Attorneys General of California, New York, Connecticut, Illinois, Maryland, Massachusetts, New Mexico, North Carolina, Oregon, Pennsylvania, Vermont, and Washington

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EPA Docket Center (EPA/DC)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, DC 20460

Via https://www.regulations.gov

Re: Comments on Proposed "Repeal of Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits," 82 Fed. Reg. 53,442

Attention: Docket No. EPA-HQ-OAR-2014-0827

The Attorneys General of California,[1] New York, Connecticut, Illinois, Maryland, Massachusetts, New Mexico, North Carolina, Oregon, Pennsylvania, Vermont, and Washington (the States) submit these comments in opposition to the United States Environmental Protection Agency's (EPA) proposal to repeal those provisions of the final rule entitled "Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles – Phase 2," 81 Fed. Reg. 73,478 (October 25, 2016) and 82 Fed. Reg. 29,761 (June 30, 2017) (correcting table), that apply to glider vehicles, glider engines, and glider kits (hereinafter, the Glider Rule). *See* 82 Fed. Reg. 53,442 (November 16, 2017) (Proposed Repeal). Gliders are heavy duty vehicles where a used or refurbished engine is incorporated into a new vehicle chassis. These trucks are typically manufactured alongside of, and sold as, new trucks.[2]

EPA's Proposed Repeal rests on a legally untenable reinterpretation of the Agency's duty to regulate harmful air pollutants from "new motor vehicles" and "new motor vehicle engines," which conflicts with the language, history and purpose of section 202(a)(1) of the Clean Air Act (CAA), and the CAA as a whole. 42 U.S.C. §§ 7401, *et seq*. Further, EPA uncritically accepts the contentions of a few glider manufacturers that were soundly rejected in the 2016 rulemaking, and ignores its own economic and environmental analysis from the Glider Rule. In doing so, EPA proposes to act arbitrarily and capriciously, without providing any good reason or substantial justification for its reversal of position.

Simply put, gliders are a pollution menace that, unless properly regulated, threaten to undermine the entire national program to reduce harmful emissions from heavy duty vehicles and engines. By way of example, in the record for the Glider Rule, EPA estimated that: 500

[1] The California Attorney General submits these comments pursuant to his independent power and duty to protect the environment and natural resources of the State. See Cal. Const., art. V, § 13; Cal. Gov. Code, §§ 12511, 12600-12612; *D'Amico v. Bd. of Medical Examiners*, 11 Cal.3d 1, 14-15 (1974).

[2] *See, e.g.*, http://trucks.fitzgeraldgliderkits.com/ (including "fully built" trucks)(last viewed 1/4/18); https://www.fitzgeraldgliderkits.com/what-is-a-glider-kit/ ("a complete unit ready to go")(last viewed 1/4/18); http://www.dtnaglider.com/Features.aspx ("factory built alongside new trucks")(last viewed 1/4/18).

non-compliant gliders produce the same total amount of harmful particulate matter (PM) and oxides of nitrogen (NOx) emissions as do 20,000 fully compliant vehicles; and 5,000 non-compliant gliders produce the same PM and NOx as 200,000 fully compliant 2014 Class-8 tractors.[3] In that same record, EPA estimated that a single model year of unregulated glider PM pollution would result in up to 1,600 premature deaths.[4] Additionally, many of the States, including California, Illinois, New Mexico, New York, and Oregon have nonattainment areas for NOx, PM, or both; and EPA also found that the Glider Rule would assist states in complying with national ambient air quality standards (NAAQS) for these and other harmful pollutants.[5] EPA's Proposed Repeal, however, discusses none of these consequences of reversing course and deregulating glider production.

Rather, EPA predicates its Proposed Repeal on an erroneous, legally unjustified "reinterpretation" of its congressionally-mandated duties under Section 202(a)(1). As explained in section II, *infra*, EPA's new interpretation is legally indefensible: it fails to comport with the plain language, context and purpose of the CAA provisions at issue. Moreover, EPA's purported reasons for its reinterpretation—including the same narrow view of the CAA that the Supreme Court rejected in *Massachusetts v. EPA*—crumble under any level of examination. Additionally, as set forth in section III, ignoring its own robust scientific evidence and myriad factual findings underpinning the Glider Rule that demonstrate the harm to public health and welfare caused by glider emissions has legal consequence for EPA's Proposed Repeal. Because EPA has failed to present any rational connection between those facts and the Proposed Repeal, its proposed action is arbitrary and capricious and, if finalized, would violate the Administrative Procedure Act.

Therefore, the States urge EPA adhere to the intent of Congress and to the Agency's duty to protect the health and welfare of our residents and all Americans, by abandoning its unlawful and irresponsible Proposed Repeal.

I. THE GLIDER RULE IS ESSENTIAL TO REDUCE HARMFUL EMISSIONS FROM HEAVY-DUTY VEHICLES

A. Background to the Glider Rule

Found within Title II of the CAA, regarding regulation of mobile sources of pollution, section 202(a)(1) compels EPA to establish and revise emission standards for any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines that in the Administrator's judgment "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). Section 202(a)(3)

[3] EPA FAQ about Heavy-Duty Glider Vehicles and Glider Kits, July 2015, EPA-420-F-25-904 ("EPA Glider FAQ"), p. 2.

[4] Response to Comments for Joint Rulemaking, EPA-426-R-16-901 (August 2016) (Phase 2 RTC) at 1877.

[5] 81 Fed. Reg. at 73,522-73,523, 73,856 (Phase 2 Standards "will be helpful" to states with $PM_{2.5}$ and ozone NAAQS compliance).

requires standards for heavy-duty vehicles or engines to "reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available" for the relevant model year standards. 42 U.S.C. § 7521(a)(3)(A)(i).

EPA's duty to regulate heavy duty truck emissions is integral to the CAA's express purpose of protecting the Nation's air resources so as to promote "public health and welfare." *See* 42 U.S.C. § 7401(b)(1). Emissions from heavy-duty vehicles contribute greatly to a number of serious air pollution problems, including the health and welfare effects related to so-called "conventional" or "criteria" pollutants such as PM, NOx, ozone, sulfur dioxide, and volatile organic compounds. 66 Fed. Reg. 5,002, 5,005 (January 18, 2001). EPA has documented these adverse effects to include: premature mortality, increased risk of lung cancer, aggravation of respiratory and cardiovascular disease, changes to lung tissues and structures, chronic bronchitis, and decreased lung function; crop and forestry losses; substantial visibility impairment in many parts of the U.S.; and the acidification, nitrification and eutrophication of water bodies. *See, e.g., id.* at 5,006.[6] EPA estimated in 2001 that as of 2007, heavy-duty vehicles would account for 28-34 percent of mobile source NOx emissions and 20-38 percent of mobile source PM emissions, especially in urban areas such as Sacramento, Washington, D.C., Los Angeles, Hartford, and Santa Fe. *Id.* at 5,006-5,007. Heavy-duty vehicle emissions also can disproportionately impact urban areas already economically disadvantaged. *Id.* at 5,007. EPA also has determined that emissions reductions from heavy-duty vehicles and engines are a critical component of achieving and maintaining compliance with NAAQS. *Id.* at 5,006.

Pursuant to its section 202(a)(1) authority, and consistent with the overarching purpose of the CAA to protect public health and welfare, EPA has regulated criteria pollutant emissions from heavy-duty on-highway engines and vehicles with increasing stringency. *See, e.g.,* 81 Fed. Reg. at 73,485, 73,522. In 2001, EPA issued diesel emission standards for heavy-duty on-highway engines that were phased in from the 2007 to 2010 model years. *Id.* at 73,522; *see also,* 66 Fed. Reg. 5,002 (Heavy-Duty Engine and Vehicle Standards requiring 100% of 2010 model year on-road heavy-duty diesel engines to have NOx exhaust control technology).

In 2009, EPA made an Endangerment Finding under its section 202(a)(1) authority, expressing its judgment that elevated concentrations of greenhouse gas (GHG) emissions in the atmosphere may reasonably be anticipated to "endanger public health or welfare." 74 Fed. Reg. 66,496 (Dec. 15, 2009); 42 U.S.C. § 7521(a)(1); *see Coalition for Responsible Regulation v. EPA,* 684 F.3d 102, 117-123 (D.C. Cir. 2012) (upholding both the Endangerment Finding and EPA's regulation of GHG emissions from motor vehicles).[7] Consistent with the Endangerment

[6] In particular, NOx is an ozone precursor that contributes to climate change, and it has been linked to asthma, especially in children. 81 Fed. Reg. at 73,522. PM poses many adverse health effects: cardiovascular and respiratory effects, reproductive and developmental effects including low birth weight and infant mortality, and carcinogenic, mutagenic, and genotoxic effects (for example, lung cancer mortality). *Id.* at 73,837.

[7] Harms associated with climate change caused by human emissions of GHGs, including from heavy duty vehicles, are widespread and complex, from increased death and illnesses related to increases in weather related events (heat waves, increased ozone pollution, and deaths associated with increased intensity in

Finding and in an effort to reduce GHGs emissions and fuel consumption for on-road heavy-duty vehicles, in 2011, EPA and the National Highway Traffic Safety Administration, on behalf of the U.S. Department of Transportation (NHTSA) implemented the Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium and Heavy-Duty Engines and Vehicles (Diesel GHG Program). 76 Fed. Reg. 57,106 (September 15, 2011). The Diesel GHG Program is a comprehensive two-phase course of action designed to address diesel engine contribution to climate change. *Id.* Phase 1 applied to several categories of medium and heavy-duty engines and vehicles in MY 2014-2018 (Phase 1 Standards). *Id.* at 57,108; 81 Fed. Reg. at 73,479.

Following two years of stakeholder meetings and fact finding, in 2015, EPA and NHTSA proposed Phase 2 of the Diesel GHG Program (Phase 2 Standards), comprised of additional technology-forcing standards applicable to various categories of medium and heavy-duty engines and vehicles phased in MY 2018 to MY 2027. 81 Fed. Reg. at 73,480-73,481. After additional meetings with stakeholders and responding to thousands of public comments, many from new heavy-duty truck manufacturers in support of the Glider Rule, EPA issued the final Phase 2 Standards on October 25, 2016. *See* 81 Fed. Reg. 73,478.[8]

The Phase 2 Standards included a number of changes and clarifications of rules respecting so-called "glider kits" and "glider vehicles." 81 Fed. Reg. at 73,512. Specifically, a "glider kit" is "a tractor chassis with frame, front axle, interior and exterior cab, and brakes." *Id.* It is "intended for self-propelled highway use, and becomes a glider vehicle [aka glider] when an engine, transmission, and rear axle are added." *Id.* at 73,513. Some or all of these drivetrain parts are used or rebuilt. The final manufacturer of the glider vehicle is typically a different manufacturer than the glider kit. *Id.* However, glider kit manufacturers generally know the final configuration of the glider vehicle, because in order for the glider vehicle to work, the wiring of the glider kit must be designed to match the configuration of the powertrain. *Id.* at 73,517.

In use for decades, gliders were originally intended as a way to salvage relatively new powertrains that were still operable from a truck chassis that had been irreparably damaged (e.g., in an accident) or to allow trucks with localized and minimal use to be updated. *See* 81 Fed. Reg. at 73,513. Prior to 2007, when emissions standards issued in 2001 became fully applicable, only about 300 gliders were being produced per year. Phase 2 RTC at 1883. EPA impliedly provided an interim exemption from the Phase 1 Standards to gliders and glider kits, by adopting 40 C.F.R. § 1037.150(j) that indicated "the general prohibition against introducing a vehicle not subject to current model year standards does not apply to MY 2013 or earlier engines." 81 Fed.

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severe weather events such as flooding, tornadoes, and hurricanes) to adverse impacts to property, habitat, and energy, transportation, and water resource infrastructure from extreme weather events and rising sea levels. *See* 81 Fed. Reg. 73,486.

[8] NHTSA did not include gliders in its Phase 1 or Phase 2 fuel consumption standards. 81 Fed. Reg. at 73,584-73,585. EPA and NHTSA treat gliders differently under their respective regulations. *Id.* As EPA noted in response to comments during the Phase 2 rulemaking that EPA's treatment of gliders should reflect principles in existing NHTSA regulations, NHTSA and EPA regulate gliders under different statutory authority and for different, albeit related, purposes. Phase 2 RTC at 1886. "More importantly," EPA noted, "such comments ignore the severe public health impacts of gliders vehicles." *Id.*

Reg. at 73, 513-14; Phase 2 RTC at 55-56, 62. However, after the promulgation of the Phase 1 Standards, EPA and NHTSA both "observed a sharp increase in glider sales, which suggests that gliders are being used more and more as a loophole to avoid purchasing engines that meet 2010 EPA emissions standards, and potentially to avoid NHTSA safety regulations."[9]

B. EPA Issued the Glider Rule to Close an Increasingly Abused, Pollution-Increasing Loophole That Harms Public Health and Welfare.

From 2004 onward, and especially after EPA promulgated the Phase 1 Standards, glider production increased rapidly from a few hundred per year in 2004 to approximately 10,000 per year by 2015. 81 Fed. Reg. at 73,943. Gliders are typically marketed and sold as "brand new" trucks with new legal titles. 81 Fed. Reg. at 72,514; 82 Fed. Reg. at 53,445; Phase 2 RTC at 55-56. However, most gliders use rebuilt engines originally manufactured before 2002 that lack the pollution control equipment required by the 2010 heavy duty truck standards for conventional pollutant control. 81 Fed. Reg. at 73,942-72,943. While this may result in upfront cost savings to the buyer, any extra costs of a compliant glider will be recouped by greater fuel savings within the first few years.[10] More importantly from a public health perspective, preventing the harm that non-compliant glider emissions cause would offset any upfront cost savings. *See, e.g.,* 81 Fed. Reg. at 73,943 ("removal of all unrestricted glider vehicle emissions from the atmosphere would yield between $6 to $14 billion in benefits annually.").[11] In promulgating the Glider Rule, EPA found that most gliders have NOx and PM emissions that are between 20-40 times higher than current MY vehicle engines. 81 Fed. Reg. 73,942-73,943. Even gliders using relatively recent engines—produced in 2007 or later—have NOx and PM emissions at least 10 times higher than current engines. *Id.* at 73,942. An EPA study in 2017 corroborates the emissions results that EPA found in promulgating the Glider Rule: NOx emissions from gliders with pre-2002 engines were *43 times higher* than conventionally built 2014 and 2015 tractors under highway cruise conditions, and 4 to 5 times higher in conditions of transient operations.[12]

EPA's review of the record when promulgating the Glider Rule led it to conclude that glider manufacturing had become, and would continue to be, an industry dependent on a regulatory loophole that harms human health.[13] Consequently, EPA established the Glider Rule

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[9] EPA Glider FAQ, p. 1.

[10] Comments by California Air Resources Board at pp. 23-24, 38-39 (citing Phase 2 RTC at 1885,1878-879). Additionally, compliant gliders also are less expensive than most new compliant trucks; thus upfront cost savings of non-compliant gliders are no justification for the Proposed Repeal. *See id.*

[11] EPA estimated that the PM and ozone reductions from Phase 1 Standards alone will result in benefits from $1.3 to $4.2 billion in 2030. 81 Fed. Reg. 73,492.

[12] Chassis Dynamometer Testing of Two Recent Model Year Heavy-Duty On-Highway Diesel Glider Vehicles, November 20, 2017, Docket No.: EPA-HQ-OAR-2014-0827-2417 (Chassis Dynamometer Testing Study) at p. 3.

[13] *See* 81 Fed. Reg. at 73,942-43. *See also*, Comments by California Air Resources Board, §§ 1.4 and 1.5.

to balance the legitimate salvage purpose gliders originally served with its mandate to protect public health and the environment.[14] The Glider Rule caps sales of gliders/kits with non-compliant engines in phases, to allow the glider market to transition into selling only gliders/kits compliant with the Phase 2 Standards.[15] In 2017, glider manufacturers could sell gliders/kits using non-compliant engines, up to the number sold during the highest year of production between 2010 and 2014. Starting in January 2018, engines in gliders would have to meet GHG and criteria pollutant emission requirements for the year of the glider assembly, subject to an exception allowing them to sell 300 gliders per year with non-compliant engines. 81 Fed. Reg. 73,518. Beginning in MY 2021, all gliders, including those using engines exempted under the transition period, must meet the Phase 2 Standards.[16] Additionally, under the Glider Rule, glider kit manufacturers must certify that the engines intended for the kits meet the Phase 2 Standards. *Id.* at 73,515-73,517.

C. The Phase 2 Standards Record Shows That the Glider Loophole Resulted in Significant Harm to Public and Environmental Health and Created an Uneven Playing Field for Diesel Truck Manufacturers.

EPA found that each glider used in lieu of a new truck with controlled emissions "results in significantly higher in-use emissions of air pollutants associated with a host of adverse human health effects, including premature morality." 81 Fed. Reg. 73,943. EPA analyses of the impacts of glider vehicles on public health concluded that "without new restrictions, glider vehicles on the road in 2025 would emit nearly 300,000 tons of NOx and nearly 8,000 tons of diesel PM annually," noting that although gliders "would make up only 5 percent of heavy-duty tractors on the road, their emissions would represent about *one-third* of all NOx and PM emissions from heavy-duty tractors in 2025." Phase 2 RTC at 1875-1876 (original emphasis). The removal of these unrestricted glider emissions is estimated to yield between $6 and $14 billion in annual PM-related benefits. *Id.* at 1876. Further, EPA's own risk analysis indicated that $PM_{2.5}$-related exposures[17] from a single model year of 5,000-10,000 high polluting glider engines would result in 350 to 1,600 premature deaths, an estimate EPA called "significantly conservative." Phase 2 RTC at 1877; *see also* Comments by California Air Resources Board, § 1.5.2.

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[14] *Id.*

[15] 81 Fed. Reg. at 73,518, 73,941-73,946; *see also* 40 C.F.R. part 1037 (GHG heavy duty vehicle standards, which refer to 40 C.F.R. part 1036 (heavy duty engine standards); 40 C.F.R. part 86 (criteria pollutant standards).

[16] EPA also included a limited allowance to exempt gliders from the Phase 2 Standards altogether where the reused engines were newer or had very low mileage. 81 Fed. Reg. at 73,944.

[17] $PM_{2.5}$ particles are "'fine' particles with a nominal mean aerodynamic diameter less than or equal to 2.5 µm. 81 Fed. Reg. at 73,836. Their harm to human health when inhaled includes developmental, reproductive, carcinogenic, mutagenic, and genotoxic effects. *Id.*; see also, fn. 6, *supra*.

Additionally, a lack of regulation of gliders distorts the marketplace and tilts the playing field against heavy-duty truck manufacturers who have invested in developing pollution controls, since "glider sales now come at the expense of sales of fully compliant new trucks."[18] Both glider and major truck manufacturers estimated that without regulation, the glider industry would continue to grow. But as noted by several commenters, including much of the new truck/engine industry, continuation of the exemption for gliders threatened to undermine the goal of not only the Phase 2 Standards, but the earlier conventional pollutant standards as well, since glider emissions per vehicle are significantly higher than those from trucks required to meet all of the proposed 2017 heavy-duty vehicle emissions standards. *See* Phase 2 RTC at 1881; Glider FAQ, p. 2. In turn, this undercuts manufacturers who had made major investments to comply with current MY emissions standards.[19]

The Glider Rule became effective December 27, 2016, without any legal challenge. *See* 81 Fed. Reg. 73,478.[20] In particular, EPA noted in the Phase 2 RTC that "[n]o commenters disagreed with EPA's assessment of NOx and PM impacts." Phase 2 RTC, p. 1875. Following the Administration change, however, three glider manufacturers petitioned EPA for reconsideration of the Glider Rule, stating as grounds for reconsideration the very basis on which EPA has now premised its proposed reinterpretation of section 202(a)(1).[21] The factual basis for the three manufacturers' petition was a glider industry-funded June 2017 Tennessee Tech study that claims gliders emit fewer pollutants than EPA had found in its analysis.[22] One month later,

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[18] RTC at 1877; *see also* Comments of the Volvo Group, October 1, 2015, EPA-HQ-OAR-2014-0827-1290, pp. 62-67.

[19] *See e.g.*, Phase 2 RTC at 1877; EPA-HQ-OAR-2014-0827-1290, p. 63 "Such a gross expansion will threaten the ability of OEM dealers to compete in the marketplace with fully compliant products."

[20] EPA has been sued over other provisions of the Phase 2 Standards pertaining to emissions standards for trailer manufacturers.

[21] The petition for reconsideration by Fitzgerald Gliders et al. states EPA lacks section 202 authority to regulate gliders, because "the most significant parts of the vehicle – the engine, transmission, and typically the rear axle – are not new." Petition for Reconsideration filed July 10, 2017, p. 3, Docket No.: EPA-HQ-OAR-2014-0827-2373 (Glider Petition). Petitioners also claim glider kits are not within the CAA definition of "motor vehicle" because they are not "self-propelled." *Id.*

[22] Glider Petition, p. 5. As noted in the November 13, 2017 "Memo re: EPA Teleconference with Tennessee Tech Univ. Regarding Glider Test Report" by EPA's National Vehicle and Fuel Emissions Lab, Fitzgerald Gliders was involved in the Tennessee Tech study. Docket No.: EPA-HQ-OAR-2014-0827-2416. Fitzgerald also underwrites the Center for Intelligent Mobility at Tennessee Tech, which calls into question the study's value as unbiased research. https://www.tntech.edu/news/releases/tennessee-tech,-tcat-livingston,-fitzgerald-companies-announce-new-partnership (last viewed 1/4/18). As noted by the California Air Resources Board, the ability to assess the merit of the Tennessee Tech study, which was not peer-reviewed, is impeded by its lack of accompanying data and Tennessee Tech's later admission that "no particulate matter samples were collected during testing" undermines its assertions regarding PM emissions from gliders in particular. *See*, Comments by California Air Resources Board, § 1.5.2. Tennessee Tech also has not yet provided any information regarding the source, mileage, age, or

in August 2017, EPA announced its intent to revisit the Glider Rule. EPA published its notice of the Proposed Repeal on November 9, 2017, relying on the legal theory presented in the three glider-manufacturers' petition for reconsideration, and referring to the Tennessee Tech study. 82 Fed. Reg. at 53,444. The indefensible legal interpretations and self-serving study proffered by three representatives of an industry that has flourished based on the exploitation of a loophole in the regulation of harmful pollutants do not provide a reasoned basis for EPA's wholesale reversal of its position on the Glider Rule.

II. THE PROPOSED REPEAL IS PREMISED ON AN ERRONEOUS AND INVALID REINTERPRETATION OF EPA'S DUTIES UNDER CAA SECTION 202(A)(1).

A. EPA's 2017 Analysis.

EPA proposes to repeal the Glider Rule based its current view "that the statutory interpretations on which the [Glider Rule] predicated its regulation of glider vehicles, glider engines, and glider kits were incorrect." Specifically, EPA now asserts that glider vehicles are excluded from the term "new motor vehicles" and glider engines are excluded from the definition of "new motor vehicle engines" under CAA Section 216(3). 82 Fed. Reg. at 53,444. "Consistent with this interpretation," EPA states that it "has no authority to treat glider kits as 'incomplete' new vehicles under CAA section 202(a)(1). *Id.* The Administrator's proposed rationale for this is that EPA's prior reading "was not the best" and that:

> the Agency failed to consider adequately the most important threshold consideration: i.e., whether or not Congress, in defining 'new motor vehicle' for purposes of Title II, had a specific intent to include within the statutory definitions such a thing as a glider vehicle – a vehicle comprised both of new *and* previously owned components. See *Chevron [USA, Inc. v. NRDC, Inc.*, 467 U.S. 837,843 n.9 (1984)], ('Where the 'traditional tools of statutory construction 'allow one to 'ascertain[] that Congress had an intention on the precise question at issue,' that 'intention is the law and must be given effect.'). Where 'Congress has not directly addressed the precise question at issue,' and the 'statute is silent or ambiguous with respect to the specific issue,' it is left to the agency charged with implementing the statute to provide an 'answer based on a permissible construction of the statute.' *Id.* at 843. 82 Fed. Reg. at 53,445.

Applying *Chevron*, the Administrator concludes that, "in light of these principles, it is clear that EPA's reading of the statutory definition of 'new motor vehicle' in the Phase 2 rule fell short." *Id.* The basis for the Administrator's reinterpretation is not in the statute itself, since EPA admits up front that gliders fall within the definition of "new motor vehicle" and "new

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condition of the "OEM 'certified' engines" cited by Tennessee Tech as examples of the emissions performance for newer engines. November 13, 2017 Memorandum concerning meeting between EPA and Tennessee Tech, pp. 2-3, Docket No.: EPA-HQ-OAR-2014-0827-2416. Furthermore, as mentioned *supra*, testing in 2017 by EPA's National Vehicle & Fuel Emissions Laboratory corroborated EPA's findings in 2016, that gliders emit significantly more NOx and PM than do comparable conventionally-manufactured MY vehicles. Chassis Dynamometer Testing Study, p. 3.

motor vehicle engine" in CAA section 216(3).[23] Instead, the Administrator focuses on whether Congress specifically *intended* to cover gliders when it wrote the definitions applicable to CAA section 202(a)(1). EPA concludes "it is likely that Congress did not have in mind that the definition would be construed" as covering gliders, since they were not produced in any great number until recently. *Id.* EPA further "supports" this conclusion by turning to the Automobile Information Disclosure Act of 1958 (AIDA), which has definitions of "new motor vehicle" and "new motor vehicle" that the Agency argues "appear" to be the source of the definitions in the CAA, although "the legislative history of the 1965 CAA does not expressly indicate" this to be the case. *Id.* The AIDA is a consumer protection law that requires a label containing information such as the Manufacturer's Suggested Retail Price (MSRP) be affixed to the windshield or side window of new automobiles. 15 U.S.C. § 1232. "New" automobiles under AIDA are defined as passenger cars or station wagons for which "the equitable or legal title to which has never been transferred by a manufacturer, distributor, or dealer to an ultimate purchaser." 15 U.S.C. § 1231(c), (d). EPA alleges that the use of the AIDA definitions:

> serves to illuminate congressional intent. As with the Disclosure Act, Congress in the 1965 CAA selected the point of first transfer of 'equitable or legal title' to serve as a bright line – *i.e.,* to distinguish between those 'new' vehicles (and engines) that would be subject to CAA section 202(a)(1) and those existing vehicles that would not be subject. [. . .] it would seem clear that Congress intended, for purposes of Title II, that a 'new motor vehicle' would be understood to mean something equivalent to a 'new automobile' – *i.e.,* a true 'showroom new' vehicle. It is implausible that Congress would have had in mind that a 'new motor vehicle' might also include a vehicle comprised of new body parts and a previously owned powertrain.

Id. at 53,446. EPA deliberately misinterprets "new motor vehicle" to mean "a true, 'showroom new vehicle,'" even though the term "showroom new" is not used in the AIDA, the CAA, or defined anywhere by the Administrator. EPA replaces the regulatory definition of "new," which is based on the transfer of title, with the colloquial definition of "new," as in "never used." However, neither the AIDA nor the CAA provide any textual or factual support for EPA's interpretation, since both statutes define newness in terms of transfer of title rather than the age of any of the components. Instead, the Administrator appears to rely on the association between an MSRP sticker and a new car showroom, where one would not expect to purchase a vehicle with a refurbished engine. EPA goes on to conclude that based on "that structure and history, it seems likely that Congress" did not intend to regulate gliders and that "[a]t a minimum, ambiguity exists," leaving EPA "with the task of providing 'an answer based on a permissible construction of the statute.'" *Id., citing Chevron*, 467 U.S. at 843. EPA then concludes that neither glider vehicles, glider engines, nor glider kits would be covered under the CAA's definitions of "new motor vehicle," "new motor vehicle engine," or EPA's authority to regulate "incomplete" vehicles. *Id.*

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[23] 82 Fed. Reg. at 53,445 ("Focusing solely on that portion of the statutory definition that provides that a motor vehicle is considered 'new' prior to the time its 'equitable or legal title' has been 'transferred to an ultimate purchaser,' a glider vehicle would appear to qualify as 'new.'").

B. EPA's Analysis Attempts to Circumvent the Plain Language Reading of Sections 202 and 216 by Manufacturing Ambiguity Where None Exists.

1. The CAA's Plain Language Confirms That EPA's Original Interpretations of Sections 202 and 216 Reflect Congressional Intent to Regulate Gliders and Kits.

As EPA decided in 2016, the plain language of Sections 202 and 216 unambiguously compels it to regulate completed gliders (i.e., kits with engines) as new motor vehicles. Completed gliders are "motor vehicles" under the plain language of section 216(2), because they are self-propelled. 42 U.S.C. § 7550(2).[24] And when sold new, i.e., prior to the final transfer of title, they are "new motor vehicles" under the plain language in 216(3). 42 U.S.C. § 7550(3).[25] The engines installed in new gliders, although they have been used prior to being remanufactured, are "new motor vehicle engines" under the plain language of section 216, which defines "new motor vehicle engine" as an "engine in a new motor vehicle" *or* a "motor vehicle engine *the equitable or legal title to which has never been transferred to the ultimate purchaser*." *Id.* (emphasis added). As discussed above, gliders are sold with a new legal title. In its proposal, EPA correctly admits that pursuant to the plain language of section 216, which "provides that a motor vehicle is considered 'new' prior to the time its 'equitable or legal title has been 'transferred to an ultimate purchaser,' a glider vehicle would appear to qualify as 'new.'" 82 Fed. Reg. at 53,445.

Similarly, the plain language of section 202(a)(1), which specifies that EPA's emissions standards apply to the vehicle or engine during its useful life "whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution," reflects Congress' intent that EPA regulate emissions from "incomplete" motor vehicles, i.e., motor vehicles that are pieced together, such as gliders built from glider kits. 42 U.S.C. § 7521(a)(1).

In its notice of proposed action, EPA acknowledges the extensive case law holding that a *Chevron* step one analysis requires examination of the language relative to "the whole law, and to its object and policy." 82 Fed. Reg. 53,445, quoting *Dole v. United Steelworkers of Amer*., 494 U.S. 26, 35 (1990), among others. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *F.D.A. v. Brown & Williamson Tobacco Corp*, 529 U.S. 120, 132-133 (2000). Indeed, to find ambiguity, a court must "examine the meaning of [those] words or phrases in context and . . . '*exhaust* the traditional tools of statutory construction.'" *Sierra Club*

[24] Section 216(2) defines a "motor vehicle" as "any self-propelled vehicle designed for transporting persons or property on a street or highway." 42 U.S.C. 7550(2).

[25] Section 216(3) defines a "new motor vehicle" as ""motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser." 42 U.S.C. 7550(3).

v. E.P.A., 551 F.3d 1019, 1026-27 (D.C. Cir. 2008)(quoting *Am. Bankers Ass'n v. Nat'l. Credit Union Admin*., 271 F.3d 262, 267 (D.C. Cir. 2001)(emphasis added).

However, EPA does not engage in the required analysis at all. Rather, it concludes that the language is ambiguous because: (1) Congress likely did not have vehicles like gliders in mind when drafting because, although gliders existed, they were not widely produced; and (2) definitions in the AIDA *might* have inspired the drafting of section 216's definitions. Neither of these reasons relates to the language of section 216 itself, the other parts of the CAA, or the CAA's purpose, i.e., the required statutory analysis factors. *See, e.g.*, *Brown & Williamson Tobacco Corp*, 529 U.S. at 132. And, as explained below, neither argument is persuasive.

Under the required analysis, it is clear "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole" that Congress contemplated regulating a vehicle as "new" irrespective of its engine age when it drafted section 216. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341. Importantly, Congress did not define "engine" for purposes of CAA Title II. Nor did it constrain the definitions of "motor vehicle" or "new motor vehicle" in any way relating to the engine or even the vehicle's age. Under its definition of "motor vehicle," a vehicle with any engine – old or new – that propels the vehicle so that people or things can be transported on a street or highway is a "motor vehicle." 42 U.S.C. § 7550(2). And Congress made no carve out or proviso that only "motor vehicles" with engines that have never been used counted as such. Rather, any motor vehicle prior to sale (i.e., transfer of title) is a "new motor vehicle" under the Act, subject to regulation under 202(a)(1). 42 U.S.C. §§ 7521(a)(1), 7550(3).[26] The plain language is clear itself, and in the context of the Act as a whole. The argument that a glider is not a "new motor vehicle" because it lacks an engine before assembly is of no moment. As soon as the glider receives its engine, it becomes a motor vehicle under Title II, and prior to transfer of title, it is a "new motor vehicle." *See id.*

The statutory language reflects Congress' intent for breadth of coverage since it requires standards for: (1) new engines prior to title change; *and* (2) any "engine in a new motor vehicle." 42 U.S.C. § 7550(3). This language demonstrates Congress intended EPA to regulate emissions from any engine, not just new engines, in a new motor vehicle. Had Congress intended to restrict EPA's Section 202 authority to regulate "new vehicle motor engines" to "*new engines* in new motor vehicles," it would have limited the definition of "new motor vehicle engine" to the first category (new engines prior to title change). Under EPA's proposed interpretation of section 216(3), where a new engine can only be one that has never been sold before, the second category of engine – an engine in a new motor vehicle – is simply redundant of the first, which violates basic canons of statutory interpretation. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 574-75 (1995).

The surrounding provisions of the statute confirm this reading. EPA acknowledged in its notice of proposed repeal, "[a]s Title II currently reads, the term new motor vehicle; appears

[26] Whether or not there is ambiguity in the definition of "new motor vehicle" in other contexts, none exists in the context of gliders.

some 32 times, and in all but two instances, the term is accompanied by "new motor vehicle engine," indicating that, at the inception of Title II, Congress understood that the regulation of *engines* was essential to control emissions from "motor vehicles." 81 Fed. Reg. 53,443, n.3 (original emphasis).

Similarly, EPA's original view that it should regulate glider kits as *incomplete* new motor vehicles finds support in the provision of section 202(a)(1), which states that EPA's emissions standards shall apply to the vehicle or engine during its useful life "whether such vehicles and engines are designed as complete systems." Other parts of Title II also support this conclusion. Congress directed that emissions standards be implemented through regulation of the *manufacturer* of the new motor vehicle. *See, e.g.,* § 203(a)(1) (prohibiting "manufacturer of new motor vehicles or new motor vehicle engines" from selling such vehicles/engines without certificate of conformity); § 206(a)(1) (certification testing of motor vehicle must be submitted by "a manufacturer"). Congress plainly intended "manufacturer" to include multiple parties at different times throughout the vehicle's completion, defining "manufacturer" as "*any* person engaged in the manufacturing *or assembling* of new motor vehicles *or* new motor vehicle engines . . .." 42 U.S.C. § 7550(1) (emphasis added). Congress' use of "any" and "or" within the definition of manufacturer clearly show that it intended a manufacturer whose business is creating, rebuilding, and assembling incomplete new motor vehicles, like a glider kit maker, be responsible for such things as testing and certification of conformity. *See id.*

EPA's proposed reinterpretations of the CAA in this rulemaking unlawfully insert constraints on the definitions of "motor vehicle," "new motor vehicle," "new motor vehicle engine." and "manufacturer" that Congress did not include, thereby changing the meaning of Congress' definitions. *See Mohasco Corp. v. Silver,* 447 U.S. 807, 825 (1980)(agency "'interpretation' of the statute cannot supersede the language chosen by Congress"); *Motor & Equip. Mfrs. Ass'n v. E.P.A.,* 627 F.2d 1095, 1108 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 952, 100 (1980) ("statute must be construed to avoid that result so that no provision will be inoperative or superfluous"); *see Brown & Williamson Tobacco Corp*, 529 U.S. at 132-133 (court must "interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into a harmonious whole.'")(internal cite omitted); *see also, Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (the Court construes terms broadly where the act at issue "clearly falls into the category of remedial legislation").

Furthermore, EPA's erroneous new reading of the statute would create a loophole whereby any manufacturer of new engines or vehicles ostensibly could legally skirt emissions control regulations applicable to "new motor vehicles" simply by including some used/refurbished parts in the engine installed in an otherwise brand new vehicle. EPA did not include any limitation on its new reading of the statute that would prevent this result, which would affect vehicles beyond heavy-duty trucks, as the definitions in section 216 apply to a wide array of cars and trucks. Under the Proposed Repeal, *any* car manufacturer willing to reconfigure its manufacturing process could insert a refurbished third-party engine into an otherwise new car body, and claim such a vehicle was not a "new motor vehicle" subject to

section 202(a)(1). This would obviously contradict the purpose of the CAA. In contrast, EPA's 2016 interpretations are consistent with the CAA's overarching purpose.[27]

2. The CAA's Overarching Purpose Affirms That EPA's 2016 Interpretations of Sections 202 and 216 Reflect Congressional Intent to Regulate Gliders and Kits.

Congress enacted the CAA "'to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population.'" *Chemical Mfrs. Ass'n. v. EPA*, 217 F.3d 861, 866 (D.C. Cir. 2000) (quoting CAA § 101(b)(1), 42 U.S.C. § 7401(b)(1)). Courts have oft noted that the CAA is "is one of the most comprehensive pieces of legislation in our nation's history" enacted specifically to address public health problem caused by air pollution. *Motor Vehicle Manufacturers Ass'n v. New York State Dep't of Envtl. Conserv*., 17 F.3d 521, 524 (2nd Cir. 1994) (CAA enacted "[i]n response to the serious public health problems caused by ozone and carbon monoxide and the enormous task of cleaning up the air we breathe"); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 190 (3rd Cir. 2013)(CAA enacted "in response to evidence of the increasing amount of air pollution created by the industrialization and urbanization of the United States and its threat to public health and welfare.").

EPA's 2016 interpretation of its section 202(a)(1) duty – to regulate air emissions found to cause pose public health risks as including its duty to regulate gliders – is consistent with overarching purpose of the CAA to ensure the protection of public health and welfare from harmful air pollution. *See id.*

In contrast, EPA's newly proposed reinterpretations undermine the very purpose of the CAA to protect air quality and promote the public health and welfare, and EPA's duty to uphold and enforce the CAA. *See* 42 U.S.C. § 7401(b)(1); *Massachusetts v. EPA,* 549 U.S. at 532, citing 42 U.S.C. § 7521 ("EPA has been charged with protecting the public's 'health' and 'welfare'"). EPA's reinterpretations—which impair the CAA's purpose—are not permissible constructions of the statutes. Consequently, a court would not uphold them. *See Chevron,* 467 U.S. at 843.

C. EPA's Arguments in Support of Deference to its Flawed Reinterpretation Are Unfounded.

Instead of undertaking a complete *Chevron* analysis of the statutes' plain language and application in context of the Act, EPA's proposed reinterpretations rely on an argument that Congress' intent was ambiguous, thereby triggering a more deferential review of the "reasonableness" of the Agency's interpretation of the statute. EPA asserts two reasons why the statutory provisions are ambiguous as to gliders. Neither succeeds.

[27] EPA's original interpretations are also consistent with its treatment of remanufactured or refurbished locomotives and locomotive engines as "new." 40 C.F.R. § 1033.901.

1. EPA's Reinterpretation Relies on the Faulty Premise that Congress did not Draft the CAA to Adapt to Changes in Technology or Markets.

First, EPA supposes that when Congress defined "new motor vehicle" in Section 202, it "likely" did not envision the definition would apply "to a vehicle comprised of new body parts and a previously owned powertrain." 82 Fed. Reg. 53,445-46.

In material respects, this is the same rationale that EPA advanced to self-limit its section 202 authority to regulate greenhouse gases that the Supreme Court rejected in *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007). EPA contended that when drafting section 202, Congress could not have envisioned a problem that arose years later such as greenhouse gas emissions. *Id.* The Court rejected this idea, finding that "[w]hile the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the CAA obsolete." *Id*. The Court held that, "[t]he broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence." *Id*. (citing *Pennsylvania Dept. of Corrections v. Yeskey* 524 U.S. 206, 212 (1998)("the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.")(Internal quote omitted).

EPA's proposal to reinterpret section 202 in a way that fails to keep up with evolving air pollution problems (here, resulting from market changes in the glider industry) is contrary to the Court's view in *Massachusetts*; hence, it fails. Beyond EPA's rejection of the Supreme Court's instruction that the CAA should be read to cover issues about which Congress might not have been aware when drafting, EPA's Proposed Repeal contradicts the purpose of the Act that Congress clearly *did* have in mind: to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population.'" 42 U.S.C. § 7401(b)(1)). In advancing the Proposed Repeal, EPA is arguing, contrary to the Act's history and *Massachusetts*, that Congress intended to allow high-polluting vehicles to escape regulation entirely.

2. EPA's Claim that Section 216's Definitions Derived From the AIDA is Speculative and Immaterial.

EPA's second argument that section 216 is ambiguous is based on the connection that it assumes exists between the definition of "new motor vehicle" in CAA section 216 and the definition in the AIDA that requires dealers affix the MSRP to "showroom new" cars. 82 Fed. Reg. 53,445-46. It claims Congress must have used the AIDA as the basis for the CAA section 216 definitions because the AIDA predated the 1965 creation of CAA Title II and because they use similar language regarding transfer of title to ultimate purchaser. Further, EPA alleges that because it is clear the MSRP requirements in the AIDA only relate to "showroom new" vehicles – a definition EPA invents and fails to define, Congress must have intended "new motor vehicles" as used in CAA 216 and 202 only to relate to "showroom new" vehicles. *Id.*

However, EPA admits this is conjecture: "[w]hile the legislative history of the 1965 CAA does not expressly indicate that Congress based its definition of "new motor vehicle" on the definition of "new automobile" first adopted by the Automobile Information Disclosure Act of 1958, it seems clear that such was the case." 82 Fed. Reg. 53,445. Beyond EPA's admission there is no evidence that Congress based the section 216 definitions on those in AIDA, it provides no proof or analysis that would show gliders or kits not to be "new" under AIDA's definitions. Rather, it leaps from discussion of AIDA to the conclusion that Congress must have meant "showroom new" in drafting section 216's definitions, to further concluding that gliders are not "showroom new." 82 Fed. Reg. 53,446.

The AIDA's purpose is wholly different from that of the CAA. Congress enacted the AIDA to protect consumers from the bewildering "marketing jungle" created by car dealers. H.R. Rep. 85-1958 (June 24, 1958) at 2903. Specifically, it noted that, "the primary purpose of this bill is to disclose the manufacturer's suggested retail price of the new automobile [passenger car or station wagon] so that the buyer will know what it is. This information is not available now." *Id.* Congress crafted the AIDA, a specific, narrow law, to address a specific, narrow issue. It has no relation whatsoever to the significantly broader purpose of protecting public health and welfare from air pollution via one of the most comprehensive laws that Congress has enacted. *See Motor Vehicle Manufacturers Ass'n*., 17 F.3d at 524. Comparison of the AIDA's definitions to section 216 is inapt.

Assuming *arguendo* that any ambiguity *could* be found, which it cannot, as discussed above, no grounds would support deference to EPA's reinterpretation. EPA's new self-limiting view of its section 202 responsibility abrogates the Supreme Court's determination in *Massachusetts v. EPA*, and spurns the CAA's objective to protect air quality and promote the public health and welfare. Indeed, the proposed reinterpretations require one to believe Congress intended to create a loophole for the use of old engines in new bodies as substitutes for new, compliant vehicles, even when that would vastly *increase* pollution, a result that directly conflicts with the stated purpose of the CAA.

III. THE PROPOSED REPEAL IS ARBITRARY AND CAPRICIOUS

A. Standard of Review

Even if EPA's proposed reinterpretation of CAA section 202(a)(1) were not clearly erroneous, rulemaking under the CAA or the Administrative Procedure Act (APA) will be reversed by a court where such action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A); 5 U.S.C. § 706(2)(A); *see also Ethyl Corp. v EPA*, 51 F.3d 1053, 1064 (D.C. Cir. 1995) (holding that the standard of review under the CAA or the APA is "essentially the same under either Act."). When engaged in rulemaking, including the repeal of an existing rule, an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made*." Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins.Co.*, 463 U.S. 29, 43 (1983) (internal quotation and citation omitted); *Encino Motorcars LLC v. Navarro*, 136 S. Ct. at 2125.

An agency action is arbitrary and capricious "if it has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. Although agencies are allowed to change an existing position, as EPA has done here, an agency cannot choose to not enforce laws of which it disapproves or ignore statutory standards in carrying out its duties. *State Farm,* 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part). Rather, agencies changing position must "'show that there are good reasons for the new policy.'" *Encino Motorcars*, 136 S.Ct. at 2126 (*citing FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009); *Smiley v. Citibank (South Dakota), N.A.,* 517 U.S. 735 (1996)); *see also Comcast Corp. v. FCC,* 600 F.3d 642, 658-59 (D.C. Cir. 2010) (applying arbitrary and capricious standard factors to an agency's changed interpretation of regulatory authority).

Further, an agency must "provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters.'" *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1209 (2015) (citation omitted). Any "unexplained inconsistency" between a rule and its repeal is "a reason for holding an interpretation to be an arbitrary and capricious change." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 981 (2005). In addition, an agency cannot suspend a validly promulgated rule without first "pursu[ing] available alternatives that might have corrected the deficiencies in the program which the agency relied upon to justify the suspension." *Public Citizen v. Steed*, 733 F.2d. 93, 103 (D.C. Cir. 1984).

B. EPA Has Failed to Acknowledge the Extensive Record Supporting the Glider Rule, Much Less Justify its Proposed Repeal.

As discussed above in Section II, due to its clearly erroneous interpretation of CAA section 202(a), EPA fails to provide a "good reason" for repealing the Glider Rule. *Encino Motorcars*, 136 S.Ct. at 2126. Additionally, the entirety of the Proposed Repeal and EPA's request for comment advances arguments regarding EPA's statutory authority to regulate gliders/kits that were made by stakeholders during the Glider Rule rulemaking, and were thoroughly discussed, vetted, and then rejected by EPA when it issued the Glider Rule. *See* 80 Fed. Reg. at 40,169-41,170, 40,527-40,530; Phase 2 RTC sections 1.3.1 and 14.2; 81 Fed. Reg. at 73,512-73,519, 73,941-73,946. Although the Proposed Repeal acknowledges that EPA intends to change its 2016 interpretation, EPA cites only to comments made by the glider industry during the Phase 2 Standards comment period and in its petition for reconsideration, and ignores the myriad and detailed bases for EPA's earlier rejections of these very same arguments. *See* 82 Fed. Reg. 53,443-53,447. EPA's action in reviving and seeking further comment on these previously rejected arguments, while ignoring the robust Glider Rule record that clearly addressed them, is arbitrary and capricious. *Fox Television Stations,* 556 U.S. at 515 ("a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.").

1. EPA's Failure to Explain Inconsistencies in the Record Pertaining to its Legal Analysis is Arbitrary and Capricious.

While an agency can change its interpretation of its legal authority, to the extent that its new interpretation is inconsistent with its prior interpretations, an acknowledgment of those inconsistencies and justification for the new interpretation is required, especially where the regulated community is relying on the existing rule. *Brand X*, 545 U.S. at 981; *Perez* 135 S.Ct. at 1209. Here, EPA merely acknowledges the fact that it is changing interpretation while ignoring completely EPA's own extensive record analyzing congressional intent supporting the Glider Rule interpretation, including section 202(a)(1)'s relationship with other provisions of the CAA; the alternative statutory bases EPA has to regulate gliders; and EPA's longstanding practice of regulating new vehicles with some rebuilt or refurbished parts.[28] This failure does not meet the requirement to acknowledge that inconsistencies exist, much less meet the requirement for "reasoned analysis" and discussion of these alternatives and is therefore arbitrary and capricious. *State Farm*, 463 U.S. at 4.

EPA has also failed to consider "serious reliance interests" that were created when it adopted the Glider Rule. *See Perez,* 135 S.Ct. at 1209. As discussed *supra*, Original Equipment Manufacturers (OEMs) have placed considerable reliance on the Glider Rule as being necessary to ensure a level playing field among heavy duty vehicle manufacturers under the Phase 2 Standards. Given that glider sales are now coming at the expense of fully compliant conventional trucks and the fact that a tiny percentage of glider emissions can dwarf the emissions of hundreds of thousands of compliant trucks, EPA must look for ways to correct the perceived deficiencies in its statutory authority. *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. at 1209; *Steed* 733 F.2d. at 103. EPA's failure in the Proposed Repeal to acknowledge the importance of the Glider Rule to the rest of the regulated industry, or to explain why it did not address its current supposed deficient authority under Section 202(a)(1) by considering the alternative statutory bases set forth in the Glider Rule rulemaking, is arbitrary and capricious under *Encino, Perez,* and *Steed*.

2. EPA's Proposed Adoption of the Glider Industry's Arguments Without Justification is Arbitrary.

The history of the Proposed Repeal itself evidences arbitrary decision making by EPA. As mentioned above in Section I, the Glider Rule was finalized in 2016 after years of stakeholder

[28] *See* Phase 2 RTC Sections 1.3.1 and 14.2; 81 Fed. Reg. 73,513-73,519 (discussing the clear congressional purpose of the CAA to control air pollutant emissions and drive technology, the relationship with NHTSA regulations of glider vehicles, the relationship to standards for incomplete vehicles, definitions of "manufacturer", the prohibition against acts that "cause" violations of emissions standards, EPA's authority under Sections 203(a)(3)(B), and 202(a)(3)(D) granting explicit authority to prescribe requirements of rebuilt heavy-duty engines; *see also*, Legal Memorandum Discussing Issues Pertaining to Trailers, Glider Vehicles, and Glider Kits under the Clean Air Act, Feb. 2016, EPA-HQ-OAR-2014-0827-1627.

meetings with all sectors of industry, and responding to thousands of public comments. The Glider Rule relied on extensive technical analyses by EPA, glider manufacturers, and OEMs regarding glider emissions, and it went into effect without legal challenge from either glider manufacturers or OEMs. However, after gaining a private meeting with the Trump Administration, three glider manufacturers submitted a Petition for Reconsideration of the Glider Rule, in which they recycled legal arguments they had made during the Glider Rule promulgation, and which EPA had considered and rejected.[29] EPA then published its notice of the Proposed Repeal, relying on the legal theory presented in the glider manufacturers' petition for reconsideration.

As part of the introduction for the Proposed Repeal, EPA cites to arguments raised by the glider manufactures about potential "benefits" of gliders on the grounds that they emit less, as alleged by the Tennessee Tech study submitted with the petition for reconsideration. 82 Fed. Reg. at 53,444. This industry-designed and funded study was not peer reviewed, and among other glaring deficiencies, it makes claims regarding PM emissions that it did not even test for, rendering its assertions questionable at best. *See* fn. 22, *supra*. In contrast, EPA staff recently released a report about glider emissions that corroborates EPA's initial glider emissions estimates supporting the Glider Rule.[30] Yet EPA cites to the Tennessee Tech study in the Proposed Repeal without any critical review or explanation about the differences in its results, as compared to the extensive and scientifically robust analysis conducted by EPA in 2016 and 2017. EPA has failed to acknowledge the severe and substantial health and environmental impacts supported by the Glider Rule record,[31] issues at the heart of the CAA's purpose and the Administrator's statutory responsibility.

The comments that EPA solicits as part of the Proposed Repeal further reflect arbitrary and capricious action, since the questions on which it seeks comment (the suitability of gliders for small businesses, whether "limiting the availability of glider vehicles could result in older, less safe, more-polluting trucks remaining on the road," and "whether glider vehicles produce significantly fewer emissions overall compared to the older trucks they would replace" as well as "the relative expected emissions impacts if the regulatory requirements at issue here were to be repealed or were to be left in place") were already asked and answered as part of the Glider Rule and notice and comment process 82 Fed. Reg. at 53,446-53,447, s*ee also* RTC to Phase 2 Rule Sections 1.3.1 and 14.2; 81 Fed. Reg. at 73,512-73,519, 73,941-73,946.

[29] See fn. 21, *supra*.

[30] Chassis Dynamometer Testing Study; see fn. 12, *supra*.

[31] The California Air Resources Board comment letter thoroughly discusses the technical merits and evidence provided by the various studies cited in the Glider Rule record and the Proposed Repeal.

3. EPA's Failure to Analyze the Economic and Environmental Impacts of the Proposal Repeal, Including States' Abilities to Comply with NAAQS, are Additional Reasons the Proposed Repeal is an Arbitrary and Capricious Action.

Two other aspects of the Proposed Repeal are further evidence of EPA's arbitrary and capricious failure to adequately explain how its Proposed Repeal rebuts the facts found during promulgation of the Glider Rule. First, EPA failed to address its many findings of health protectiveness, and assessment of costs and benefits that it set out in the Regulatory Impact Assessment (RIA) for the Glider Rule.

EPA's only attempt at satisfying its obligations to provide the RIA information is a three-page long memo titled "Assessment of Economic Factors Associated with Glider Vehicles" (Memo) dated Nov. 16, 2017. Docket No. EPA-HQ-OAR-2014-0827-2407. In the Memo, EPA expressly acknowledges that it "is not including a Draft RIA for this proposed rule." Memo, p. 1. The Administrator acknowledges that he reviewed and considered the RIA for the Phase 2 rulemaking (Phase 2 RIA). But this is all he says about the Phase 2 RIA. That RIA (docket no. EPA-HQ-OAR-2014-0827-2345) is more than 1,000 pages long, and its economic impact analysis includes, among other things, the quantified monetized non-GHG health and environmental impacts of the Phase 2 rule, including the Glider Rule. Phase 2 RIA, chapter 8.6. It discusses the changes in ambient concentrations of PM and ozone that will result from the Phase 2 standards, and the fact that it is "important to quantify the health and environmental impacts associated with the standards because a failure to adequately consider ancillary impacts could lead to an incorrect assessment of their costs and benefits." Phase 2 RIA, p. 8-41. It presents monetized benefits from reducing exposure to PM. *Id.* at ch. 8.6.1. EPA's failure to consider whether or how the Proposed Repeal would affect the health-related benefits and costs found in the Phase 2 RIA renders the Proposed Repeal arbitrary and capricious. The discretion the CAA accords EPA does not matter here, since the omission pertains to the Administrator's duty to protect public health and welfare. 42 U.S.C. § 7617(e)(2).

Additionally, the meager economic analysis provided with the Proposed Repeal includes determinations that it will not result in costs/impacts to consumer costs and energy use. Memo, p. 2. However, EPA based these determinations on *unverified* claims by the glider industry that glider engines have better fuel efficiency and maintenance costs than new compliant engines. *Id.* A determination based on unverified claims, particularly when they are counter-intuitive – old engines have better fuel efficiency – and belied by the Agency's earlier findings,[32] is arbitrary; especially when the claims are advanced by *the action's proponents*.

Second, it is clear from the notice of Proposed Repeal that EPA gave no consideration to the effect the repeal would have on the States' ability to meet the NAAQS, an aspect of the Phase 2 program that the Glider Rule considered. Specifically, EPA found that further NOx reductions would "assist[] states and local areas in attaining and maintaining the applicable ozone NAAQS." 81 Fed. Reg. at 73,522. Further, it found that, "the emissions reductions and

[32] *See, e.g.,* Phase 2 RTC at 1877-1879.

improvements in ambient $PM_{2.5}$ concentrations from this action [. . .] will be helpful to states as they work to attain and maintain the $PM_{2.5}$ NAAQS." *Id.* at 73,856. In the Proposed Repeal, EPA totally ignored these prior findings. See 82 Fed. Reg. at 53,442-49. EPA mentions NAAQS only once, in its justification why it need not comply with Executive Order 13045 and study the Proposed Repeal's effects on the protection of children (despite its admission that some of the benefits to children's health will be lost in repealing the Glider Rule). 82 Fed. Reg at 53,448. However, this mention is not a substitute for analysis;[33] as it does not approach the requisite consideration of EPA's previous findings that Phase 2 with the Glider Rule would assist the States with NAAQS compliance. Repeal of the Glider Rule will have the exact opposite effect on the States' abilities to meet the NAAQS requirements. Finalization of the Proposed Repeal would be arbitrary and capricious, and subject to reversal by courts, for any of the foregoing reasons.

IV. EPA CANNOT DEFENSIBLY MAKE THE ALTERNATIVE CHANGES TO THE GLIDER RULE ON WHICH EPA REQUESTS COMMENT.

In addition to requesting comment on repeal of the Glider Rule EPA also seeks comment on two alternative changes that could substantially weaken and undermine the Rule. 82 Fed. Reg. at 53,446-47. First, EPA asks whether it should increase the exemption for small manufacturers above the current limit of 300 glider vehicles per year. *Id.* Second, EPA seeks comment on whether it should extend the date of compliance for glider vehicles and glider engines, and if so by how long. *Id.* The CAA and the record from the Glider Rule foreclose either option.

In response to concerns expressed by small business manufacturers and assemblers, the Glider Rule carved out an exemption that allows such entities to produce up to 300 vehicles per year (or up to the highest annual production volume for calendar years 2010 through 2014, whichever is less) with engines meeting the criteria pollutant standards corresponding to the year of the engine. 40 C.F.R. § 1037,150(t)(1)(ii); *see also* 81 Fed. Reg. 73,518, 73,942, 73,944-45. EPA found that this 300-unit level "reflects the upper end of the range of production that occurred before significant avoidance of the 2007 criteria pollutant standards began." *Id.* at 73,944. EPA further found that:

> [G]iven this relief combined with other changes being made into the final regulations, any small businesses that have been focused on producing gliders for legitimate purposes will not be significantly impacted by the new requirements since they can use donor engines within their regulatory useful life for either age or mileage. See generally RIA Chapter 12.7.3. Only those small businesses that have significantly increased production to create new trucks to avoid the 2010 NOx and PM standards will have their sales significantly restricted.

[33] In fact, it appears that EPA copied and pasted language from the section regarding E.O. 13045 in its notice of proposed repeal of the Clean Power Plan, even forgetting to swap out "glider rule" for "CPP" in the last sentence.

Id. at 73,944-45. Further, EPA noted that commenters who had argued against any limit or proposed a higher limit during the 2016 rulemaking "did not address the very significant adverse environmental impacts of the huge increase in glider vehicle production over the last several years." *Id.* at 73,944.

The historical facts regarding the volume of glider production prior to their manufacture to evade emissions requirements are not subject to reasonable dispute. Further, the fact that increasing the exemption would increase the very pollution that EPA is required to control is well established by EPA's own testing. Thus, EPA cannot provide the required "good reason" for an expansion of the exemption or "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations*, 556 U.S. at 515.

EPA's second alternative, to delay the date of compliance for glider vehicles and glider engines, is similarly untenable. In relevant part, the CAA provides that "[a]ny regulation shall take effect after a period of time the Administrator finds necessary to permit the development and application of the requisite control measures, giving appropriate consideration to the cost of compliance within the period and energy and safety factors." CAA § 202(a)(3)(D); 42 U.S.C. §7521(a)(3)(D). Here, as EPA found, "no time is needed to develop and apply the requisite control measures for criteria pollutants because compliant engines are immediately available." 81 Fed. Reg. 73,518. Additionally, EPA noted that "manufacturers of compliant engines, and dealers of trucks containing those engines, commented that they are disadvantaged by manufacturing more costly compliant engines while glider vehicles avoid using those engines." *Id.* And, EPA noted the risks of "massive pre-buys" if compliance deadlines were lengthy. *Id.* For these reasons, the Glider Rule capped production of gliders using higher polluting engines starting January 1, 2017, and requires use of engines meeting Phase 1 Standards as of January 1, 2018. *Id.* at 73,942. EPA further noted that "[g]iven the severity of these [associated health] impacts, delaying these provisions cannot be justified by merely the potential for inconvenience to the industry." Phase 2 RTC at 1881. Simply put, there is no statutory basis for extending the January 1, 2018 compliance date, because the engines needed for manufacturers to comply are available.[34]

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[34] Nor would any other statutory provision authorize EPA to extend the January 1, 2018 compliance date or other later compliance dates. For example, Section 705 of the Administrative Procedure Act does not apply because, among other reasons: (a) the Glider Rule has already taken effect and (b) the Glider Rule has not been challenged in litigation. *See Safety-Kleen Corp. v. EPA*, No. 92-1629, 1996 U.S. App. LEXIS 2324, at *2-3 (D.C. Cir. Jan. 19, 1996) (per curiam); *see also Becerra v. United States Department of the Interior*, No. 17-CV-02376-EDL, 2017 WL 3891678, at *9 (N.D. Cal. Aug. 30, 2017); *California v. Bureau of Land Management*, No. 17-CV-03804-EDL, 2017 WL 4416409, at *8 (N.D. Cal. Oct. 4, 2017). Similarly, section 301 of the Clean Air Act "does not provide the Administrator with carte blanche authority to promulgate any rules, on any matter relating to the Clean Air Act, in any manner that the Administrator wishes." *Citizens to Save Spencer City v. EPA*, 600 F.2d 844, 873 (D.C. Cir. 1979). The general power of section 301 does not trump the specific statutory provisions of the Clean Air Act. *See Natural Res. Def. Council v. Reilly*, 976 F.2d 36, 40-41 (D.C. Cir. 1992); *see also Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 384 (1992).

CONCLUSION

The basis for the Proposed Repeal is an incorrect, unjustifiable reinterpretation of EPA's Congressionally-mandated duties in the CAA that violates its cardinal obligation to protect public health and welfare from harmful air pollution, and EPA has not articulated any valid basis for the Proposed Repeal. EPA should withdraw its Proposed Repeal and retain the Glider Rule in its entirety.

Sincerely,

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