IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PEOPLE OF THE STATE OF CALIFORNIA, ex rel. EDMUND G. BROWN JR., ATTORNEY GENERAL; STATE OF CONNECTICUT; STATE OF MAINE; COMMONWEALTH OF MASSACHUSETTS; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT; DISTRICT OF COLUMBIA; CITY OF NEW YORK, Petitioners, **v.** NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, an agency within the UNITED STATES DEPARTMENT OF TRANSPORTATION, Respondent.	Case Nos. 06-72317 and 06-72641 Consolidated with Case Nos.: 06-71891; 06-72694; 06-73807; 06-73826

STATE OF MINNESOTA,

Petitioner,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, et al.,

Respondent.

RESPONSE OF PETITIONERS IN CONSOLIDATED CASES NOS. 06-72317 AND 06-72641 TO PETITION FOR REHEARING

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The National Highway Traffic Safety Administration (NHTSA) has petitioned for rehearing, with suggestion for rehearing *en banc*, of this Court's order requiring the agency to prepare an Environmental Impact State ("EIS") under the National Environmental Policy Act ("NEPA")[1] prior to issuing its new Corporate Average Fuel Economy ("CAFE") standards under the Energy Policy and Conservation Act ("EPCA").[2] NHTSA does not challenge the Court's conclusion that Petitioners met the standard for requiring an EIS, raising "a substantial question as to whether the Final Rule may have a significant impact on the environment." *Center for Biological Diversity v. National Highway Traffic Safety Administration ["CBD"]*, 508 F.3d 508, 514 (9th Cir. 2007). Rather, it broadly argues that the Court has no authority to "direct the agency to take a particular action on remand," and can only remand to the agency to address the deficiencies in the Environmental Assessment (EA), without ordering it to prepare an EIS. Petition for Rehearing ("Pet.") at 1, 7.

Contrary to NHTSA's assertions, neither the Court's opinion nor the Petition raises any fundamental question of administrative law or split between the circuits. Indeed, it appears that all courts agree that where a court simply

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1. 42 U.S.C. §§ 4321 *et seq.*

2. 49 U.S.C. §§ 32902 *et seq.*

determines that an EA is not adequate, the proper remedy is to remand the matter to the agency for preparation of a new assessment, without mandating that an EIS be prepared. In contrast, where a court finds that the evidence in the record establishes that the project may have a significant impact on the environment, then a remand for preparation of an EIS is appropriate. *See O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225, 238-40 (5th Cir. 2007) (cited in Pet. at 12).

In this instance, the Court did not merely find that the EA was inadequate; it expressly concluded that "NHTSA's FONSI [Finding of No Significant Impact] is arbitrary and capricious and the agency must prepare an EIS because the evidence raises a substantial question as to whether the Final Rule may have a significant impact on the environment." *CBD*, 508 F.3d at 554. Thus, there is no dispute on this record that the Court found that the evidence met the test for preparing an EIS. Nor is there any dispute that, where such findings are properly made, remand with directions to prepare an EIS is proper. Accordingly, the Petition neither raises a conflict, nor an issue of administrative law that needs to be resolved.

Finally, NHTSA points vaguely to the Energy Independence and Security Act of 2007 ("EISA), Publ. L. No. 110-140 (Dec. 19, 2007) as a reason that the

Court cannot order the agency to prepare an EIS. The EISA, however, contains a broad savings clause preserving all requirements of law, including environmental law. Nothing in the EISA affects the analysis here.

The Petition should be denied.

THE OPINION

The Court's ruling had two parts. First, in its EPCA analysis, the Court held that the final CAFE rule for MYs 2008-11 was arbitrary and capricious, and remanded to the agency to promulgate new standards as expeditiously as possible. 508 F.3d at 514, 527-545. Second, in its NEPA analysis, the Court held that the EA failed adequately to analyze cumulative impacts and reasonable alternatives, *id.* at 548-552, and that Petitioners met their burden of demonstrating a substantial question as to whether the CAFE rule may have a significant impact on the environment. The Court therefore held that NHTSA must prepare an EIS. *Id.* at 552-558.

In support of its NEPA ruling, the Court cited to a wealth of information in the administrative record. First, the Court noted that it is the scientific consensus that carbon dioxide (CO2) concentrations have been increasing over the 21st century, and are "virtually certain to be mainly due to fossil-fuel emissions. . . ." *Id.* at 522-23. The increasing CO2 emissions are having

significant impacts on the environment, including causing a melting of Arctic sea ice, rise of sea levels, extinction of species, heightened weather systems, and increase in the spread of disease. *Id.* at 523. Further, climate change may be "non-linear, meaning that there are positive feedback mechanisms that may push global warming past a dangerous threshold (the 'tipping point')" *ibid.,* and there is "substantial evidence that even a small increase in greenhouse gases could cause abrupt and severe climate changes." *Id.* at 557.

Second, the Court found that the sheer size of the greenhouse gas ("GHG") emissions in the CAFE rulemaking means that they can have a significant impact on global warming. "The transportation sectors account for about 31 percent of human-generated CO2 emissions in the U.S. economy. [citation] 'Overall, U.S. light-duty vehicles [passenger cars and light trucks] produce about 5 percent of the entire world's greenhouse gases,' [citation]" and "[e]missions from light trucks make up about eight percent of annual U.S. greenhouse gas emissions." *Id.* at 522.

The opinion concludes that "'fuel economy improvements could have a significant impact on the rate of CO2 accumulation in the atmosphere,' which would affect climate change. [citation]" *id.* at 547, and "the CAFE standard will affect the level of the nation's greenhouse gas emissions and impact global

warming." *Ibid.*[3]

ARGUMENT

I. The APA Permits the Court to Order an Agency to Take Affirmative Action

In its first and most general argument, NHTSA asserts that the Administrative Procedure Act ("APA") only permits a Court to set aside agency action, but "does not authorize the reviewing court to direct the agency to take a particular action on remand." Pet. at 1. This argument is unsupported by any of the authorities that NHTSA cites.

In making its argument, NHTSA references subdivision (2) of 5 U.S.C. § 706, which provides the standard for setting aside agency action, but ignores subdivision (1) which makes clear that a reviewing court "shall (1) compel agency action unlawfully withheld or unreasonably delayed. . ." As stated in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004), a claim under § 706(1) can proceed where the "agency failed to take a *discrete* agency action that it is *required to take*." (Emphasis in original.) While the *Norton*

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3. The Court's ruling is consistent with the decision of the Supreme Court in *Massachusetts v. EPA*, 127 S.Ct. 1438, 1457-58 (2007), which held that "[j]udged by any standard, U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, . . . to global warming."

court did not reach the question of whether the APA applies to a NEPA required duty, *id.* at 72, here, the duty to prepare an EIS is a discrete agency action, and the Court has already determined, based on the facts of this case, that it is mandated by law. Further, it is beyond dispute that reviewing courts routinely order agencies to take particular steps to comply with NEPA. *See, e.g., American Bird Conservancy, Inc. v. F.C.C.,* __F.3d__, 2008 WL 425529, *5 (CA D.C. 2008) (address request for programmatic EIS and provide notice required by NEPA); *Ocean Advocates v. United States Army Corps of Engineers*, 402 F.3d 846, 875 (9th Cir. 2005) (prepare EIS); *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1225, 1230-31 (10th Cir. 2002) (prepare EIS); *Grand Canyon Trust v. F.A.A.*, 290 F.3d 339 (CA D.C. 2002) (evaluate cumulative impact of noise pollution); *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 154 (CA D.C. 1985) (complete adequate EA); *Sierra Club v. Sigler*, 695 F.2d 957, 984 (5th Cir. 1983) (revise EIS and reconsider permit decision).

The cases cited by NHTSA are not to the contrary. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 376 (1989) and *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) simply stand for the well-accepted proposition that an agency decision is set aside pursuant to 5 U.S.C.

section 706(2), when it is arbitrary and capricious. *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 88,94 (1943), which is not a NEPA case, stands for the proposition that, where an agency has made a substantive decision on an issue committed to its discretion (approving a company plan of reorganization), the courts will not set aside the decision simply because they would have decided differently. *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20-21 (1952), again, not a NEPA case, stands for the proposition that a court can not modify a license granted by an agency, but can only remand to the agency to modify the license consistent with the order of the court. Finally *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 541, 543, 549 (1978) held only that the court could not invalidate an agency rule under NEPA because of perceived inadequacies in the rulemaking proceedings.

None of the above cases support NHTSA's assertion that courts cannot order agencies to take affirmative action that is mandated by law.

II. Ninth Circuit Caselaw is Internally Consistent

Attempting to justify its petition for rehearing, NHTSA next argues that there is an intra-circuit split in the law because some courts have ordered agencies to prepare an EIS and others have remanded for further consideration. The facts of the cases, however, demonstrate that the caselaw is consistent

within the Circuit.

The Ninth Circuit standard for requiring an EIS is clear. To prevail, Petitioners need not establish that the CAFE rule *will* have a significant impact on the environment. Rather, as this Court recognized, an agency must prepare an EIS if "substantial questions are raised as to whether a project . . . *may* cause significant degradation of some human environmental factor." *CBD*, 508 F.3d at p. 552 (emphasis in original) (quoting *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998)). In determining whether the above standard is met, the courts consider two factors – context and intensity. *CBD*, 508 F.3d at 553. Context includes the scope of the agency action and the interests affected. *National Parks & Conservation Ass'n v. Babbitt,* 241 F.3d 722, 731 (9th Cir. 2001) *cert. denied*, 534 U.S. 1104. Intensity includes, among other things, the degree to which the action affects public health or safety, the degree to which the effects are likely to be highly controversial, and the degree to which the effects are highly uncertain or involve unique or unknown risks. *CBD*, 508 F.3d at 553; 40 C.F.R. § 1508.27(b).

When the administrative record demonstrates that petitioners have met the standard of proof, the courts will order the agency to prepare an EIS. Thus, courts have ordered agencies to prepare an EIS where, for example:

- the plaintiffs have raised substantial questions as to whether a project *may* have a significant effect on the environment. *Idaho Sporting Cong., supra,* 137 F.3d at 1151 (record demonstrated that creek had excess of sediment and additional sediment would further degrade water system); *Ocean Advocates, supra,* 402 F.3d at 867 (record demonstrated that impact caused by increased tanker traffic "would be unquestionably severe");

- the environmental effects are highly uncertain or involve unique or unknown risks, *Ocean Advocates*, *supra,* 402 F.2d. at 870 (increase in tanker traffic due to dock extension was unknown); *National Parks & Conservation, supra,* 241 F.3d at 732-33, 740 (EA revealed definite environmental effects, but was uncertainty over intensity of impact);

- the effects are likely to be highly controversial, *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212-13 (9th Cir. 1998) *cert. denied*, 527 U.S. 1003 (substantial dispute concerning likelihood and significance of effects from logging); *National Parks & Conservation Association, supra,* 241 F.3d at 736-37 (85% of comments opposed project and cast doubt on methodology).

Conversely, and consistent with the above, courts in this Circuit have remanded to the agency to comply with NEPA, without specifying that an EIS

was required, where it is not possible to tell from the record whether the standard for an EIS has been met. Such circumstances include where:

- the agency did not prepare any NEPA document, *Steamboaters v. F.E.R.C.* 759 F.2d 1382, 1392 (9th Cir. 1985); *Jones v. Gordon*, 792 F.2d 821, 828-29 (9th Cir. 1986);

- the agency prepared an inadequate EA, and the administrative record was insufficient for the court to determine whether an EIS was required, *Grand Canyon Trust, supra,* 290 F.3d at 339-40, 346;

- the EA failed to consider a possible cause of environmental effects, *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n,* 449 F.3d 1016, 1024, 1031, 1035 (9th Cir. 2006) *cert. den.* 127 S.Ct. 1124 (2007) (agency did not consider terrorist acts as part of environmental review); or

- the agency prepared an EA under circumstances where it could not be considered objective. *Metcalf v. Daly*, 214 F.3d 1135, 1142-43, 1146 (9th Cir. 2000) (agency prepared EA after it agreed to project).

Thus, the decisions in this Circuit are consistent. If, for whatever reason, the courts can't determine from the record whether there is a substantial question that the project may have significant impacts, they will remand to the agency to make that determination. If the record is sufficient for the courts to determine

that the standard for preparing an EIS has been met, the courts will order the agency to prepare the EIS.

III. Ninth Circuit Caselaw is Consistent with Other Circuits

NHTSA next argues that decisions in other circuits conflict with the Ninth Circuit decisions ordering agencies to prepare an EIS. Again, a closer examination of these cases demonstrates that they are consistent with the approach of this Circuit.

In *O'Reilly, supra,* 477 F.3d at 239-240, the court of appeals concluded that, because the district court found flaws in the methodology of the EA, but did not conclude that the effects were significant, the district court should have remanded to the agency to correct the deficiencies in the analysis. As the court explained, the decision by an agency to forego preparation of an EIS may be unreasonable for two reasons: either (1) the evidence demonstrates that the project may have a significant impact on the environment, or (2) the agency's review was flawed in such a way that the court cannot conclude whether the project may have a significant impact. The Fifth Circuit noted that the appropriate relief depends upon which of these findings the court makes. "If the court finds that the project may have a significant impact, the court should order the agency to prepare an EIS. [citations] If the court finds, on the other hand,

that the EA is inadequate in a manner that precludes making the determination whether the project may have a significant impact, the court should remand the case to the agency to correct the deficiencies in its analysis. [citations]" *Id.* at 239 (emphasis added).

The cases cited by NHTSA are consistent with the *O'Reilly* analysis. Thus, in *National Audubon Society v. Hoffman,* 132 F.3d 7, 15, 18 (2d Cir. 1997), the court held that gaps in the administrative record prevented the court from determining whether the agency had considered the impact on the environment, and the appropriate remedy was to remand to correct the deficiencies in the record. Similarly in *Foundation on Economic Trends, supra,* 756 F.2d at 154, the court held that, because the agency failed to address a major environmental concern and never considered the question of whether an EIS should be prepared, the agency must complete an adequate EA. *See also Fritiofson v. Alexander*, 772 F.2d 1225, 1248 (5th Cir. 1985) (court may only require an EIS if it finds that the project may have a significant effect on the environment, but such a finding was neither expressly made nor implied in the trial court's opinion); *Louisiana Wildlife Federation v. York*, 761 F.2d 1044, 1053 (5th Cir. 1985) (declining to order Army Corps of Engineers to prepare a supplemental EIS because "the question of whether the Project might have a

significant adverse impact on the [environment] is still an open one" that had not yet been analyzed by the Corps.)

Conversely, as is the case in this Circuit, where the administrative record demonstrates clearly that an EIS is required, the courts will order the agency to prepare one. *See, e.g., Middle Rio Grande Conservancy Dist., supra,* 294 F.3d at 1229 (declining agency request to conduct another EA and requiring EIS because of overwhelming evidence that agency action will significantly affect the environment); *Save our Ten Acres v. Kreger,* 472 F.2d 463, 467 (5th Cir. 1973) ("if the court finds that the project may cause a significant degradation of some human environmental factor . . . the court should require the filing of an impact statement or grant [plaintiffs] such other equitable relief as it deems appropriate.")

In making its argument, NHTSA also relies on a statement from the *O'Reilly* court that "some circuits do not permit the court to ever make the determination that a project's effects are significant; instead, those courts require that the court *always* remand to the agency." *O'Reilly, supra*, 477 F.3d at 239, n. 12 (citing *National Audubon Soc'y,* 132 F.3d at 18) (emphasis in original). The statement in *O'Reilly*, however, is an overbroad and incorrect reading of *National Audubon Society,* which does not in any way stand for the proposition

that the Second Circuit prohibits courts from ordering the agency to prepare an EIS. As noted above, *National Audubon Society* turned on the specific fact that the impact was not clear because of critical gaps in the administrative record, but "despite an incomplete record," the district court undertook to supplement that record and itself resolved the question of whether the challenged action may have a significant impact on the environment. 132 F.3d at 18. Presumably, had the administrative record been complete, and had it demonstrated that the action may have a significant impact on the environment, the court would properly have ordered the agency to prepare an EIS.

NHTSA's reliance on two non-NEPA Supreme Court cases is similarly misplaced. Pet. at 10-11. In *Immigration and Naturalization Service v. Ventura*, 537 U.S. 12 (2002), a panel of this Court reversed a decision by the Bureau of Immigration Appeals denying asylum, then ruled in favor of asylum on alternative grounds that had not been considered by the agency. The Supreme Court reversed, holding that the Panel should have remanded to the agency for consideration of the alternative basis for asylum. *Id.* at 13-14, 16-17.

In contrast to *Ventura*, in ordering the Agency to prepare an EIS, this Court simply ordered the agency to comply with its *mandatory duty* under the law to comply with the procedural requirements of NEPA, based on an

administrative record that made it abundantly clear that an EIS is required. The Court did not usurp NHTSA's authority to establish the proper CAFE mileage standard, a matter it left squarely to the discretion of the agency.

Finally, in *National Association of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518 (2007) the Supreme Court addressed the question whether the Endangered Species Act ("ESA") imposes an additional criterion on the Environmental Protection Agency ("EPA") when it transfers permitting authority to states under the Clean Water Act. *Id.* at 2525-26. A divided panel of the Ninth Circuit vacated EPA's transfer decision as arbitrary and capricious because EPA relied on legally contradictory positions concerning its ESA obligations. *Id.* at 2528. In dicta, the Supreme Court noted that, if EPA's action had been arbitrary and capricious, the proper remedy was to remand to the agency to require a plausible explanation of its action. *Id.* at 2529. Again, that ruling, which is not a NEPA decision, does not apply here, where the Court found that the record clearly demonstrated that the standard for an EIS was met. *See* discussion in *CBD*, 508 F.3d at 547, n. 68.

IV. The Court Found that the Record Satisfied the Legal Standard for Requiring an EIS

Consistent with the caselaw in this and other circuits, the Court ordered the agency to prepare an EIS because the administrative record demonstrated

that Petitioners had met their burden of proving that there is a substantial question that the CAFE Rule may have a significant impact on the environment. NHTSA does not herein challenge any of the critical findings made by the Court. Thus, as noted above, the Court found that global warming is occurring, caused in large measure by anthropogenic input of CO_2 from the burning of fossil fuels. The effects of global warming include rising sea levels, more intense weather phenomena, increased disease, and the possible extinction of species. Further, the phenomenon of global warming is "non-linear," and small incremental increases in CO_2 can lead to abrupt, catastrophic, and irreversible changes. Finally, the Court found that NHTSA is in control of a major portion of the GHGs emitted in the United States and in the world and those emissions will have a significant effect on global warming. *CBD*, 508 F.3d at 522-23, 547, 554-55. The Court concluded that "Petitioners have provided substantial evidence that even a small increase in greenhouse gases could cause abrupt and severe climate changes." *Id.* at 557.

The Court also held that "Petitioners have satisfied several of the 'intensity' factors listed in 40 C.F.R. § 1508.27(b) for determining 'significant effect.'" Thus, the evidence indicates that the "Final Rule clearly may have an 'individually insignificant but cumulatively significant' impact with respect to

global warming." Further, global warming will have an effect on public health and safety. *Id.* at 555. Finally, the court held that the Petitioners satisfied the "controversy factor" set out in 40 C.F.R. section 1508.27(b)(4). As the Court noted, "NHTSA received 45,000 individual submissions on its proposal." *CBD*, 508 F.3d at 555. Ultimately, based on the administrative record, the Court concluded that "Petitioners have raised a 'substantial question' as to whether the CAFE standards for light trucks MYs 2008-2011 '*may* cause significant degradation of some human environmental factor,' particularly in light of the compelling scientific evidence concerning 'positive feedback mechanisms' in the atmosphere." *Id.* at 554.

These rulings, which NHTSA does not challenge, demonstrate that NHTSA has a mandatory duty to prepare an EIS. Remand to the Agency to revise the EA would be an "idle and useless formality." *See National Labor Relations Board v. Wyman-Gordon Co.*, 394 U.S. 759, 766, n.6 (1969) (plurality opinion) (no remand required where it would be "idle and useless formality" and courts are not required to "convert judicial review of agency action into a ping-pong game"); *see also e.g., Vista Hill Foundation, Inc. v. Heckler*, 767 F.2d 556, 566, n.9 (9th Cir. 1985); *American Federation of Government Employees, AFL-CIO v. Federal Labor Relations Authority*, 778 F.2d 850, 862, n.19 (D.C. Cir.

1985) (and cases cited therein); *American Postal Workers Union AFL-CIO v. United States Postal Service*, 682 F.2d 1280, 1284 (9th Cir. 1982), *cert. denied,* 459 U.S. 1200 (1983).

V. The EISA Does Not Change NHTSA's Duty to Prepare an EIS

In a few cursory sentences, NHTSA suggests that the EISA undermines the Court's NEPA analysis. NHTSA apparently has not read the broad savings clause that Congress enacted, which left NEPA untouched:

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

EISA, Pub. L. No. 110-140, § 3, 121 Stat. 1492, 1498 (codified at 42 U.S.C. § 17002). Moreover, as NHTSA acknowledges, the EISA does not change the basic factors that the agency must balance in determining a "maximum feasible" fuel economy standard. The legislation only mandates a fleet-wide minimum of 35 miles per gallon for model year 2020, and the standards for model years 2011 through 2019 need only be increased "ratably" and can only be done in up to five year increments. *Id.*, § 102(a)(2), 121 Stat. at 1499 (amending 49 U.S.C. § 32902(b)(2)(C), (b)(3)(B)). Thus, nothing in EISA changes the Court's

conclusion that NHTSA must prepare an EIS prior to proposing its fuel economy standards.

CONCLUSION

Petitioners respectfully request that this Court deny NHTSA's Petition for Rehearing.

Dated: March 7, 2008

Respectfully submitted,

FOR PETITIONERS

THE PEOPLE OF THE STATE OF CALIFORNIA, *et al.*

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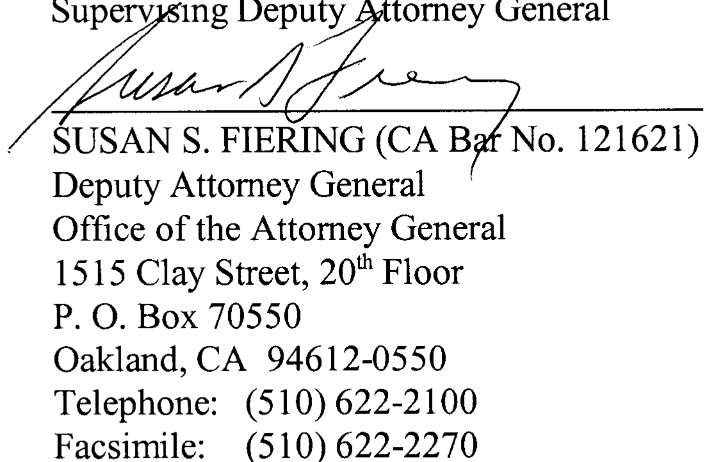

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached **RESPONSE OF PETITIONERS IN CONSOLIDATED CASES NOS. 06-72317 AND 06-72641** is proportionately spaced, has a typeface of 14 points or more and contains 4,051 words.

Dated: March 7, 2008

Respectfully submitted,

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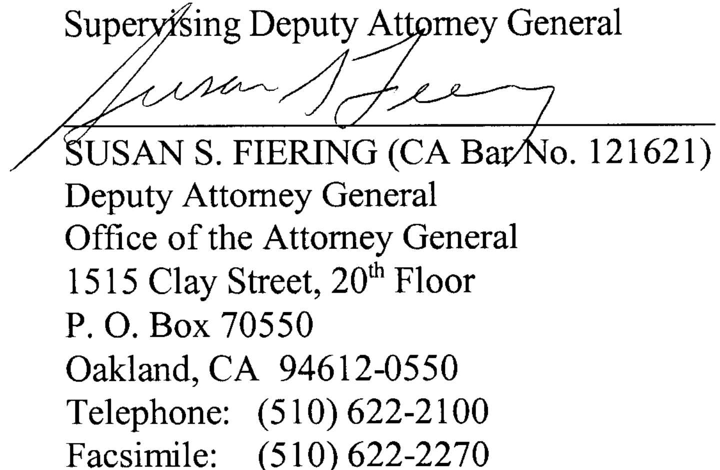

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DECLARATION OF SERVICE BY U.S. MAIL OR OVERNIGHT COURIER

Case Name: PEOPLE OF THE STATE OF CALIFORNIA, et al. v. NATIONAL HIGHWAY TRANSPORTATION SAFETY ADMINISTRATION, et al./ STATE OF MINNESOTA v. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, et al.

Case No.: United States Court of Appeals for the Ninth Circuit, Case Nos. 06-72317 and 06-72641 (Consolidated with Case Nos.: 06-71891, 06-72694, 06-73807, 06-73826)

I declare:

I am employed in the County of Alameda, Oakland, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is the Office of the Attorney General, 1515 Clay Street, 20th Floor, P. O. Box 70550, Oakland, California 94612-0550.

On **March 7, 2008**, I served the attached

RESPONSE OF PETITIONERS IN CONSOLIDATED CASES NOS. 06-72317 AND 06-72641 TO PETITION FOR REHEARING

by placing true copies thereof in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Oakland, California, or where indicated, in a sealed envelope for deposit with our contractor, Federal Express (for next-day delivery), each addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on **March 7, 2008**, at Oakland, California.

DEBRA BALDWIN

Signature

SERVICE LIST

Case Name: PEOPLE OF THE STATE OF CALIFORNIA, et al. v. NATIONAL HIGHWAY TRANSPORTATION SAFETY ADMINISTRATION, et al./ STATE OF MINNESOTA v. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, et al.

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POS of Response of Petitioners to NHTSA's Pet. for Rehearing.wpd