg. at 43,237 & n.532. Thus, for purposes of Section 32909, the phrases "prescribed under" and "prescribed in carrying out" describe the same regulations—namely, those "promulgated 'pursuant to' or 'by reason of the authority

of'" a specified section of EPCA. *NAM*, 138 S. Ct. at 630. *Cf.* Black's Law Dictionary (11th ed. 2019) (defining "pursuant to" as "under," "[a]s authorized by," "[i]n carrying out").

Third, D.C. Circuit precedent contradicts Defendants' contention that the phrase "carrying out" in Section 32909 sweeps more broadly than the term "under" in other direct-review provisions. In *Delta Construction Company v. EPA*, 783 F.3d 1291 (D.C. Cir. 2015), the court explained, based on a "straightforward reading of Section 32909," that the courts of appeals have jurisdiction to review only regulations prescribed "*under* the provisions enumerated in the direct review statute." *Id.* at 1299 (emphasis added). The D.C. Circuit thus read "carrying out" as synonymous with "under," consistent with the statutory history. And despite Defendants' present contention that Section 32909 is meaningfully distinct from the Motor Vehicle Safety Act's judicial review provision, 49 U.S.C. § 30161(a)—which authorizes review of standards prescribed "under" a different chapter of Title 49, *see* Mot. 16—the D.C. Circuit explained that Section 32909 is "significantly the same as 49 U.S.C. § 30161 with respect to what petitions for review may be heard by the court of appeals in the first instance." *Delta Constr.*, 783 F.3d at 1298–99. Thus, in EPCA, as in the Motor Vehicle Safety Act and the Clean Water Act, Congress *did* "specify that only discrete agency actions are reviewable" in the courts of appeals. Mot. 16.[3]

2. NHTSA's invocation of inapposite statutory provisions listed in Section 32909 does not divest this Court of jurisdiction.

As described above, a "straightforward reading of Section 32909," *Delta Constr.*, 783 F.3d at 1299, demonstrates that the courts of appeals have exclusive jurisdiction only over challenges to regulations prescribed "pursuant to" or "by reason of the authority of" six specified provisions of EPCA, *NAM*, 138 S. Ct. at 630. The courts of appeals' jurisdiction under Section

[3] The Department of Transportation acknowledged in its brief in *Delta Construction* that the "limited grant of jurisdiction in § 32909(a)" was "analogous" to that in 49 U.S.C. § 30161 and "similarly singled out only a narrow category of agency regulatory actions for direct appellate review." Resps.' Br. 54, 2014 WL 6662583 (Nov. 24, 2014).

32909 is thus "strictly limited" to these regulations, *NetCoalition*, 715 F.3d at 348, such as rules prescribing CAFE standards for a given model year, 49 U.S.C. § 32902(a); establishing a credit trading program, *id.* § 32903(f), (g); or increasing the CAFE civil penalty, *id.* § 32912(c). The Preemption Rule—whatever its provenance—is clearly not a regulation prescribed "under the provisions enumerated in the direct review statute." *Delta Constr.*, 783 F.3d at 1299.

Defendants contend that this Court nonetheless lacks jurisdiction because NHTSA "repeatedly *invoked* Sections 32901 through 32903" as purported authority for the Preemption Rule. Mot. 13–14 (emphasis added). But an agency cannot manipulate federal jurisdiction over its actions in this manner. An agency's mere "invocation" of authority under a particular section "does not control [the Court's] interpretive inquiry" in determining whether a challenged rule falls within a direct-review provision. *NAM*, 138 S. Ct. at 630 n.8; *see also Loan Syndications*, 818 F.3d at 721–23 (district court had jurisdiction over challenged rule, notwithstanding agencies' invocation of statutory provisions that would have triggered direct review). *Cf. Adamo Wrecking Co. v. United States*, 434 U.S. 275, 279, 283 (1978) (an agency's "mere designation" of a regulation as one covered by a direct-review statute is not "conclusive as to its character"). Because "[i]nterpretation of a judicial review provision is a judicial inquiry, not an administrative one," NHTSA "is owed no deference in its interpretation of Section 32909." *NRDC*, 894 F.3d at 106 n.2. And Defendants cannot, "after the manner of Humpty Dumpty in Through the Looking Glass," *Adamo*, 434 U.S. at 283, make the Preemption Rule one prescribed pursuant to specified statutory sections just by saying so.

Rather, for this Court to lack jurisdiction over the Preemption Rule, the rule must be at least "colorably authorized" by one of the statutory provisions specified in Section 32909. *Loan Syndications*, 818 F.3d at 723; *accord Paralyzed Veterans of Am. v. U.S. Dep't of Transp.*, 286

F. Supp. 3d 111, 116–18 (D.D.C. 2017) (analyzing whether sections in direct-review statute "colorably support" the challenged rule). *Cf. Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513 & n.10 (2006) (federal-question jurisdiction exists under 28 U.S.C. § 1331 only where a federal claim is "colorable"). But none of the provisions invoked by NHTSA even arguably authorizes the Preemption Rule. The rule is, "at most," a regulation promulgated pursuant to EPCA's provision addressing preemption, Section 32919 (and whatever general rulemaking authority NHTSA may claim to possess to implement that section), and thus "review must be sought in district court in the first instance." *Funeral Consumer All., Inc. v. FTC*, 481 F.3d 860, 863 (D.C. Cir. 2007).

NHTSA did not explicitly assert authority to promulgate the Preemption Rule pursuant to Sections 32901 through 32903 in the notice of proposed rulemaking. *See supra* 4–5. And its subsequent response to commenters who questioned NHTSA's authority to issue the rule is revealing. 84 Fed. Reg. at 51,320. In the preamble to the final rule, NHTSA began by invoking the agency's general rulemaking authority under 49 U.S.C. § 322(a) and then asserted that "NHTSA has delegated authority to carry out the Secretary's authority under Chapter 329 of Title 49, which encompasses EPCA's preemption provision." *Id.* It then asserted, as *ipse dixit*, that "NHTSA therefore has clear authority to issue this regulation under 49 U.S.C. 32901 through 32903." *Id.* But that *non sequitur* does not suffice to divest this Court of jurisdiction.

Nothing in Sections 32901 through 32903 comes even remotely close to authorizing the Preemption Rule. Section 32901 is a provision that defines several terms for purposes of EPCA's fuel-economy chapter. *See* 49 U.S.C. § 32901(a)(1)–(19). It also provides limited rulemaking authority permitting NHTSA to prescribe regulations refining some of those definitions, *see, e.g.*, *id.* § 32901(a)(14), (18) ("manufacturer" and "passenger automobile"); changing the percentage of ethanol in alternative fuels, *id.* § 32901(b); and establishing a minimum range for dual-fueled

passenger automobiles, *id.* § 32901(c). Section 32902, in turn, authorizes NHTSA to prescribe and amend CAFE standards. *Id.* § 32902(a)–(d), (g), (k). And Section 32903 governs compliance credits that automakers can earn for exceeding CAFE standards, *id.* § 32903(a)–(e); it also authorizes NHTSA to prescribe regulations establishing trading or transferring programs for the credits, *id.* § 32903(f), (g). Nothing in any of these sections "colorably authorized" the Preemption Rule, however, *Loan Syndications*, 818 F.3d at 723, which is perhaps why Defendants refer to the sections together, as if NHTSA's authority to promulgate the rule could derive from their collective penumbra. *See, e.g.*, Mot. 10, 15, 17, 19. But, again, Defendants distort the statutory language of Section 32909 by equating carrying out particular statutory sections with carrying out the fuel-economy "program," *id.* at 11, which—as noted above, *supra* 11–12—would improperly sweep EPCA's entire fuel-economy chapter into Section 32909's ambit.

In fact, NHTSA has effectively conceded that the Preemption Rule does not "carry out" either Sections 32902 or 32903. As noted above, *see supra* 3, Section 32902 requires that NHTSA "shall consult with the Secretary of Energy in carrying out this section and section 32903." 49 U.S.C. § 32902(i); *see also id.* § 32902(j). But NHTSA maintained in the preamble to the Preemption Rule that it did not need to consult with the Secretary of Energy pursuant to Section 32902 because it was not establishing CAFE standards under that section. *See* 84 Fed. Reg. at 51,361. Rather, as NHTSA acknowledged, "its regulation concerning EPCA preemption is independent and … separate from its decision on the appropriate standards for any given model years." *Id.* at 51,320; *see also id.* at 53,310–11 (asserting that "EPCA preemption" is a "legal matter[] … independent of the technical details of the proposed [CAFE] standards"); 83 Fed. Reg. at 43,239 (explicitly contrasting NHTSA's "proposed interpretation of 49 U.S.C. 32919" from the fuel economy "standards being proposed … under 49 U.S.C. 32902"). If NHTSA really

were "carrying out" Section 32902 (or Section 32903, for that matter) in promulgating the Preemption Rule, as Defendants now maintain, the agency could not have avoided its obligation to consult with the Secretary of Energy under that section.

Properly understood, then, a "regulation prescribed in carrying out" Section 32902 means a regulation establishing or amending a CAFE standard. The petitions for review historically filed under EPCA's judicial review provision reflect this fact.[4] Nor can NHTSA's discussion of implied preemption transform the Preemption Rule into one promulgated pursuant to Section 32902, because NHTSA "has not concluded that implied preemption broadens the scope of preemption established by Congress." 84 Fed. Reg. at 51,318. Rather, the agency asserted that the preemption provision of Section 32919 "is clear on the question of preemption, and NHTSA must carry it out." *Id.* at 51,320. Thus, there is no basis to characterize the Preemption Rule as one "carrying out" Section 32902 where NHTSA itself has asserted that the rule is merely "a statement of what Federal law requires … *without regard to* the details of the [CAFE] standards the agencies have set previously or set in the future." *Id.* at 51,314 (emphasis added).

Recent cases challenging NHTSA's attempts to suspend and reverse an increase to the civil penalty for violating CAFE standards are not to the contrary. *See* Mot. 17–18. Some of the Plaintiffs here filed those cases in a court of appeals not (as Defendants mistakenly suggest) because the challenged rules were "related to 'carrying out' fuel economy standards." *Id.* at 18. Rather, Plaintiffs challenged those rules in a court of appeals because a *different paragraph* of EPCA's judicial review provision—namely, Section 32909(a)(2), which Defendants ignore in

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[4] *See, e.g.*, *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172 (9th Cir. 2008) (challenging NHTSA rule setting CAFE standards for model years 2008 through 2011); *Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107 (D.C. Cir. 1990) (challenging NHTSA rule amending CAFE standards for model years 1987 through 1989); *Pub. Citizen v. NHTSA*, 848 F.2d 256 (D.C. Cir. 1988) (challenging NHTSA rule amending CAFE standards for model year 1986); *Ctr. for Auto Safety v. NHTSA*, 793 F.2d 1322 (D.C. Cir. 1986) (challenging NHTSA rule amending CAFE standards for model year 1985 and establishing standards for model year 1986).

their motion—specifically authorizes direct review of regulations prescribed under Section 32912(c)(1), the provision regarding CAFE penalty increases. While petitioners in those cases have contested NHTSA's authority under *any* provision to issue the challenged rules suspending and reversing its earlier penalty increase, they also have recognized that the agency's authority must have "derive[d], if at all," *NRDC v. Abraham*, 355 F.3d 179, 194 (2d Cir. 2004), from the EPCA provision regarding penalty increases, which is why they sued in a court of appeals.

Indeed, that Congress specifically and separately provided for direct review of NHTSA's regulations increasing the CAFE penalty when it amended EPCA in 1978, *see* Pub. L. No. 95-619, § 402, 92 Stat. 3206, 3256 (1978) (originally codified at 15 U.S.C. § 2008(e)(3)); *see also* Pub. L. No. 103-272, 108 Stat. at 1070 (codified as amended at 49 U.S.C. § 32909(a)(2)), is yet further evidence that the universe of regulations "carrying out" Section 32902 cannot be so vast as Defendants maintain. *Cf. Loan Syndications*, 818 F.3d at 721 (holding that Congress's addition to direct-review provision of certain rules, but not others, supported conclusion that district court had jurisdiction over challenged rule); *API*, 714 F.3d at 1335 (similar). If, as Defendants suggest, regulations amending the civil penalty for violating CAFE standards were sufficiently "related to 'carrying out' fuel economy standards" to trigger direct review under Section 32909(a)(1), Mot. 18, then Congress's addition of the penalty-specific paragraph in Section 32909(a)(2) would have been entirely unnecessary. Thus, once again, *see supra* 11–12, Defendants' construction of Section 32909 fails because it "renders other statutory language superfluous," *NAM*, 138 S. Ct. at 630, and "run[s] counter to the 'basic interpretive canon[]' that 'a statute should be construed so that effect is given to all its provisions,'" *API*, 714 F.3d at 1334 (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).

In sum, this Court has jurisdiction to review the Preemption Rule under 28 U.S.C. § 1331 because the statutory provisions specified in Section 32909 do not colorably authorize the rule.

B. Defendants' remaining arguments cannot displace this Court's jurisdiction.

Unable to escape the "straightforward reading of Section 32909," *Delta Constr.*, 783 F.3d at 1299, Defendants next raise a series of "extratextual considerations" that they believe support direct review in this case, *NAM*, 138 S. Ct. at 632. But "[t]hose considerations—alone and in combination—provide no basis to depart from the [direct-review provision's] plain language." *Id.* As the Supreme Court and D.C. Circuit have emphasized time and again, "jurisdiction is governed by the intent of Congress and not by any views [a court] may have about sound policy." *Id.* at 634 (quotation omitted). Courts are "simply … not at liberty to displace, or to improve upon, the jurisdictional choices of Congress." *Loan Syndications*, 818 F.3d at 724 (quotation omitted).

1. Defendants contend that this Court should leave the determination of its jurisdiction to the D.C. Circuit in the first instance. *See* Mot. 19–23. But "it is familiar law that a federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628 (2002). "And when a federal court has jurisdiction, it also has a virtually unflagging obligation to exercise that authority." *Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015) (quotation and alteration omitted). District courts thus regularly interpret and apply direct-review provisions, like Section 32909, in determining whether challenges to agency action fall within their jurisdiction.[5] Nor does a district court's ruling on its own jurisdiction interfere with a court of appeals' later ability to do the same, *contra* Mot. 19–20, because the district court's determination ultimately is

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[5] *See, e.g.*, *Nat'l Min. Ass'n v. Jackson*, 880 F. Supp. 2d 119, 134 (D.D.C. 2012) (concluding that Clean Water Act judicial review provision did not apply to challenged action), *rev'd and remanded on other grounds sub nom. Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014); *Sierra Club v. Jackson*, 813 F. Supp. 2d 149, 157–59 (D.D.C. 2011) (concluding that agency's stay of rule was subject to district court review under APA rather than Clean Air Act's direct-review provision); *Levy v. SEC*, 462 F. Supp. 2d 64, 68–69 (D.D.C. 2006) (concluding that district court had jurisdiction because agency did not act pursuant to sections specified in direct-review provision).

subject to appellate review. *See* 28 U.S.C. § 1291. If Defendants believe they can demonstrate a sufficient justification for early review by the court of appeals, then they may request, at an appropriate time, that this Court certify its jurisdictional ruling as an interlocutory order for immediate appeal under 28 U.S.C. § 1292(b). But there is certainly nothing untoward about a district court determining its own jurisdiction in the first instance.

That Plaintiffs contest NHTSA's authority to issue the Preemption Rule does not change the jurisdictional inquiry. Defendants argue that "[c]laims that an agency acted *ultra vires* must be resolved in the same court that has jurisdiction to review the underlying agency action." Mot. 19. But this argument assumes its own conclusion: namely, that the D.C. Circuit has jurisdiction over the Preemption Rule. The cases on which Defendants rely are therefore inapposite. In *FCC v. ITT World Communications, Inc.*, 466 U.S. 463 (1984), for example, there was no dispute that the court of appeals had exclusive jurisdiction to review the agency's final orders, including the denial of the rulemaking petition at issue. *Id.* at 468. In addition to a properly filed petition for review, one litigant also filed a parallel suit in district court, advancing the same arguments and seeking to enjoin as *ultra vires* the same conduct that the agency declined to cease when it denied the rulemaking petition. *Id.* at 466, 468. The Supreme Court held that the plaintiff could not ask the district court to "enjoin action that is the outcome of the agency's order," where the underlying order undisputedly was reviewable exclusively in the courts of appeals. *Id.* at 468. By contrast, here, Plaintiffs have challenged NHTSA's Preemption Rule in the forum compelled by the only colorable interpretation of the applicable judicial review scheme. *See supra* 15–18.[6]

[6] The non-precedential cases that Defendants cite in passing, *see* Mot. 19, are likewise inapposite because they also involved direct-review provisions that plainly applied. *See Sagar v. Mnuchin*, No. 18-5183, 2019 WL 667201, at *1 (D.C. Cir. Jan. 29, 2019) (per curiam) (statutes precluded district court review of employee's allegedly *ultra vires* termination); *Hunter v. FERC*, 348 F. App'x 592, 593 (D.C. Cir. 2009) (plaintiff could not sue in district court to enjoin allegedly *ultra vires* agency enforcement proceeding where court of appeals undisputedly would have exclusive jurisdiction to review outcome of that proceeding).

Defendants' contrary position appears to be that any time an agency invokes statutory sections specified in a direct-review provision, that invocation vests exclusive jurisdiction over the agency's action in the courts of appeals. Under Defendants' theory, it is *defendant agencies* that can "bootstrap themselves into jurisdiction in an improper forum," Mot. 19, merely by reciting statutory sections that do not support their action. This approach has been soundly and repeatedly rejected. *E.g.*, *NAM*, 138 S. Ct. at 630 n.8 ("[T]he agencies' passing invocation of § 1311 does not control our interpretive inquiry."); *Loan Syndications*, 818 F.3d at 721–23 (rejecting argument for court of appeals' "jurisdiction based on … agencies' invocation of other statutes, some of which contain direct-review provisions, in the 'authority, purpose and scope' provisions of the challenged rule"); *Paralyzed Veterans*, 286 F. Supp. 3d at 116 (rejecting similar argument).

At this juncture, Plaintiffs "do not ask the Court to determine whether the [Preemption Rule] is *valid*" under EPCA; "rather, they urge the Court to determine," as a matter of subject-matter jurisdiction, whether Sections 32901 through 32903 "even *colorably* support the rule." *Paralyzed Veterans*, 286 F. Supp. 3d at 116 (emphases in original); *see also Nat'l Nutritional Foods Ass'n v. FDA*, 504 F.2d 761, 772 (2d Cir. 1974) (Friendly, J.) (acknowledging that the court of appeals would lack jurisdiction over a challenged agency action that was not based on an "arguable interpretation" of sections specified in the direct-review statute). As explained above, there is no colorable argument that the Preemption Rule was prescribed pursuant to any of those provisions, as Section 32909 would require to trigger direct review. And a determination by this Court that it has jurisdiction over this case will not conclusively resolve the merits of Plaintiffs' challenge to the Preemption Rule, as NHTSA also claims authority to promulgate the rule pursuant to its delegated general rulemaking authority, 49 U.S.C. § 322(a), to carry out "EPCA's preemption provision," Section 32919. 84 Fed. Reg. at 51,320.

2. Binding precedent forecloses Defendants' next contention that jurisdiction belongs in the courts of appeals pursuant to *Telecommunications Research & Action Center v. FCC (TRAC)*, 750 F.2d 70 (D.C. Cir. 1984), which involved litigation "seeking to compel an agency to perform a mandatory statutory duty unreasonably delayed." Mot. 20. *TRAC* held that where the agency action at issue is one that must be reviewed directly in a court of appeals, only that court—pursuant to its authority under the All Writs Act, 28 U.S.C. § 1651(a)—could "resolve claims of unreasonable delay in order to protect its future jurisdiction." *TRAC*, 750 F.2d at 76.

The D.C. Circuit has explained that the principles animating *TRAC* do not apply when resolving disputes over the proper forum for review of final agency regulations. That is because where, as here, "the agency action is final," there is "no danger that [it] will 'forever evade [the court of appeals'] review,' if it is reviewed in the district court initially." *Five Flags*, 854 F.2d at 1442. Rather, parties "routinely go[] first to district courts, and then take[] appeals from final district court judgments." *Pub. Citizen*, 489 F.3d at 1288. Contrary to Defendants' suggestion, *see* Mot. 20, that scenario "obviously does not thwart" the court of appeals' jurisdiction to ultimately review the merits. *Pub. Citizen*, 489 F.3d at 1288; *see API*, 714 F.3d at 1337 (observing that "many challenges to agency regulations are heard first in the district court and then reviewed de novo" by the court of appeals). In determining original jurisdiction over such cases, the court looks only to whether a direct-review provision encompasses the challenged final action. And here, as in other cases that rejected reliance on *TRAC*, "the plain terms of the statute dictate that judicial review of NHTSA's [action] must begin in district courts—not in courts of appeals." *Pub. Citizen*, 489 F.3d at 1287.

3. Finally, Defendants observe that "judicial economy" favors initial D.C. Circuit review of NHTSA's Preemption Rule because that court has exclusive jurisdiction to review EPA's ac-

tion revoking parts of California's waiver of preemption under the Clean Air Act. *See* Mot. 21–23. Regardless of Defendants' view of the most efficient allocation of judicial resources, however, it is the statutory limits on jurisdiction that control. Indeed, even if the parties shared a preference for a single, assertedly more efficient forum, their agreement would be irrelevant: They cannot confer subject-matter jurisdiction by consent. *See Ins. Corp. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *Franklin-Mason v. Mabus*, 742 F.3d 1051, 1055 (D.C. Cir. 2014) (reaffirming this "time-honored rule"). Considerations of efficiency—"no matter how compelling"—cannot displace Congress's jurisdictional choices. *Loan Syndications*, 818 F.3d at 724; *see NAM*, 138 S. Ct. at 633. And here, by "limiting direct review to [only] certain sections" of EPCA's fuel-economy chapter and omitting several sections that grant specific rulemaking authority to the agencies, "Congress 'knew it would be sending some cases to the district court that' could be resolved more efficiently at the appellate level." *Loan Syndications*, 818 F.3d at 724 (quoting *API*, 714 F.3d at 1337).

Thus, while the Clean Air Act confers jurisdiction on the D.C. Circuit to review EPA's action, Defendants (correctly) do not contend that this statute somehow authorizes direct review of NHTSA's Preemption Rule. As noted above, *see supra* 12, the Clean Air Act's judicial review provision differs from EPCA's by providing for direct review of any "final action of the Administrator under this chapter." 42 U.S.C. § 7607(b)(1). But that provision, by its express terms, does not apply to actions taken by *other* agencies pursuant to *other* statutes. NHTSA is therefore not a proper respondent under the Clean Air Act, particularly for its Preemption Rule purporting to implement EPCA. *See Delta Constr.*, 783 F.3d at 1299 (dismissing claims against NHTSA because EPCA did not provide for direct review of its action, even though court of appeals had jurisdiction under the Clean Air Act over EPA's related action). Indeed, the D.C. Circuit has

squarely held that a statute providing for direct review of one agency's decision does not allow a party to obtain direct review in the court of appeals of other agencies' actions that are a predicate for a challenged decision of the first agency. *See Nat'l Min. Ass'n v. Mine Safety & Health Admin.*, 599 F.3d 662, 671–72 (D.C. Cir. 2010); *see also Bangor Hydro-Elec. Co. v. FERC*, 78 F.3d 659, 662 (D.C. Cir. 1996) (similar). Here too, the Clean Air Act "does not provide a basis for naming respondents other than" EPA. *Nat'l Min. Ass'n*, 599 F.3d at 672.[7]

The D.C. Circuit has, on occasion, exercised jurisdiction over a "*single* agency action [that] relies on multiple statutory bases," so long as one of the bases triggers direct review. *Waterkeeper All. v. EPA*, 853 F.3d 527, 533 (D.C. Cir. 2017) (emphasis added); *see Int'l Bhd. of Teamsters v. Peña*, 17 F.3d 1478, 1482 (D.C. Cir. 1994). Thus, Plaintiffs do not dispute that *if* the Preemption Rule were subject to direct review in the D.C. Circuit under 49 U.S.C. § 32909(a), then their National Environmental Policy Act claim also would belong there, under governing caselaw. *See* Mot. 23–25; Compl. ¶¶ 117–24; *City of Rochester v. Bond*, 603 F.2d 927, 936–37 (D.C. Cir. 1979); *Pub. Citizen v. NHTSA*, 848 F.2d 256, 265–68 (D.C. Cir. 1988). But such cases provide no support for dismissing a complaint challenging one agency's rule merely because that rule may have informed *another* agency's action that is reviewable in the court of appeals under a different statute. *See Nat'l Min. Ass'n*, 599 F.3d at 671–72. *Cf. Sierra Club v. Jackson*, 813 F. Supp. 2d 149, 155 (D.D.C. 2011) (denying motion to dismiss and concluding "there is no basis for this Court to defer to any purported ancillary jurisdiction that the court of appeals may have over this case").

[7] That Plaintiffs' "ultimate success" may also depend on their challenge to EPA's action in the D.C. Circuit does not undermine their standing to challenge NHTSA's rule in this Court. *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 587–88 (D.C. Cir. 2001); *see also Ams. for Safe Access v. DEA*, 706 F.3d 438, 449 (D.C. Cir. 2013) (successful challenge to DEA listing of marijuana as Schedule I drug likely to redress veteran's injuries where Veterans Affairs' (VA) policy relied on DEA listing, even though VA not before the court). "[T]he mere existence of multiple causes of an injury does not defeat redressability." *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1157 (9th Cir. 2015). Nor do Defendants' judicial economy arguments suggest otherwise. *See* Mot. 21–22.

Defendants' judicial economy arguments are therefore irrelevant to the question of statutory subject-matter jurisdiction presently before the Court. To be sure, such considerations might inform *how* a court exercises its jurisdiction to "control the disposition of the causes on its docket with economy of time and effort." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). And because EPA premised parts of its action on NHTSA's rule, the D.C. Circuit may opt to hold in abeyance any petitions for review of EPA's action until this Court renders judgment in the instant case. *See Sierra Club*, 813 F. Supp. 2d at 154 n.2 (noting that D.C. Circuit held protective petition for review in abeyance pending district court's resolution of motion to dismiss and cross-motions for summary judgment). At that point, the D.C. Circuit could hear any appeals from this Court's final decision pursuant to its appellate jurisdiction under 28 U.S.C. § 1291.

That course of action—as opposed to Defendants' attempt to displace this Court's authority to determine its own jurisdiction and review the Preemption Rule in the first instance—properly respects Congress's jurisdictional choices. Indeed, it would hardly serve "judicial economy" for this case to go first to the D.C. Circuit, only to have that court dismiss Plaintiffs' challenge to the Preemption Rule for lack of jurisdiction. For the D.C. Circuit, too, cannot rely on efficiency considerations to "disregard plain statutory terms assigning a different court initial subject-matter jurisdiction over a suit." *Pub. Citizen*, 489 F.3d at 1288; *see Loan Syndications*, 818 F.3d at 724. After all, "it is Congress's job," not that of a federal court sitting in equity, "to determine 'the court in which judicial review of agency decisions may occur.'" *API*, 714 F.3d at 1337 (quoting *Watts v. SEC*, 482 F.3d 501, 505 (D.C. Cir. 2007)).

II. Because this Court has jurisdiction, Defendants' transfer request must be denied.

This Court may transfer a case to a court of appeals only where it "finds that there is a want of jurisdiction." 28 U.S.C. § 1631; *see Ukiah Adventist Hosp.*, 981 F.2d at 549. Defendants'

alternative request for transfer to the D.C. Circuit under 28 U.S.C. § 1631, *see* Mot. 25–26, is therefore not a viable option because, as explained above, this Court has jurisdiction to review the Preemption Rule under 28 U.S.C. § 1331. If the Court were to disagree and determine that exclusive jurisdiction lies in the court of appeals under Section 32909, then transfer would be unnecessary because Plaintiffs have filed a timely protective petition for review in the D.C. Circuit. *See API*, 714 F.3d at 1337; *supra* 5–6. But, because "jurisdiction is proper in this court" under 28 U.S.C. § 1331, the Court is simply "without power to transfer this action, in whole or in part," to a court of appeals. *Hoffmann v. United States*, 266 F. Supp. 2d 27, 36 (D.D.C. 2003).

CONCLUSION

Defendants' motion to dismiss or transfer should be denied.

Dated: November 14, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2019, I electronically filed a Notice of Service pursuant to this Court's General Order and Guidelines Applicable to APA Cases, with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system. The participants in the case are registered CM/ECF users and service of that Notice will be accomplished by the CM/ECF system.

I further certify that on November 14, 2019, I served a copy of the foregoing response in opposition to Defendants' Motion to Dismiss or Transfer on lead counsel for Defendants via e-mail.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ENVIRONMENTAL DEFENSE FUND *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 1:19-cv-02907-KBJ
ELAINE L. CHAO, in her official capacity as Secretary of the United States Department of Transportation, *et al.*,	)	
Defendants.	)	

[PROPOSED] ORDER

Upon consideration of the Motion to Dismiss or Transfer filed by Defendants and the materials submitted in support of and in opposition to the Motion, it is hereby ORDERED that the Motion to Dismiss or Transfer is DENIED.

Dated: ________________________

____
Honorable Ketanji Brown Jackson
UNITED STATES DISTRICT JUDGE

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