October 26, 2021

To: National Highway Traffic Safety Administration

Submitted By: Center for Climate and Energy Solutions, Institute for Policy Integrity at New York University School of Law, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists

Subject: Comments on the Consideration of the Social Cost of Greenhouse Gases in Corporate Average Fuel Economy Standards for Model Years 2024-2026 Passenger Cars and Light Trucks, 86 Fed. Reg. 49,602 (Sept. 3, 2021) (Docket No. NHTSA-2021-0053)

The undersigned organizations respectfully submit the following comments[1] on the National Highway Traffic Safety Administration's application of the social cost of greenhouse gases in its proposed regulation, Comments on the Consideration of the Social Cost of Greenhouse Gases in Corporate Average Fuel Economy Standards for Model Years 2024-2026 Passenger Cars and Light Trucks ("Proposed Rule"),[2] and the preliminary Regulatory Impact Analysis[3] ("Proposed RIA") and technical support document[4] ("Proposed Rule TSD") accompanying that proposal.

NHTSA appropriately applies the social cost estimates developed by the Interagency Working Group on the Social Cost of Greenhouse Gases ("Working Group") and rejects the faulty numbers that the agency applied from 2017 until early 2021. The Working Group developed its social cost estimates through a rigorous and transparent process incorporating the best available science. Those values—though widely agreed to underestimate the full social costs of greenhouse gas emissions[5]—are appropriate to use as conservative estimates and have been

[1] Our organizations may separately and independently submit other comments to this docket. This document does not purport to represent the views, if any, of New York University School of Law.

[2] 86 Fed. Reg. 49,602 (Sept. 3, 2021).

[3] NHTSA, Preliminary Regulatory Impact Analysis: Proposed Rulemaking for Model Years 2024-2026 Light-Duty Vehicle Corporate Average Fuel Economy Standards (Aug. 2021) ("RIA").

[4] NHTSA, Technical Support Document: Proposed Rulemaking for Model Years 2024-2026 Light-Duty Vehicle Corporate Average Fuel Economy Standards (Aug. 2021) ("TSD").

[5] Interagency Working Group on the Social Cost of Greenhouse Gases, Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide – Interim Estimates Under Executive Order 13,990 at 4 (2021) [hereinafter "IWG, 2021 TSD"] (acknowledging that current social cost valuations "likely underestimate societal damages from [greenhouse gas] emissions").Richard L. Revesz et al., *Global Warming: Improve Economic Models of Climate Change*, 508 NATURE 173 (2014) (explaining that the Working Group's values, though methodically rigorous and

applied in dozens of previous rulemakings[6] and upheld in court.[7] In contrast, the estimates that NHTSA and other federal agencies applied in the Trump administration disregarded the best available science and were rejected by a federal court as arbitrary and capricious.[8] While NHTSA should follow the science and apply any updated valuations that the Working Group releases before this rule is finalized, the agency is fully justified in relying on the Working Group's current interim estimates that are based on extensive evidence and rigorous review.

NHTSA provides several compelling justifications for readopting the Working Group's estimates. But while the legal challenges that have already been brought against the Working Group's estimates are unfounded,[9] NHTSA should anticipate similar legal challenges to its application of the social cost of greenhouse gases and so provide additional explanation for its policy choices on this consequential issue.[10] In particular, **NHTSA should expand upon its rationale for adopting a global damages valuation and for the range of discount rates it applies to climate effects**. As detailed herein, there are many additional legal, economic, and policy justifications for such methodological decisions that can further bolster NHTSA's support for these choices. NHTSA should also strongly consider conducting supplemental sensitivity analyses to further confirm that strengthening the vehicle emissions standards will deliver significant net benefits to society under a range of analytical assumptions.

These comments are organized into five sections. First, as Section I recommends, NHTSA should both **explicitly affirm that, in NHTSA's own expert judgment, the Working Group's estimates are appropriate but conservative lower bounds that omit significant categories of climate damages**.

Section II recommends that NHTSA further explain the reasons for adopting a global framework for valuing climate impacts. These include legal justifications based on the Energy Policy and Conservation Act, the National Environmental Policy Act's broad government-wide policy mandates, the Administrative Procedure Act's requirement to consider all important factors, and executive orders and international agreements. NHTSA can similarly strengthen its economic and policy justifications, such as by **explicitly concluding that the theory and evidence for international reciprocity justify a focus on the full global values**. Section II also recommends that NHTSA modify its treatment of domestic-only estimates. The RIA currently uses the flawed domestic-only values developed under the now-revoked Executive Order 13,783 in a sensitivity analysis. Though NHTSA correctly judges those values to be underestimates,

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highly useful, are very likely underestimates) (note that co-author Kenneth Arrow is a Nobel Prize-winning economist).

[6] Peter Howard & Jason A. Schwartz, *Think Global: International Reciprocity as Justification for a Global Social Cost of Carbon*, 42 COLUM. J. ENV'T L. 203, 270–84 (2017) (listing all uses through mid-2016).

[7] *Zero Zone v. Dept. of Energy*, 832 F.3d 654, 679 (7th Cir. 2016).

[8] *California v. Bernhardt*, 472 F. Supp. 3d 573, 613 (N.D. Cal. 2020).

[9] *See Missouri v. Biden*, No. 4:21-cv-00287-AGF, 2021 WL 3885590 (E.D. Mo. Aug. 31, 2021) (dismissing lawsuit brought against the Working Group's valuations); Iliana Paul & Max Sarinsky, Inst. for Pol'y Integrity, *Playing With Fire: Responding to Criticism of the Social Cost of Greenhouse Gases* (2021), https://policyintegrity.org/publications/detail/playing-with-fire (rebutting substantive arguments presented in that case and another lawsuit brought by the State of Louisiana).

[10] *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (explaining that when an agency changes its position on an issue, it must "at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy'" (quoting *FCC v. Fox Television Stations Inc*., 556 U.S. 502, 515 (2009)).

they are actually fatally incomplete[11] and should not be used. NHTSA should instead use a sounder domestic-only estimate.

Section III recommends that NHTSA provide additional explanation for adopting the range of discount rates endorsed by the Working Group, applying a 2.5% consumption-based discount rate for climate impacts in its reference case, and deciding not to apply a 7% capital-based discount rate to climate impacts. In particular, **NHTSA should further explain the reasons for combining climate effects discounted at an appropriate consumption-based rate with other costs and benefits discounted at a capital-based rate, and for combining climate effects discounted at an appropriate "certainty equivalent" long-term consumption-based rate with other costs and benefits discounted at a near-term consumption-based discount rate.** Besides climate effects presenting special legal, economic, and policy considerations for the discount rate, NHTSA should also argue that it is appropriate generally to focus its analysis of this rule on consumption-based rates given that most costs and benefits are projected to fall to consumption rather than to capital investments. We also urge NHTSA to consider providing additional sensitivity analysis using discount rates of 2% or lower for climate impacts, as recently suggested by the Working Group.

Section IV recommends that NHTSA bolster its explanation for relying on the Working Group's other methodological choices, including the fact that the Working Group applied a transparent and rigorous process that relied upon the best-available and most widely-cited models for monetizing climate damages. This section also provides detailed **rebuttals to common criticisms of the Working Group's methodology** from opponents of climate regulation.

Finally, Section V suggests that NHTSA apply the social cost of greenhouse gases in its environmental impact statement, as it has in previous analyses conducted under the National Environmental Policy Act.

I. NHTSA Should Affirm That, in Its Expert Judgment, the Working Group's Social Cost of Greenhouse Gas Estimates Are Appropriate But Conservative

The Proposed Rule,[12] TSD,[13] and RIA[14] cite and quote the Working Group's February 2021 Technical Support Document as support for the methodological choices underlying the social cost of greenhouse gas values that NHTSA applies in its analysis. Such references provide compelling justifications for applying the Working Group's estimates as appropriate lower bounds. However, NHTSA should take the additional steps of explicitly incorporating the Working Group's entire Technical Support Document by reference, and then affirming that in NHTSA's own judgment, the values it endorses are conservative underestimates.

These additional steps will serve two important goals. First, they will help shield NHTSA from any attacks that the agency's reliance on the Working Group's guidance or its justification for the values is in any way incomplete. Second, they will bolster the case that stronger vehicle

[11] *Bernhardt*, 472 F. Supp. 3d at 613 (recognizing that the Trump-era estimates of domestic climate damages "ignores impacts on 8 million United States citizens living abroad, including thousands of United States military personnel; billions of dollars of physical assets owned by United States companies abroad; United States companies impacted by their trading partners and suppliers abroad; and global migration and geopolitical security").

[12] 86 Fed. Reg. at 49,732–34.

[13] Proposed Rule TSD at 533–39.

[14] Proposed RIA at 169.

fuel-economy standards will deliver significant net benefits to society. Notably, the Working Group's estimates do not currently reflect (due to data limitations) societal costs arising from many significant effects of climate change, including ocean acidification, wildfires, public health effects from methane emissions, abrupt ecosystem disruptions, and many potentially catastrophic outcomes, to name just some categories of omitted damages.[15] Because of such omitted damages and other limitations of the current estimates, the Working Group's damage estimates most likely severely underestimate the full climate effects from greenhouse gas emissions. NHTSA should note in all its presentations of net benefits that its estimates of climate benefits are conservative underestimates that do not currently include many significant categories of climate damages.[16]

II. NHTSA Should Provide Additional Explanation for Its Reliance on Global Climate Damage Valuations, While Revising Its Analysis of Domestic Effects

In the Proposed Rule, NHTSA appropriately focuses on a global estimate of climate benefits, returning to its historical approach and correcting its recent, temporary, and arbitrary practice of disregarding all climate effects that occur outside the physical borders of the United States. While NHTSA offers persuasive justifications for this decision,[17] it should provide additional analysis on this front.[18] In particular, NHTSA should emphasize the concern for the impacts of U.S. pollution on foreign welfare in numerous sources of law (including the fact that reliance on global valuations under the Energy Policy and Conservation Act has been specifically upheld in court[19]), further highlight the significance of U.S. strategic interests and reciprocity, discuss the importance of extraterritorial impacts and spillovers, and highlight the inconsistency that would occur if the agency considered only domestic benefits while focusing on global costs. At the same time, NHTSA may wish to revise its sensitivity analysis around a domestic-only valuation by focusing on guidance from the Working Group's past technical support documents rather than the arbitrary estimates that NHTSA has applied in the past.

A. Relevant Statutes and Executive Orders Permit, if Not Compel, a Global Perspective on Climate Damages

The Energy Policy and Conservation Act ("EPCA"), National Environmental Policy Act, Administrative Procedure Act, and other key sources of law permit, if not require, NHTSA to consider the effects of U.S. pollution on foreign nations. NHTSA should highlight these legal provisions as further explanation for its focus on global climate impacts.

Under EPCA, NHTSA is charged with mandating fuel-economy standards that take into consideration, among other enumerated factors, "the need of the United States to conserve

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[15] Climate Impacts Reflected in the SCC Estimates, COST OF CARBON, https://costofcarbon.org/scc-climate-impacts (listing included and omitted damages in Working Group's estimates).

[16] IWG, 2021 TSD, *supra* note 5, at 4 (explaining that due to omitted damages, uncertainties surrounding long-term discount rates, and other factors such as recent evidence on equilibrium climate sensitivity, "the range of four interim SC-GHG estimates presented in this [technical support document] likely underestimate societal damages from GHG emissions").

[17] *See, e.g.*, Proposed Rule TSD at 534.

[18] *See generally* Jason A. Schwartz, Inst. for Pol'y Integrity, *Strategically Estimating Climate Pollution Costs in a Global Environment* (2021), https://policyintegrity.org/files/publications/Strategically_Estimating_Climate_Pollution_Costs_in_a_Global_Environment.pdf.

[19] *Zero Zone*, 832 F.3d at 679.

energy."[20] For decades, courts have affirmed that this language does not bar, but in fact compels NHTSA to consider the environmental implications of energy conservation, including effects on climate change. In 1988, the U.S. Court of Appeals for the D.C. Circuit highlighted that the Energy Policy and Conservation Act contains no statutory command prohibiting environmental considerations, recognizing "no conflict" between considering "environmental consequences" with "the factors NHTSA must weigh under EPCA."[21] The court further approved of the Department of Transportation's interpretation that the reference to "need of the Nation to conserve energy" "requires consideration of . . . environmental . . . implications."[22] More recently, in 2008, the U.S. Court of Appeals for the Ninth Circuit indicated that, due to advancements in "scientific knowledge of climate change and its causes," "[t]he need of the nation to conserve energy is even more pressing today than it was at the time of EPCA's enactment."[23] Accordingly, the court concluded, "EPCA does not limit NHTSA's duty … to assess the environmental impacts, including the impact on climate change, of its rule."[24]

Nowhere does EPCA restrict consideration of climate impacts to those effects that occur within the nation's borders, as confirmed in a recent case from the U.S. Court of Appeals for the Seventh Circuit. In that case, industry groups challenged a Department of Energy efficiency standard that was promulgated under EPCA, specifically objecting to the alleged "mismatch in the [social cost of carbon] analysis looking to global benefits." According to the petitioners, "EPCA authorizes [the agency] to conduct only a national analysis. There are no references to global impacts in the statute."[25] The Seventh Circuit rejected that argument, holding that DOE "acted reasonably" in considering the "global benefits" of its EPCA standards.[26] Although that case concerned a different provision of EPCA, the statutory factors for DOE's efficiency standards at issue in that case are very similar to the statutory standards provided for NHTSA's fuel-economy standards.[27] In light of the similarities between these two provisions, the Seventh Circuit's holding—that EPCA permits consideration of global climate impacts—naturally applies to NHTSA's consideration of fuel-economy standards under that statute.

The Ninth Circuit decision discussed above provides additional support for this interpretation. In that case (discussed further below), the court held that NHTSA must monetize climate impacts as part of any cost-benefit analysis of proposed fuel-economy standards under EPCA.[28] In its ruling, the court listed several estimates of the global social cost of greenhouse gases as values that the agency could have applied.[29] By implication, the court indicated that NHTSA should consider the global externalities of greenhouse gases in setting fuel-economy

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[20] 49 U.S.C. § 32902(f).

[21] *Pub. Citizen v. Nat'l Highway Traffic Safety Admin.*, 848 F.2d 256, 263 n.27 (D.C. Cir. 1988).

[22] *Id.*; *see also id.* at 265 (recognizing that Congress did not supply "precise balancing formula for the agency to apply," therefore leaving it within NHTSA's discretion to engage in a "reasonable accommodation of conflicting policies that were committed to the agency's care by the statute") (internal quotation marks omitted).

[23] *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1197–98 (9th Cir. 2008).

[24] *Id.* at 1214.

[25] Brief for Petitioners at 28–30, *Zero Zone v. Dep't of Energy*, 832 F.3d 654 (7th Cir. 2016).

[26] *Zero Zone*, 832 F.3d at 679.

[27] *Compare* 42 U.S.C. § 6295(o)(2)(B)(i)(VI) (cited at *Zero Zone*, 832 F.3d at 679) (requiring DOE to consider "the need for national energy and water conservation) *with* 49 U.S.C. § 32902(f) (requiring NHTSA to consider "the need of the United States to conserve energy").

[28] *Ctr. for Biological Diversity*, 538 F.3d at 1198–1203.

[29] *Id.* at 1199 & n.44 (recognizing significance of climate change's "global decision context" for setting appropriate social cost values).

standards—and not limit its analysis to effects only within the geographic borders of the United States.

This interpretation is further supported by the National Environmental Policy Act ("NEPA"). Though best known for requiring agencies to prepare environmental impact statements before taking certain actions , NEPA also much more broadly declares a national environmental policy and requires of all agencies that "to the fullest extent possible[,] the policies, regulations, and public laws of the United States *shall be interpreted and administered* in accordance with the policies set forth in this chapter,"[30] including the need to "recognize the worldwide and long-range character of environmental problems" and to "lend appropriate support" to help "maximize international cooperation."[31] In other words, especially because adopting a global perspective on climate damages will advance U.S. foreign policy goals (see the next subsection), NEPA requires NHTSA to interpret all of the laws it administers, including EPCA, in ways that recognize the worldwide character of environmental problems. Using global social cost of greenhouse gas estimates helps fulfill that requirement.

Other key legal commitments compel this same conclusion. For instance, the United Nations Framework Convention on Climate Change—to which the United States is a party[32]—declares that national "policies and measures to deal with climate change should be cost-effective so as to *ensure global benefits* at the lowest possible cost."[33] The Convention further commits parties to evaluating global climate effects in their policy decisions, by "employ[ing] appropriate methods, for example *impact assessments* . . . with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change."[34] The unmistakable implication of the Convention is that parties—including the United States—must account for global economic, public health, and environmental effects in their impact assessments. In 2008, a

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[30] 42 U.S.C. § 4332(1) (emphasis added).

[31] *Id*. § 4332(2)(F); *see also EDF v. Massey*, 986 F.2d 528, 536 (D.C. Cir. 1993) ("Section 102(2)(F) further supports the conclusion that Congress, when enacting NEPA, was concerned with worldwide as well as domestic problems facing the environment. . . . Compliance with one of the subsections can hardly be construed to relieve the agency from its duty to fulfill the obligations articulated in other subsections."); *NRDC v. NRC*, 647 F.2d 1345, 1387 (D.C. Cir. 1981) (J. Robinson, concurring; J. Wilkey wrote for the Court, but there was no majority opinion) (concluding that even if a conflict with another statute prevents the agency from conducting an environmental impact statement, that "does not imply that NRC may ignore its other NEPA obligations," including the "provision for multinational cooperation" and the "policy of the United States with respect to the ecological well-being of this planet"; rather, the agency "should remain cognizant of this responsibility"); *Greene County Planning Bd. v. Federal Power Comm'n*, 455 F.2d 412, 424 (2d Cir. 1972) ("The Commission's 'hands-off' attitude is even more startling in view of the explicit requirement in NEPA that the Commission 'recognize the worldwide and long-range character of environmental problems' and interpret its mandate under the Federal Power Act in accordance with the policies set forth in NEPA.").

[32] S. Treaty Doc. No. 102-38; S. Exec. Rept. No. 102-55.

[33] U.N. Framework Convention on Climate Change art. 3(3), May 9, 1992, 1771 U.N.T.S. 107 (emphasis added); *see also id.* art. 3(1) ("The Parties should protect the climate system for *the benefit of present and future generations of humankind, on the basis of equity* and in accordance with their common but differentiated responsibilities and respective capabilities.") (emphasis added); *id*. art. 4(2)(a) (committing developed countries to adopt policies that account for "the need for equitable and appropriate contributions by each of these Parties to the global effort").

[34] *Id*. art. 4(1)(f) (emphasis added); *see also id.* art. 3(2) (requiring parties to give "full consideration" to those developing countries "particularly vulnerable to the adverse effects of climate change"); *see also* North American Agreement on Environmental Cooperation art. 10(7), Jan. 1, 1994, 32 I.L.M. 1480 (committing the United States to the development of principles for transboundary environmental impact assessments).

group of U.S. senators—including then-Senator John Kerry, who helped ratify the framework convention on climate change—agreed with this interpretation of the treaty language, saying that "[u]pon signing this treaty, the United States committed itself to considering the global impacts of its greenhouse gas emissions."[35]

And under the Administrative Procedure Act, it is arbitrary and capricious for agencies to "entirely fail[] to consider an important aspect of the problem"[36]—an obligation that a federal court held requires federal agencies to consider international climate impacts. Specifically, a recent ruling from the U.S. Court for the Northern District of California struck down as arbitrary the Bureau of Land Management's ("BLM") rescission of the Waste Prevention Rule in part because the agency had abandoned the Working Group's peer-reviewed, global estimates of the social cost of greenhouse gases in favor of flawed estimates (the same estimates that NHTSA applied under the Trump administration) that looked only at effects within the U.S. borders.[37] The court found that the global values developed by the Working Group reflected "the best available science about monetizing the impacts of greenhouse gas emissions,"[38] whereas "focusing solely on domestic effects has been soundly rejected by economists as improper and unsupported by science."[39]

The court reminded BLM that relevant executive orders, including Executive Order 12,866, require consideration of "all" costs and benefits, based on the "best reasonably obtainable scientific, technical, economic, and other information," and concluded that "no[] . . . regulatory rules or orders require exclusion of global impacts."[40] More recently, Executive Order 13,990 instructed agencies to "tak[e] global damages into account," because "[d]oing so facilitates sound decision-making, recognizes the breadth of climate impacts, and support the international leadership of the United States on climate issues."[41] This language again reinforces the instructions from NEPA that, whenever not precluded by statute from doing so, agencies should account for the environmental impacts of their actions on foreign nations.

NHTSA should draw upon these legal authorities in further explaining its reliance on global climate-damage valuations.

B. Focusing on Global Climate Damages Furthers U.S. Strategic Interests by Facilitating Reciprocity, Mitigating International Spillover Effects, and Protecting U.S. Extraterritorial Interests

NHTSA explains that the Working Group selected a global perspective in part because climate impacts occurring outside U.S. borders can directly and indirectly affect U.S. welfare through spillovers and foreign reciprocity, and that NHTSA is readopting that global perspective consistent with its approach from 2009–2016.[42] NHTSA should expand on this justification. In

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[35] Comment Letter from U.S. Sens. Feinstein, Snowe, Nelson, Cantwell, Sanders, Kerry, Durbin, Reed, Boxer, & Cardin to Mary Peters, Sec'y, U.S. Dep't of Transp. on Proposed Rule for Average Fuel Economy Standards, Passenger Cars and Light Trucks; Model Years 2011–2015 (July 1, 2008).

[36] *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co*., 463 U.S. 29, 41–43 (1983).

[37] *Bernhardt*, 472 F. Supp. 3d at 613.

[38] *Id.* at 611.

[39] *Id.* at 613.

[40] *Id.* at 611–12 (internal quotation marks omitted).

[41] Exec. Order No. 13,990 § 5(a), 86 Fed. Reg. 7037, 7040 (Jan. 20, 2021).

[42] Proposed Rule TSD at 534.

particular, NHTSA should explicitly explain why the theory and evidence for reciprocity by itself justifies a focus on the full global values, and that additional strategic and practical justifications provide further support.

1. Use of the Global Values Facilitates International Reciprocity

Because the world's climate is a single interconnected system, the United States benefits greatly when foreign countries consider the global externalities of their greenhouse gas pollution and cut emissions accordingly. It therefore promotes the strategic interests of the United States to encourage all other countries to think globally in setting their climate policies. The United States can advance this objective by itself adopting the full global social cost of greenhouse gases—as numerous leading climate economists and experts have explained.[43] Indeed, basic economic principles demonstrate that the United States stands to benefit greatly if all countries apply global social cost of greenhouse gas values in their regulatory decisions and project reviews[44]—likely trillions of dollars in direct benefits from foreign action to combat climate change.[45]

The Biden Administration has clearly made such a strategic choice, to adopt a global valuation of climate damages as part of its diplomatic strategy. Executive Order 13,990 unequivocally states that "[i]t is essential that agencies capture the full costs of greenhouse gas emissions as accurately as possible, including by taking global damages into account . . . [to] support the international leadership of the United States on climate issues."[46] The Order later elaborates: "Our domestic efforts must go hand in hand with U.S. diplomatic engagement. Because most greenhouse gas emissions originate beyond our borders, such engagement is more necessary and urgent than ever. The United States must be in a position to exercise vigorous

[43] Most generally, it is individually rational for a country to fully internalize the global social cost of greenhouse gases "if a country expects a decrease in its own emissions to decrease that of all others in proportion to the ratio of its external cost of emissions to its internal costs." Matthew J. Kotchen, *Which Social Cost of Carbon? A Theoretical Perspective*, 5 J. ASSOC. ENV'T. & RES. ECON. 673, 683 (2017). Other economists have justified use of the global social cost estimates on more intuitive grounds. *See, e.g.*, Tamma Carleton & Michael Greenstone, *Updating the United States Government's Social Cost of Carbon* at 26-27 (Becker Friedman Institute Working Paper 2021-04, Jan. 2021), https://perma.cc/H9EU-XWBX ("The global SCC . . . is an ingredient in efforts to procure the necessary international action. . . . Even if policymakers decide that the effects of regulations on U.S. citizens are what matter (in terms of both law and policy), it would make sense to use the global measure, as it would protect U.S. citizens against a range of adverse effects from unmitigated climate change."); William Pizer et al., *Using and Improving the Social Cost of Carbon*, 346 SCIENCE 1189, 1190 (2014) (explaining that the "potential to leverage foreign mitigation," combined with moral, ethical, and security issues, provide "compelling reasons to focus on a global SCC but, more important, to make a strategic choice."); Robert S. Pindyck, Comments on Proposed Rule and Regulatory Impact Analysis on the Delay and Suspension of Certain Requirements for Waste Prevention and Resource Conservation, Nov. 6, 2017, *available at* https://perma.cc/HG8Q-MT6H ("[W]hat treatment of international damages is in the United States' self-interest? . . . The simplest answer is to find the value of the [social cost of carbon] that maximizes global welfare. . . . I continue to think that the global value is the appropriate provisional value for use as research on this topic continues.").

[44] *See* Kotchen, *supra* note 43, at 678 (providing formulas for the "efficiency argument in support of all countries internalizing the GSCC [global social cost of carbon] for domestic policy").

[45] Inst. for Pol'y Integrity, *Foreign Action, Domestic Windfall: The U.S. Economy Stands to Gain Trillions from Foreign Climate Action* (2015), https://perma.cc/T3WN-H42U.

[46] Exec. Order No 13,990 § 5(a).

climate leadership in order to achieve a significant increase in global climate action and put the world on a sustainable climate pathway."[47]

There is already evidence that the U.S. strategy of combining its domestic efforts—including the global valuation of climate damages—with its diplomatic engagement is spurring foreign reciprocity. During the April 2021 "Leaders' Summit on Climate" hosted by the United States, following the announcement of a new U.S. commitment to reduce emissions to 50–52% below 2005 levels by 2030, multiple other countries reciprocally increased the ambition of their own climate targets. Notably, Japan accelerated its reduction goal from 26% to 46–50%; Canada strengthened its target from 30% to 40–45%; the European Union set a target of at least 55%; the United Kingdom set a new target for the year 2035; South Korea strengthened its target to achieve net zero emissions by 2050; China promised to peak coal use by 2025 and phase down coal consumption after that, and to join the Kigali Amendment to reduce hydrofluorocarbon emissions; Argentina pledged to strengthen its goal by 2.7% and make previously "conditional" targets "unconditional" instead; Brazil committed to a net zero target by 2050 (ten years earlier than its previous 2060 goal) and pledged to end illegal deforestation by 2030; South Africa shifted its emission peak ten years earlier, to 2025; and New Zealand, Bhutan, and Bangladesh all committed to submit more ambitious plans in the near future.[48]

This flurry of activity is just the latest evidence of reciprocity in international climate actions. Some past reciprocity has been explicit. The Kigali Amendment, for example, is the latest internationally negotiated climate treaty, with more than 120 parties so far committing to common but differentiated responsibilities to phase down hydrofluorocarbons.[49] Previously, under the Copenhagen Accord and the Paris Agreement, some parties, including the European Union and Mexico, have at times explicitly made conditional pledges, promising to ratchet up their efforts if other countries make comparable reductions.[50] By contrast, when the United States "failed to take action to reduce greenhouse gas emissions during the George W. Bush Administration and during . . . the Trump Administration," as economist Michael Greenstone has testified before the U.S. House of Representatives, "both periods were characterized by little [international] progress, and indeed many instances of backsliding, in reducing emissions globally."[51] By failing to take international climate damages into account, in other words,

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[47] *Id*. § 6(d). Though this subsection takes action on the Keystone XL Pipeline permit, its statement of diplomatic goals has much broader relevance.

[48] U.S. Dept. of State, Leaders' Summit on Climate: Day 1, Apr. 22, 2021, https://perma.cc/3X8A-KF4G; Climate Action Tracker, *Warming Projections Global Update: May 2021* at 3 (2021), https://perma.cc/7JYN-N2DU.

[49] *See* U.N., Kigali Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (2016), https://perma.cc/SEX3-HAQA (last visited June 8, 2021).

[50] *See* Eur. Comm'n, Expression of Willingness to Be Associated with the Copenhagen Accord and Submission of the Quantified Economy-Wide Emissions Reduction Targets for 2020 at 2, Jan. 28, 2010, https://perma.cc/77DD-M4LS (committing to a 20% reduction but "reiterat[ing] its conditional offer to move to a 30% reduction by 2020 compared to 1990 levels, provided that other developed countries commit themselves to comparable emission reductions and that developing countries contribute adequately according to their responsibilities and respective capabilities"); Gov't of Mex. Ministry of Env't. and Nat. Res., Nationally Determined Contributions: 2020 Update at 22, https://perma.cc/VF4A-K5HK (making an unconditional pledge of 22% reduction of GHGs and 51% of black carbon by 2030; and making a conditional pledge of up to 36% reduction GHGs and 70% black carbon, conditioned on "an international price for carbon trading, adjustment of tariffs for carbon content" as well as technology transfers and financial resources).

[51] Economics of Climate Change: Hearing before the U.S. H. Comm. on Oversight & Reform's Subcomm. on Env't at 6 (Dec. 19, 2019) (testimony of Michael Greenstone), *available at* https://perma.cc/H5JS-V4H6.

NHTSA and other U.S. agencies would incentivize other countries to do the same, which in turn would cause greater greenhouse gas pollution originating in other countries that causes climate damage within the United States.

In January 2021, Trevor Houser and Kate Larsen published a conservative estimate of the number of tons of greenhouse gases that the rest of the world has committed to reduce for each ton that the United States has pledged to reduce: a figure they call the "Climate Reciprocity Ratio."[52] Using only the quantifiable, unconditional pledges that 51 countries have made since 2014 to cut emissions through 2030, Houser and Larsen conservatively estimate that for every ton the United States pledged to reduce, these other countries have pledged 6.1–6.8 tons in return.[53] While implementation of all these foreign policies is not guaranteed, Houser and Larsen cite evidence that several large emitters are on track to meet their goals, and that the ratio should grow over time as the U.S. share of global emissions falls.[54]

In short, both empirical evidence and economic theory strongly support a strategic choice for U.S. agencies to adopt the full global estimates of the social cost of greenhouse gases, as this facilitates international reductions in greenhouse gas pollution that directly benefits the United States. NHTSA should therefore explicitly make the case that current evidence of foreign reciprocity supports a focus on the full global valuations of the social cost of greenhouse gases.

2. Use of the Global Values Recognizes Spillover Impacts from Climate Change

Significant costs to trade, human health, and security will inevitably "spill over" to the United States as other regions of the planet experience climate change damages.[55] Due to its unique place among countries—both as the largest economy with trade- and investment-dependent links throughout the world, and as a military superpower—the United States is particularly vulnerable to effects that will spill over from other regions of the world. Use of global damage values recognizes these spillover effects, which were ignored under the Trump administration's domestic-only valuation.

These spillover effects take many forms. In terms of trade-related impacts, for one, as climate change disrupts the economies of other countries, decreased availability of imported inputs, intermediary goods, and consumption goods will cause supply shocks to the U.S. economy, causing particularly damaging disruptions in sectors such as agriculture and technology. Similarly, the U.S. economy will experience demand shocks as climate-affected countries decrease their demand for U.S. goods. U.S. trade and businesses that rely on foreign-

[52] Trevor Houser & Kate Larsen, *Calculating the Climate Reciprocity Ratio for the U.S.*, Rhodium Group, Jan. 21, 2021 (calling their estimate "deliberately conservative").

[53] The estimate is conservative because it omits any conditional pledges, any pledges that are not readily quantified into specific reductions, any actions from countries that have not formally submitted Nationally Determined Contributions to the United Nations, any reductions occurring after 2030, and any foreign actions already achieved before 2014 that may have motivated U.S. pledges in the first place. *Id.*

[54] *Id.*

[55] Though some positive spillover effects are also possible, such as technology spillovers that reduce the cost of mitigation or adaptation, *see* S. Rao et al., *Importance of Technological Change and Spillovers in Long-Term Climate Policy*, 27 ENERGY J. 123–39 (2006), overall climate spillovers are likely strongly negative, *see* Jody Freeman & Andrew Guzman, *Climate Change and U.S. Interests*, 109 COLUM. L. REV. 1531 (2009).

owned infrastructure, services, and resources will suffer.[56] Financial markets will also suffer as foreign countries become less able to loan money to the United States and as the value of U.S. firms declines with shrinking foreign profits. As seen historically, economic disruptions in one country can cause financial crises that reverberate globally at a breakneck pace.[57]

Climate change is also predicted to exacerbate existing security threats—and possibly catalyze new security threats—to the United States.[58] Besides threats to U.S. military installations and operations at home and abroad from flooding, storms, extreme heat, and wildfires,[59] climate change is also a "source[] of conflict around the world"[60] and a "threat multiplier" that, as recognized by the Department of Defense, will "aggravate stressors abroad such as poverty, environmental degradation, political instability, and social tensions—conditions that can enable terrorist activity and other forms of violence."[61] Climate change will create and exacerbate new conflicts and humanitarian crises that will require a U.S. response, even as climate change also complicates the logistics of deploying forces and achieving missions.[62]

Climate change will also very directly cause spillover damages across transboundary resources. The United States has already begun to experience increased smoke from Canadian wildfires and drought conditions that spread along the U.S.-Mexico border.[63] The United States shares a maritime border with 21 other countries, shares water resources like the Columbia River with our neighbors, and shares ecosystems—including the oceans through which migratory species with high economic and ecosystem-service values, like the Pacific hake, travel and live.[64]

All of these individual spillover effects can also interact and trigger feedback loops that will propagate additional spillover damages.[65] Economic shocks around the world can make it more difficult for other countries to continue investing in mitigation and abatement, thus hastening the pace of climate change.[66] Conflict and political instability caused by climate change can further reduce the willingness or ability of countries to engage in domestic climate

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[56] U.S. Global Change Res. Prog., Fourth National Climate Assessment, Volume II: Impacts, Risks, and Adaptation in the United States, Chapter 16: Climate Effects on U.S. International Interests 608 (2018) [hereinafter "NCA4"].

[57] *See* Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L.J. 193, 249 (2008) (observing that financial collapse in one country is inevitably felt beyond that country's borders).

[58] *See* CNA Military Advisory Board, National Security and the Accelerating Risks of Climate Change (2014).

[59] U.S. Gov't Accountability Off., GAO-14-446, Climate Change Adaptation: DOD Can Improve Infrastructure Planning and Processes to Better Account for Potential Impacts (2014); Union of Concerned Scientists, The U.S. Military on the Front Lines of Rising Seas (2016).

[60] U.S. Dep't of Def., Report on Effects of a Changing Climate to the Department of Defense 8 (2019), *available at* https://perma.cc/4WPP-86EN.

[61] U.S. Dep't of Def., Quadrennial Defense Review 2014 at vi, 8 (2014).

[62] U.S. Dep't of Def., Climate Adaptation Plan 3 (2021) ("Extreme weather events are already costing the Department billions of dollars and are degrading mission capabilities. These effects and costs are likely to increase as climate change accelerates. Not adapting to climate change will be even more consequential with failure measured in terms of lost military capability, weakened alliances, enfeebled international stature, degraded infrastructure, and missed opportunities for technical innovation and economic growth.").

[63] NCA4, *supra* note 56, at 607.

[64] *Id.* at 615.

[65] Peter Howard & Michael Livermore, *Climate-Society Feedback Effects: Be Wary of Unidentified Connections*, INTL. REV. ENV'T. & RES. ECON. (forthcoming 2021).

[66] Peter Howard & Michael A. Livermore, *Sociopolitical Feedbacks and Climate Change*, 43 HARV. ENV'T. L. REV. 119, 122-23 (2019).

policy or international cooperation.[67] Spillover effects can chain together: if climate change accelerates migration, the attendant economic ripple effects and spread of health risks may cause political instability, which in turn can cause more migration and further economic ripple effects, thus starting the feedback loop again.[68]

Some experts on the social cost of greenhouse gases have therefore concluded that, because the integrated assessment models that underlie the Working Group's social cost valuations currently do not capture many of these key inter-regional costs, use of the global values can be further justified as a proxy for capturing all spillover effects.[69] Though not all climate damages will spill back to affect the United States, many will, and together with other justifications, the likelihood of significant spillovers makes a global valuation the better, more transparent accounting of the full range of costs and benefits that matter to U.S. policymakers and the public. NHTSA can therefore highlight spillover impacts as further explanation for relying on global social cost valuations. In addition to the spillover effects that NHTSA already mentions,[70] NHTSA should argue that transboundary spillovers, feedback loops, information spillovers, and other effects justify a focus on the full global values, either independently or in combination with other strategic and ethical considerations.[71]

3. Use of the Global Values Preserves Extraterritorial Interests

The TSD mentions direct and indirect impacts to U.S. citizens and assets located abroad as a justification for a global valuation,[72] but U.S. extraterritorial interests are even more extensive and significant. A domestic-only estimate of the social cost of greenhouse gases based on some rigid conception of geographic borders or U.S. share of world GDP will fail to capture all the climate-related costs and benefits that matter to U.S. citizens, including impacts to

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[67] *Id.*

[68] NCA4, *supra* note 56, at 621 (explaining that instability has economic effects, and economic risks create risk of conflict); Freeman & Guzman, *supra* note 55, at 1581–89; *id.* at 1581 (noting that climate-induced pandemics may cause political instability); *id.* at 1564 n.157 (noting that cross-sectoral interactions will "reinforce" international spillovers and create "a costly multiplier effect"). Howard & Livermore, *supra* note 65.

[69] Robert E. Kopp & Bryan K. Mignone, *Circumspection, Reciprocity, and Optimal Carbon Prices*, 120 CLIMATE CHANGE 831, 833 (2013) (2013) (explaining that the principle of "circumspection" can account for spillover effects and can then be used to justify a global SCC value).

Notably, in Katharine Ricke et al., *Country-Level Social Cost of Carbon*, 8 NATURE CLIMATE CHANGE 895 (2018), the authors concede that after factoring in spillovers and other considerations, an individual country's interests may be better reflected in a global valuation than a country-specific valuation, and it may not be appropriate to use a country-specific valuation in setting climate policies:

> Globalization and the many avenues by which the fortunes of countries are linked mean that a high CSCC in one place may result in costs as the global climate changes even in places where the CSCC is nominally negative. For many countries, the effects of climate change may be felt more greatly through transboundary effects, such as trade disruptions, large-scale migration, or liability exposure than through local climate damage. . . . These considerations suggest that country-level interests may be *more closely aligned to global interests than indicated by contemporary country-level contributions* to the SCC. . . . [A] host of other *strategic and ethical considerations* factor into the international relations of climate change mitigation. . . . We make no claim here regarding the utility of the CSCC in setting climate policies. CO_2 emissions are a global externality.

Id. at 899 (emphases added).

[70] Proposed Rule TSD at 534 (citing trade, tourism, economic spillovers, political destabilization, and global migration).

[71] *See* Schwartz, *supra* note 18, at 26; *id.* at 12 (on information spillovers).

[72] Proposed Rule TSD at 534.

significant U.S. ownership interests in foreign businesses, properties, and other assets, as well as U.S. consumption abroad including tourism,[73] and even effects to the millions of Americans living abroad.[74] The United States also has military personnel and assets located in almost every nation across the globe, and many if not all installations abroad—including those with high replacement costs or irreplaceable strategic value—face imminent climate risks.[75] Because no methodology for estimating a "domestic-only" value would capture these impacts to extra-territorial interests, focusing on the global values can be further justified in part as a proxy for these important considerations.

The Office of Management and Budget's *Circular A-4* guidance on conducting regulatory impact analysis requires agencies to count all significant costs and benefits, including "use" values as well as "non-use" values like bequest and existence values.[76] *Circular A-4* cautions that "ignoring these values" may cause analyses to "significantly understate the benefits and/or costs" involved.[77] Similarly, *Circular A-4* recognizes that U.S. citizens may have "altruism for the health and welfare of others," and instructs agencies that when "there is evidence of selective altruism, it needs to be considered specifically in both benefits and costs."[78] U.S. citizens will experience costs because of their use values, non-use values, and altruistic values attached to climate effects occurring outside the U.S. borders.

Such non-use and altruistic values take many forms. For one, the United States and its citizens have a willingness to pay—as well as a legal obligation—to protect the global commons of the oceans and Antarctica from climate damages. Furthermore, a quarter of the U.S. population consists of either foreign-born immigrants or second-generation residents,[79] and subsequent generations of Americans retain significant familial, cultural, economic, and religious ties to their ancestors' home nations across the world.[80] U.S. citizens and residents have a significant willingness to pay to protect their relatives, ancestral homes, and cultural and religious sites located abroad.[81] Similarly, U.S. citizens value natural resources and plant and

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[73] "U.S. residents spend millions each year on foreign travel, including travel to places that are at substantial risk from climate change, such as European cities like Venice and tropical destinations like the Caribbean islands." David A. Dana, *Valuing Foreign Lives and Civilizations in Cost-Benefit Analysis: The Case of the United States and Climate Change Policy* 10 (Northwestern Faculty Working Paper 196, 2009), https://perma.cc/EW3B-NKYC.

[74] IWG, 2021 TSD, *supra* note 5, at 15 (citing a 2016 figure from Bureau of Consular Affairs, Dept. of State); *see also* Dept. of State, Consular Affairs by the Numbers (2020), https://perma.cc/F3M8-EFSJ.

[75] Ctr. for Climate & Sec., Military Expert Panel Report: Sea Level Rise and the U.S. Military's Mission 7 (2d ed. 2018), https://perma.cc/ZM4R-ED89.

[76] A bequest value captures willingness to pay to preserve a resource for a future generation. Existence value captures willingness to pay to preserve a resource even with no intention to ever use or bequeath the resource. Off. of Mgmt. & Budget, Circular A-4: Regulatory Analysis 22 (2003).

[77] *Id*.

[78] *Id.*

[79] U.S. Census Bureau, Characteristics of the U.S. Population by Generational Status: 2013 at 3 (2016), https://perma.cc/AS3H-BCWK; *see also* Pew Res. Ctr., *First- and second-generation share of the population, 1900-2017*, June 3, 2019, https://perma.cc/Y9WT-75R4 (showing a growing percentage in recent years); *see also* Pew Res. Ctr., Key Findings About U.S. Immigration, Aug. 20, 2020, https://perma.cc/8JEK-Y88S (showing that 77% of the U.S. foreign-born population are naturalized U.S. citizens or permanent/temporary U.S. residents).

[80] Over $100 billion is sent from the United States to other countries in remittances every year. *See* Pew Res. Ctr., *Remittance Flows Worldwide in 2017*, Apr. 3, 2019, https://perma.cc/D684-7ZA8.

[81] Many cultural sites are located near water because of how civilization developed, Yu Fang & James W. Jawitz, *The evolution of human population distance to water in the USA from 1790 to 2010*, 10 NATURE COMMUNICATIONS

animal lives abroad—even if they never see or use those resources—and care about the health and welfare of unrelated foreign citizens[82] and cultural and world heritage sites threatened by climate change.[83] This altruism is "selective altruism," consistent with *Circular A-4*, because the United States is directly responsible for a huge amount of the historic emissions contributing to climate change.[84]

Both strategic considerations and the need to account for spillovers already provide independent justifications for focusing on the full global social cost of greenhouse gas estimates. But the global values can also be at least partly justified as a proxy for these extra-territorial interests that otherwise would be overlooked using a domestic-only damage estimate. NHTSA can therefore highlight U.S. extraterritorial interests as further reason for relying on global social cost valuations, and should call attention to climate-vulnerable U.S. military instillations abroad with high replacement costs or irreplaceable strategic value, U.S. willingness to pay to protect relatives, ancestral homes, cultural and religious sites, and natural resources located abroad, and U.S. altruism toward the people, animals, and natural habitats across the globe.

C. Focusing on Global Climate Damages Is Consistent With NHTSA's Consideration of Global Costs

NHTSA can further explain its focus on global climate benefits as necessary for consistency with the rest of its analysis. NHTSA's analysis implicitly takes a global perspective on technology costs, and so it would be arbitrary not to take a global perspective on climate effects as well.

All industry compliance costs ultimately fall on the owners, employees, or customers of regulated and affected firms. Whether the Proposed Rule's technology costs are passed to consumers or investors, or some combination thereof, a significant portion of the Proposed Rule's alleged compliance costs will ultimately accrue to foreign customers or foreign investors. Regulated manufacturers include major corporations that are headquartered abroad or that are publicly traded with investors across the globe.[85] Consumers similarly include corporate fleets of passenger vehicles and light-duty trucks owned by foreign entities or by public corporations with

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1 (2019), and so such sites may be especially vulnerable to climate change, *see* Lee Bosher et al., *Dealing with multiple hazards and threats on cultural heritage sites: an assessment of 80 case studies*, 29 DISASTER PREVENTION AND MANAGEMENT: AN INTERNATIONAL JOURNAL 109 (2019). More broadly, there are clear cultural costs of climate change, W. Neil Adger et al., *Cultural dimensions of climate change impacts and adaptation*, 3 NATURE CLIMATE CHANGE 112 (2013), and a willingness to pay to protect culture, Ali Ardeshiri et al., *Conservation or Deterioration in Heritage Sites? Estimating Willingness To Pay for Preservation* (Working Paper, 2019).

[82] *See* Arden Rowell, *Foreign Impacts and Climate Change*, 39 HARV. ENVT'L. L. REV. 371 (2015); Dana, *supra* note 73 (discussing U.S. charitable giving abroad and foreign aid, and how those metrics likely severely underestimate true U.S. willingness to pay to protect foreign welfare).

[83] *See* UNESCO, *Climate Change Now Top Threat to Natural World Heritage*, Dec. 2, 2020, https://perma.cc/K9SW-XQDM.

[84] Datablog, *A History of CO_2 Emissions*, THE GUARDIAN (Sept. 2, 2009) (from 1900-2004, the United States emitted 314,772.1 million metric tons of carbon dioxide; Russia and China follow, with only around 89,000 million metric tons each).

[85] Stellantis, which has been subject to the largest penalties in recent years for noncompliance, is based in the Netherlands. Volkswagen, Mercedes-Benz, and BMW are based in Germany. Mazda, Honda, Toyota, and Nissan are based in Japan. Yet in the Proposed Rule, NHTSA does not distinguish between compliance costs that would fall upon Japanese investors, German investors, Dutch investors, or American investors.

foreign shareholders.[86] In general, about 29% of U.S. corporate debt and 14% of equities are foreign-owned,[87] and adding foreign direct investment to portfolio stock ownership suggests that foreigners own about 40% of U.S. corporate equity.[88] Thus, a significant share of technology costs may fall on foreign entities, but NHTSA never distinguishes between those costs that would accrue to foreign entities as opposed to U.S. citizens or U.S. entities, and so its calculations of technology cost implicitly include all global effects. Considering global climate benefits is consistent with that approach.

In a few recent analyses, agencies have admitted that some portion of the costs or cost savings calculated for publicly-traded corporations will "accru[e] to entities outside U.S. borders" through foreign ownership, employment, or consumption.[89] Yet much like in the Proposed Rule, these analyses do not attempt to separate out such effects to foreign interests, nor attempt to exclude such effects from consideration altogether. Indeed, splitting corporate effects into subparts based on ultimate ownership—much like separating climate benefits geographically—could be extremely complicated.[90] Thus, as a practical matter, agencies typically count all costs or benefits to corporations, no matter how those effects may be passed through to foreign owners, foreign employees, or foreign customers.

Since NHTSA analyzes the Proposed Rule's costs globally—without distinguishing between U.S. and foreign effects—it would be inconsistent and arbitrary for the agency to attempt to separate out and disregard climate benefits that occur abroad, as doing so would "put a thumb on the scale" by treating costs globally but benefits domestically.[91] NHTSA can therefore highlight its consistent treatment of costs and benefits as further reason for relying on global social cost of greenhouse gas valuations.

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[86] Agrium, for example, a subsidiary of Canadian-based Nutrien, operates one of the largest corporate fleets of pickup trucks operating in the United States, 6 FleetTrax, The Largest Fleets in America, https://fleettrax.net/largest-fleets-america/ ("Agrium also owns and operates a staggering 7,627 pickup trucks and cargo vans—a record number for this list."; reporting on "the largest private fleets operating in the United States"). Large fleets are also owned by public companies like Hertz. Norway's Government Pension Fund, for example, owns 1% of Hertz. https://www.nbim.no/en/the-fund/investments/#/2019/investments/equities/3799/Hertz%20Global%20Holdings%20Inc.

[87] Dept. of Treasury et al., *Foreign Portfolio Holdings of U.S. Securities* at B-3 (2020), https://perma.cc/6VP6-PPG6.

[88] Steve Rosenthal & Theo Burke, *Who's Left to Tax? U.S. Taxation of Corporations and Their Shareholders* at 2 (Urban-Brookings Tax Policy Center Working Paper, 2020), https://perma.cc/YMR2-XREM.

[89] *See, e.g.*, EPA, Regulatory Impact Analysis for the Proposed Reconsideration of the Oil and Natural Gas Sector Emission Standards for New, Reconstructed, and Modified Sources at 3-13 (2018); EPA, Regulatory Impact Analysis for the Proposed Revised Cross-State Air Pollution Rule (CSAPR) Update for the 2008 Ozone NAAQS at 5-5 (2020).

[90] *See, e.g.*, EPA, Draft Guidelines for Preparing Economic Analyses: Review Copy prepare for EPA's Science Advisory Board at 5-2 (2020), *available at* https://perma.cc/3K86-M7AH ("Limiting standing to citizens and residents of the United States can be complicated to operationalize in practical terms (e.g., how should multi-national firms with plants in the United States but shareholders elsewhere be treated?).").

[91] *Ctr. for Biological Diversity*, 538 F.3d at 1198.

D. NHTSA Should Replace Its References to the Domestic-Only Values Created Under Executive Order 13,783, and Instead Base Any Corresponding Sensitivity Analysis on Guidance from the Working Group

While NHTSA correctly relies on global social cost of greenhouse gases values to assess the Proposed Rule's benefits, it should modify its treatment of the rule's domestic climate impacts. In a sensitivity analysis, NHTSA applies the flawed domestic-only values developed under the now-revoked Executive Order 13,783.[92] But those numbers are fatally incomplete and thus should not be used. Instead, in any sensitivity analysis exploring domestic-only estimates, NHTSA should use sounder estimates.

The Working Group may in the future release guidance on an appropriate range for such a valuation, and considerable evidence suggests that—after weighing strategic benefits, spillover effects, and extraterritorial interests—any reasonable attempt to estimate the U.S. share of climate benefits would be quite a high proportion of global benefits.[93] In the meantime, however, the best existing guidance available to NHTSA for a domestic-only estimate is not the arbitrary values calculated under the now-revoked Executive Order 13,783—numbers that were struck down in federal court as fatally incomplete.[94] Rather, NHTSA should look to the Working Group's past technical support documents for guidance.

In 2010, the Working Group provided an "approximate, provisional, and highly speculative" range of up to 23% of the global value as a domestic-only estimate, but admitted even that was likely a significant underestimate.[95] Though an imprecise and gross underestimate, those values at least have the virtue of some regulatory precedent, as the Department of Energy has repeatedly used them for sensitivity analyses.[96] NHTSA should therefore consider 23% of the global value to be the absolute minimum used for a domestic-only sensitivity analysis. NHTSA should emphasize that such values are still gross underestimates, as they disregard most of the domestic impacts discussed above including international reciprocity, spillover impacts, and extraterritorial interests. NHTSA should also note that the integrated assessment models used to estimate the social cost of greenhouse gases were not designed for such localized, non-global estimates.

III. NHTSA Should Further Explain the Reasons for Its Discount Rate Choices and Conduct Sensitivity Analysis Using Lower Rates

NHTSA applies the social cost of greenhouse gas estimates calculated at discount rates of 2.5%, 3%, and 5%,[97] consistent with the Working Group's current recommendations, and

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[92] Proposed RIA at 235 ("NHTSA also presents a sensitivity case showing costs and benefits under a scenario using the now-rescinded interim domestic only SC-GHG values at a 3% discount rate.").

[93] *See* Schwartz, *supra* note 18, at 39-40 (recommending that a value over 75% could be justified).

[94] *Bernhardt*, 472 F. Supp. 3d at 613.

[95] Working Group, *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis* 11 (2010), https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/for-agencies/Social-Cost-of-Carbon-for-RIA.pdf ["IWG, 2010 TSD"].

[96] *See, e.g.*, Dept. of Energy, Technical Support Document: Energy Efficiency Program for Consumer Products: Residential Central Air Conditioners and Heat Pumps at 14-3 & n.b, 14-6 to 14-7 (2016) (giving preference to calculations based on the global social cost of greenhouse gases, but also including a domestic valuation in sensitivity analysis).

[97] Note that just as there is growing evidence that the discount rate should be below 2%, there is growing evidence that 5% is much too high a discount rate. The values at 5% should be considered a very conservative lower bound.

justifies its decision to return to its prior conclusion that a 7% capital-based discount rate is inappropriate for climate effects. While NHTSA's return to a reasonable range of discount rates to assess climate impacts—including its use of a 2.5% discount rate in its central analysis—is well supported, in anticipation of specious but inevitable legal challenges, NHTSA should further explain the rationale behind its discounting choices.[98] NHTSA should also work to promote consistent language on discounting with the Environmental Protection Agency's analysis of its proposed vehicle greenhouse gas emission standards and, per the Working Group's recommendation, NHTSA should strongly consider providing additional sensitivity analysis around discount rates lower than 2.5%—such as a 2% discount rate.

A. NHTSA Should Further Explain the Reasons for Its Discount Rate Range

The TSD cites the Working Group's arguments that, for long-term policies with intergenerational effects, uncertainty and ethical considerations make a 7% capital-based discount rate inappropriate.[99] The TSD further explains that lower discount rates are appropriate for climate impacts as compared to the Proposed Rule's other costs and benefits, given the long time horizon of climate impacts and the uncertainties and ethical issues that this entails.[100] Though these arguments provide sufficient reason for NHTSA's approach to discount rates, because the Working Group's approach to discount rates—and in particular the reversal of the prior administration's irrational application of a 7% rate to climate effects—has already been challenged in court,[101] NHTSA should further explain the reasons behind its focus on long-term, consumption-based rates and its approach to discounting climate effects as compared to other costs and benefits.

1. For Numerous Reasons, A 7% Discount Rate Based on the Private Return to Capital Is Inappropriate for Climate Effects

Although *Circular A-4* provides discount rates of 3% and 7% as a default assumption, it also requires agency analysts to do more than rigidly apply default assumptions.[102] As such, analysis must be "based on the best reasonably obtainable scientific, technical, and economic information available,"[103] and agencies must "*[u]se sound and defensible values* or procedures to monetize benefits and costs, and ensure that key analytical assumptions are defensible."[104] Rather than assume that a 3% or 7% discount rate should be applied automatically to every analysis, *Circular A-4* requires agencies to justify the choice of discount rates for each analysis.[105] Based on *Circular A-4*'s criteria, there are numerous reasons why applying a 7%

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[98] *See generally* Peter Howard & Jason A. Schwartz, *About Time: Recalibrating the Discount Rate for the Social Cost of Greenhouse Gases* (Policy Integrity Report 2021), https://policyintegrity.org/files/publications/About_Time.pdf

[99] Proposed Rule TSD at 534–35.

[100] *Id.* at 539–40.

[101] Complaint, *Missouri v. Biden*, No. 4:21-cv-00287-AGF at 20-21 (E.D. Mo. filed Mar. 8, 2021); Complaint, *Louisiana v. Biden*, No. 2:21-cv-01074 at 37-38 (W.D. La. filed Apr. 2021).

[102] *Id.* at 3 ("You cannot conduct a good regulatory analysis according to a formula. Conducting high-quality analysis requires competent professional judgment.").

[103] *Id.* at 17.

[104] *Id.* at 27 (emphasis added).

[105] *Id.* at 3 ("[S]tate in your report what assumptions were used, *such as . . . the discount rates* applied to future benefits and costs," and explain "clearly how you arrived at your estimates.") (emphasis added).

discount rate to climate effects that occur over a 300-year time horizon would be unjustifiable—and that discount rates below 3% are appropriate.

First, basing the discount rate on the consumption rate of interest (which *Circular A-4* estimated at 3%, but which the latest data shows is much lower, *see infra*) is the correct framework for analysis of climate effects, whereas a discount rate based on the private return to capital (which the 7% rate represents) is inappropriate. While *Circular A-4* suggests that 7% should be a "default position" that reflects regulations that primarily displace capital investments, it also explains that "[w]hen regulation primarily and directly affects private consumption . . . *a lower discount rate is appropriate*."[106] The 7% discount rate is based on a private sector rate of return on capital, as private market participants typically have short time horizons. By contrast, climate change concerns the public well-being broadly rather than market participants narrowly. Rather than evaluating an optimal outcome from the narrow perspective of investors alone, economic theory requires analysts to make the optimal choices based on societal preferences and social discount rates. Moreover, because climate change is expected to mostly affect large-scale consumption, as opposed to capital investment,[107] a 7% rate is inappropriate. Crucially, as the Working Group recognizes, the social cost of greenhouse gas estimates present climate damages in consumption-equivalent units, and therefore, *Circular A-4*'s guidance in fact dictates application of consumption-based discount rates.[108] The National Academies of Sciences has agreed that a capital-based rate would be inappropriate for use with the social cost of greenhouse gases, given that climate damages are estimated in consumption-equivalent units.[109] There is also strong consensus through the economic literature that a capital discount rate like 7% is inappropriate for climate change.[110]

In fact, NHTSA notes that because its model assumes that costs will be passed on to consumers, its proposed rule's benefits and costs will primarily affect future consumption, not

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[106] *Id.* at 33.

[107] Maureen Cropper, *How Should Benefits and Costs Be Discounted in an Intergenerational Context?*, 183 RESOURCES 30, 33 (2013) ("There are two rationales for discounting future benefits—one based on consumption and the other on investment. The consumption rate of discount reflects the rate at which society is willing to trade consumption in the future for consumption today. Basically, we discount the consumption of future generations because we assume future generations will be wealthier than we are and that the utility people receive from consumption declines as their level of consumption increases. . . . The investment approach says that, as long as the rate of return to investment is positive, we need to invest less than a dollar today to obtain a dollar of benefits in the future. Under the investment approach, the discount rate is the rate of return on investment. If there were no distortions or inefficiencies in markets, the consumption rate of discount would equal the rate of return on investment. There are, however, many reasons why the two may differ. As a result, using a consumption rather than investment approach will often lead to very different discount rates."); *see also* Richard G. Newell & William A. Pizer, Uncertain Discount Rates in Climate Policy Analysis, 32 ENERGY POL'Y 519, 521 (2004) ("Because climate policy decisions ultimately concern the future welfare of people—not firms—the consumption interest rate is more appropriate.").

[108] *See* IWG, 2021 TSD, *supra* note 5, at 17.

[109] Nat'l Acad. Sci., Engineering & Med., *Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide* 28 (2017), https://www.nap.edu/read/24651/chapter/1 [hereinafter "NAS 2017 Report"]; *see also* Kenneth Arrow et al., *Is There a Role for Benefit-Cost Analysis in Environmental, Health, and Safety Regulation?*, 272 SCIENCE 221 (1996) (explaining that a consumption-based discount rate is appropriate for climate change).

[110] *See, e.g.*, Richard Newell, *Unpacking the Administration's Revised Social Cost of Carbon* (Oct. 10, 2017), http://www.rff.org/blog/2017/unpacking-administration-s-revised-social-cost-carbon; Comments from Robert Pindyck, to BLM, on the Social Cost of Methane in the Proposed Suspension of the Waste Prevention Rule (submitted Nov. 5, 2017).

investments, and so a consumption-based rate may be more appropriate not just for its consideration of climate effects, but for its entire cost-benefit analysis.[111]

Second, uncertainty over the long time horizon of climate effects should drive analysts to select a lower discount rate. As an example of when a 7% discount rate is appropriate, *Circular A-4* identifies an EPA rule with a 30-year timeframe of costs and benefits.[112] By contrast, greenhouse gas emissions generate effects stretching out across approximately 300 years. As *Circular A-4* notes, "[p]rivate market rates provide a reliable reference for determining how society values time within a generation, but for extremely long time periods no comparable private rates exist."[113] *Circular A-4* discusses how uncertainty over long time horizons drives the discount rate lower.[114] *Circular A-4* cites the work of renowned economist Martin Weitzman and concludes that the "certainty-equivalent discount factor . . . corresponds to *the minimum discount rate having any substantial positive probability*."[115] The National Academies of Sciences makes the same point about discount rates and uncertainty.[116]

Third, a 7% discount rate also ignores catastrophic risks and the welfare of future generations. As EPA showed in a recent cost-benefit analysis, the 7% rate truncates the long right-hand tail of social costs relative to the 3% rate's distribution.[117] The long right-hand tail represents the possibility of catastrophic damages. Thus, the 7% discount rate effectively assumes that present-day Americans are barely willing to pay anything at all to prevent medium- to long-term catastrophes. Given NEPA's mandate that agencies "recognize the worldwide and long-range character of environmental problems,"[118] it would not be reasonable for NHTSA to discount climate impacts at such a high rate as to effectively ignore the welfare of future generations.[119] In the SAFE rule, EPA and NHTSA explained that the 7% capital rate did not adequately account for "tradeoffs between improving the welfare of current and future generations."[120]

Fourth, long-term time horizons in general counsel strongly against application of a capital-based rate. The Working Group's latest guidance cites Li and Pizer's work on how the

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[111] PRIA at 97.

[112] Circular A-4, note 76, at 34; *see also* Interagency Working Group on the Social Cost of Carbon, Response to Comments: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 at 21 (2015), https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/scc-response-to-comments-final-july-2015.pdf [hereinafter "Response to Comments"] (noting that "most regulatory impact analysis is conducted over a time frame in the range of 20 to 50 years," and thus do not fully implicate "special ethical considerations [that] arise when comparing benefits and costs across generations").

[113] Circular A-4, note 76, at 36.

[114] *Id*. (explaining that "the longer the horizon for the analysis," the greater the "uncertainty about the appropriate value of the discount rate," which supports a lower rate).

[115] *Id.*; *see also* Council of Econ. Advisers, *Discounting for Public Policy: Theory and Recent Evidence on the Merits of Updating the Discount Rate* at 9 [hereinafter "CEA Issue Brief"], *available at* https://obamawhitehouse.archives.gov/sites/default/files/ page/files/201701_cea_discounting_issue_brief.pdf.

[116] NAS 2017 Report, *supra* note 109, at 27.

[117] EPA, Benefit and Cost Analysis for Revisions to Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, at I-4 fig. I-1 (showing the 7% discount rate distribution).

[118] *See supra* note 31and accompanying text.

[119] H.R. Rep. No. 95-294, 34, 1977 U.S.C.C.A.N. 1077, 1112.

[120] 85 Fed. Reg. at 24,735 (explaining that the central analysis focused on a 3% rate, and the 7% rate was used only for sensitivity analysis).

capital-based rate is generally inappropriate in many longer-term contexts.[121] Specifically, Li and Pizer find that, given their best estimate of the shadow price of capital, the appropriate social discount rate collapses to the consumption-based rate relatively quickly, in the span of just several decades.[122] Given the long time horizon that analysis of climate policies demands, the capital-based rate is simply inapplicable.

Fifth, several standard justifications for capital-based discount rates break down given the particular threats of climate change. For example, one argument for capital-based discount rates is that spending capital on climate abatement policies has opportunity costs and so, in policy analysis, future costs and benefits should be discounted at the rate of return to capital. However, the irreversible, uncertain, and catastrophic risks of climate change may disrupt this "opportunity cost" rationale: while it may seem, for instance, that future, wealthier generations might have better opportunities to address climate change for themselves, irreversible or catastrophic damages could arise that make future mitigation efforts more expensive or impossible.[123] Similarly, if climate damages are "non-marginal," such that climate change significantly affects the natural resources that drive economic growth, growth could decline or even turn negative.[124]

Finally, a 7% discount rate is inappropriate because it is based on outdated data and diverges from the current economic consensus. *Circular A-4* requires that assumptions—including discount rate choices—are "based on the best reasonably obtainable scientific, technical, and economic information available."[125] Yet *Circular A-4*'s own default assumption of a 7% discount rate was published 18 years ago and was based on data from even earlier.[126] *Circular A-4*'s guidance on discount rates is in need of an update, as the Council of Economic Advisers ("CEA") detailed recently after reviewing the best available economic data and theory.[127] CEA gave two reasons to revise the 7% rate, both of which are generally applicable but may have particular force in the context of climate change. The first argument is that the market data clearly shows that the long-term interest rates used to derive the consumption-based discount rates have fallen, such that the 3% consumption-based rate instead "should be at most 2 percent."[128] Because of the relationship between long-term, tax-free interest rates and rates of return on capital (i.e., the divergence between those rates is caused largely by taxation), a 1% drop in the consumption-based discount rate strongly suggests a corresponding drop in the

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[121] IWG, 2021 TSD, *supra* note 5, at 19.

[122] Qingran Li & William A. Pizer, Use of the Consumption Discount Rate for Public Policy over the Distant Future, 107 J. ENV'T. ECON. & MGMT. 102,428 (2021).

[123] Richard L. Revesz & Matthew R. Shahabian, *Climate Change and Future Generations*, 84 S. CAL. L. REV. 1097, 1149-52 (2011).

[124] *Id.* at 1153 & n.246 (citing Heal's observation that estimates of productivity growth based on historical records omit depletion of natural resources, and thus bias discount rates upwards).

[125] Circular A-4, *supra* note 76, at 17.

[126] The 7% rate was based on a 1992 report; the 3% rate was based on data from the 30 years preceding the publication of Circular A-4 in 2003. *Id.* at 33–34.

[127] CEA Issue Brief, *supra* note 115, at 1; *see also id.* at 3 ("In general the evidence supports lowering these discount rates, with a plausible best guess based on the available information being that the lower discount rate should be at most 2 percent while the upper discount rate should also likely be reduced."); *id.* at 6 ("The Congressional Budget Office, the Blue Chip consensus forecasts, and the Administration forecasts all place the ten year treasury yield at less than 4 percent in the future, while at the same time forecasting CPI inflation of 2.3 or 2.4 percent per year. The implied real ten year Treasury yield is thus below 2 percent in all these forecasts.").

[128] *Id.* at 1.

capital-based rate.[129] This may be especially true for longer-term context like climate change, because of the lack of reliable market data to measure expected rates of return on assets held inter-generationally.[130]

The second argument why the 7% rate is too high is that market rates of return are artificially increased by returns associated with unpriced externalities, rents associated with market power, and private (as opposed to social) risk premiums.[131] For example, a market return on an oil and gas investment is increased because the oil and gas operation can externalize some of the costs of its pollution onto society. Yet especially when crafting long-term climate policies, it would be inappropriate to discount future welfare based on the fact that the current generation of investors prefers the high market returns that are now available partly because of such externalities.[132] As such, the 7% capital-based rate is not only out of date and too high, but especially inappropriate for climate policy.

2. Considerable Evidence Indicates that the Proper Consumption-Based Discount Rate To Apply to Climate Effects Is Well Below 3%, and Regulatory Precedent Supports the Use of Discount Rates Below 3% for Long-Term Impacts

As discussed above, it is the consumption-based discount rate—not the capital-based rate—that is appropriate for climate impacts. While *Circular A-4* provides a default consumption-based rate of 3%, however, that rate should be seen as an upper bound of the discount rate to apply to climate impacts. NHTSA appropriately applied a 2.5% discount rate to climate impacts in its central analysis, and can build upon its justifications for that decision with the extensive evidence that proper long-term, consumption-based rates are likely well below 3%.

The Working Group's most recent Technical Support Document recognizes that recent market data shows the consumption-based rate should be lower than past estimates, and also acknowledges some enduring ethical dilemmas with using market data as the main proxy for a consumption-based rate. This section provides additional evidence in support of a lower rate.

Updated Market Evidence Supports a Much Lower Consumption-Based Rate

Circular A-4 and the Working Group have, in the past, estimated consumption-based discount rates by taking the mean of long-run interest rates for low-risk investments. In 2003, *Circular A-4* used 10-year Treasury note data from 1973–2002, found an average rate of 3.1%, and settled on an estimated consumption-based discount rate of 3%.[133] In 2010, the Working Group looked at similar data, found an average rate of 2.7%, and also settled on a 3% rate, to be consistent with *Circular A-4*.[134] However, as the Working Group recognizes in its February 2021 Technical Support Document,[135] real Treasury interest rates on the 10-year notes have fallen

[129] *Id.* at 12.
[130] *See id.*
[131] *Id.* at 12-13.
[132] *See* Howard & Schwartz, *supra* note 98, at 5–6 (arguing for a decrease in the capital-based rate).
[133] *Circular A-4* at 33-34.
[134] IWG, 2010 TSD, *supra* note 95, at 20 (using the data from Newell & Pizer 2003, and adjusting for federal taxes based on 2003-2006 tax rates).
[135] IWG, 2021 TSD, *supra* note 5, at 19–20.

steadily and substantially since at least 2000, and even recently hit negative numbers.[136] As a result, applying the same methodology to more recent data on Treasury rates (i.e., from 1991–2020) would indicate a consumption-based discount rate of 2%.[137] The Council of Economic Advisers came to the same conclusion in 2017: that based on more recent data and forecasts, the consumption-based discount rate should be at most 2%.[138] Simply replacing old data (from 1970–2002) with updated data (1991–2020) by itself presents a straightforward and compelling case for applying a discount rate below 3% to climate impacts.

In addition to the steady decline in U.S. Treasury rates over the last two decades, there is considerable other empirical evidence to support a lower estimate of a consumption-based discount rate.[139] For example, other advanced economies worldwide have seen similar recent downward trends in their rates.[140] Meanwhile, U.S. savings rates have climbed over the last decade,[141] suggesting consumers are placing somewhat less value on current consumption relative to future consumption.[142] These data-points reinforce the conclusion that the consumption-based discount rate should be 2% or lower.

Forecasts for future rates have also fallen. As of 2017, the federal executive branch's forecast of long-run real interest rates for 10-year notes was 1.4%, and the Blue Chip consensus forecast was 1.5%.[143] A 2020 report published by the Congressional Budget Office found that, because of factors like slowing global growth rates and increasing savings rates tied to increasing life expectancy, real interest rates on 10-year U.S. Treasury notes would likely be between 1.2%-2.3% over the next several decades.[144]

Moreover, newer methodologies can better account for the stochastic nature of the bond interest rate data—in other words, the fact that the data can be characterized by random variation

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[136] OMB, Table of Past Years Discount Rates from Appendix C of OMB Circular No. A-94 (Dec. 21, 2020), https://perma.cc/5VYS-LAFH (showing that rates on 30-year bonds have also fallen steadily); *see also* CEA Issue Brief, *supra* note 115, at 5 (explaining past negative real rates were due largely to very high inflation, whereas recent negative numbers are because of very low nominal rates and not because of high inflation).

[137] IWG, 2021 TSD, *supra* note 5, at 20.

[138] CEA Issue Brief, *supra* note 115, at 4–7, 12.

[139] A few papers on U.K. and Singapore housing markets may also provide some revealed-preference evidence for long-run market discount rates. *See* Eric Fesselmeyer et al., *How Do Households Discount Over Centuries? Evidence from Singapore's Private Housing Market* (IZA Disc. Paper 9862, 2016); Stefano Giglio et al., *Climate Change and Long-Run Discount Rates: Evidence from Real Estate* (NBER No. w21767, 2018) (finding evidence of a downward sloping discount rate for real estate).

[140] CEA Issue Brief, *supra* note 115, at 6 (showing rates in Japan, France, Germany, the United Kingdom, Canada, and Korea); Edward Gamber, Cong. Budget Off., *The Historical Decline in Real Interest Rates and Its Implications for CBO's Projections* at 22-24 (CBO Working Paper 2020-09, Dec. 2020), https://perma.cc/63AW-VHD4 CBO at 22, 24 (showing declining global rates).

[141] FRED St. Louis, Personal Saving Rate, https://fred.stlouisfed.org/series/PSAVERT (from 1992-2003, the rate averaged 6.4%; increased to an average of 7% over 2008-2019; spiked in 2020 during the recession).

[142] *But see* Revesz & Shahabian, *supra* note 123, at 1135 (first posing that savings rates should be interpreted in light of technological growth and other factors, before concluding that savings rates and other observed market data provide little useful guidance on an appropriate intergenerational discount rate).

[143] CEA Issue Brief, *supra* note 115, at 2, 6; *see also id.* at 7 (citing similar data from futures markets).

[144] Gamber, CBO, *supra* note 140, at 4-7 (listing other factors, including slowed labor force growth, a global savings glut, a shortage of safe assets, and secular stagnation); *id.* at 39 (showing medium-term and long-term forecasts).

over time.[145] Bauer and Rudebusch recently found that, had an updated methodology been applied to the same data used by OMB in 2003, *Circular A-4*'s calculation of the consumption-based discount rate would have dropped from 3% down to about 2%.[146] And when Bauer and Rudebusch took the average estimates from the recent literature, which draws on more recent data, they found an average equilibrium real rate of interest of 0.68% in the prior decade.[147]

In short, due to demographic shifts, other trends, and improved methodologies, the best empirical estimate of the discount rate based on long-term interest rates in the current period is under 1%—and is likely to remain under 2% or less for the foreseeable future.[148]

Given Their Long Time Horizon, an Even Lower Consumption-Based Discount Rate Is Appropriate for Climate Impacts

Even as market evidence strongly supports lowering the discount rate, there are many reasons to believe that such a lowered estimate could still be too high for long-term climate impacts.[149] This is because of limitations of a purely descriptive approach to calibrating the discount rate based on market data alone.

Market rates reflect only the investment preferences and relatively short-run expectations of the current generation. Inter-generational discount rates are not generally observable in the market.[150] Because the current generation of consumers, savers, and investors will not fully or efficiently consider the welfare of future generations, discount rates based on market data may overestimate the optimal rate for society to use in an inter-generational context. Society has a longer planning horizon than most individuals. For example, the probability of death likely causes individuals to demand a relatively higher rate of return when trading their own current versus future consumption;[151] by contrast, the probability of an end-of-civilization event is relatively low and so can only justify an exceedingly small discount rate.[152]

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[145] *See* Richard G. Newell & William A. Pizer, *Discounting the Distant Future: How Much Do Uncertain Rates Increase Valuations?*, 46 J. ENV'T ECON. & MGMT. 52 (2003).

[146] Michael D. Bauer & Glenn D. Rudebusch, *The Rising Cost of Climate Change: Evidence from the Bond Market* (Fed. Reserve Bank Working Paper 2020-25); *see also* IWG, 2010 TSD, *supra* note 95, at 20 (calculating the rate as 2.7%).

[147] Bauer & Rudebusch, *supra* note 146 (averaging estimates from Del Negro et al. (2019), Johannsen & Merten (2016), Laubach & Willians (2016), Kiley (2020), Christensen & Rudebusch (2015), and Bauer & Rudebusch (2020)).

[148] *See id.*

[149] It is also possible that foreign demand for safe investments could be driving down U.S. Treasury rates by reflecting the time preferences of foreign investors, which arguably should not influence U.S. policy analyses. *See* CEA Issue Brief, *supra* note 115, at 3. If true, this could partially offset some of the other factors suggesting that market data leads to an overestimated discount rate. But regardless, it is yet another reason why market data should be supplemented by other inputs, like expert elicitation.

[150] EPA, Guidelines for Economic Analysis, at 6-12 (explaining that intergenerational discounting is complicated by the fact that "the 'investment horizon' is longer than what is reflected in observed market interest rates representative of intertemporal consumption tradeoffs made by the current generation"). Real estate investments are among the few potentially intergenerational assets, though real estate investments, too, may generate externalities.

[151] CEA Issue Brief, *supra* note 115, at 3.

[152] *See* Revesz & Shahabian, *supra* note 123, at 1116-17 (discussing the Stern Report's reliance on a world-ending disaster to justify a pure rate of time preference of 0.1%, but noting even that seems too high).

While the current generation of consumers and investors will not fully or efficiently consider the welfare of future generations in their market behavior, most people do have a strong ethical preference to split resources fairly between generations, as shown in informal surveys conducted by Richard Revesz (who directs the undersigned Institute for Policy Integrity),[153] but they need government to help implement this preference.[154] And whereas market data on savings rates and investment preferences can reflect only intrapersonal market behavior and not inter-generational preferences, empirical evidence on inter-vivos wealth transfers to subsequent generations and stated-preferences studies on people's attitudes about discount rates over long time horizons suggest lower discount rates than typically estimated from market data.[155]

Finally, discount rates derived solely from market data cannot account for uncertainty or ethics, as the Working Group recognized,[156] or the limited substitutability of market and non-market goods. *Circular A-4* recognizes that intergenerational contexts raise unique ethical issues that further counsel for lower discount rates. Specifically, it recognizes that "[i]t may not be appropriate for society to demonstrate a similar preference when deciding between the well-being of current and future generations" as it does in the intragenerational setting." [157] *Circular A-4* thus recommends that agencies conduct additional analysis at "using a lower [than 3%] but positive discount rate" for impacts with important intergenerational effects.[158] Likewise, Executive Order 13,990 instructs agencies to ensure that the social cost of greenhouse gas values adequately account for "intergenerational equity."[159] Discount rates below 3%--including the 2.5% rate that NHTSA applies in its central analysis—fulfill these mandates.

3. NHTSA Should Further Explain Its Distinct Approach to Discounting Climate Effects

As explained above, NHTSA's choice to use the social cost of greenhouse gas values calculated with consumption-based discount rates—including rates below 3%—is fully justified. But it also means that NHTSA is calculating the present value of reduced greenhouse gas emissions differently than the present value of other costs and benefits (which, per *Circular A-4*'s current default recommendations, are calculated at 3% and 7% discount rates). In its central analyses, NHTSA applies a discount rate of 2.5% to climate impacts when analyzing other costs and benefits at a 3% rate, and applies a discount rate of 3% to climate impacts when analyzing other costs and benefits at a 7% rate.[160]

In the future, NHTSA (and the Department of Transportation broadly) should consider working with OMB and the Working Group (of which DOT is a member) to move toward a

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[153] Revesz & Shahabian, *supra* note 123, at 1123 (reporting the "overwhelming response" from asking professional and academic audiences how to divide resources among different generations living on an isolated island; Kenneth Arrow reported the same ethical intuition and acknowledged that a positive pure rate of time preference would be inconsistent with this overwhelming ethical intuition).

[154] *Id.* at 1142 (without government enforcement mechanisms, "people . . . who would otherwise be willing to sacrifice collectively for future generations by mitigating climate change may not reflect that preference in their everyday behavior if they think their sacrifice alone will have little impact").

[155] *Id.* at 1136, 1139-41, 1141.

[156] IWG, 2021 TSD, *supra* note 5, at 21.

[157] Circular A-4, *supra* note 76, at 35–36.

[158] *Id.*

[159] Exec. Order § 13,990 5(b)(ii)(E).

[160] Proposed RIA at 134.

declining discount rate framework that can straightforwardly resolve these issues of consistent discounting, by adopting a single schedule of applicable discount rates that steadily declines over time.[161] In the meantime, while NHTSA offers numerous compelling justifications for its distinct approach to discounting climate impacts,[162] it should consider expanding upon those justifications to further minimize legal risk. NHTSA should consider two approaches: (1) explaining why a general focus on discounting all costs and benefits at consumption-based rates, rather than at a 7% capital-based rate, is appropriate in this particular rulemaking; and (2) expanding upon its reasons for why special legal, economic, and policy considerations justify a different approach to discounting climate effects as distinct from other costs and benefits.

To begin, NHTSA can expand on its explanation why, given the nature of the Proposed Rule's costs and benefits, it is more appropriate to discount all effects using consumption-based rates, and so the present value calculations that include some costs and benefits discounted at a 7% rate can be viewed as lower-bound sensitivity analyses.[163] The capital-based discount rate theoretically assesses whether the net benefits from government action will exceed the returns that society could earn by instead investing the same resources in the private sector. But this framework for discounting and comparing benefits and costs makes sense only under the "extreme" assumption that all the costs of government action would "fully displace" (i.e., crowd out) private investment.[164] In this way, the capital-based rate "at best creat[es] a lower bound on the estimate of net benefits," by applying a maximum discount rate that reflects an extreme case not likely to apply to many government actions.[165]

In general, there is less of a chance now that U.S. government actions will crowd out private investments than there was in 1992 when OMB first set its 7% capital-based discount rate, because the U.S. economy is relatively more open now.[166] Additionally, the magnitude of the costs and benefits involved in many agency actions will be relatively small compared to the overall U.S. debt, again making it unlikely that agency actions will significantly crowd out private U.S. investment.[167] Some agency actions may also induce more private investment than they displace.[168] And if the costs of agency actions will be more borne through displaced consumption rather than displaced investment, the crowding-out theory for a capital-based discount rate further breaks down. In this rulemaking, the upfront technology costs and long-term fuel savings will be felt primarily by individual consumers, as will rebound value and refueling time savings; other effects, like health effects, climate benefits, energy security, and congestion, will be felt by society as a whole. In other words, because of the nature of the rule, the theory for assessing regulatory impacts using a capital-based discount rate has a tenuous

[161] *See* Howard & Schwartz, *supra* note 98, at 41 (recommending a declining discount rate framework).

[162] Proposed Rule TSD at 539–40.

[163] Proposed RIA at 97 (arguing that most costs and benefits will affect consumption, but explaining NHTSA is also using a 7% rate because there may be "some uncertainty about whether and how completely cost savings will be passed through to buyers rather than redeployed by manufacturers to other investment opportunities").

[164] IWG, 2021 TSD, *supra* note 5, at 18-19.

[165] *Id.*

[166] *See* EPA, Guidelines for Economic Analysis, at 6-11.

[167] *Id.*

[168] IWG, 2021 TSD, *supra* note 5, at 19 (noting that if the social returns to induced investments have not been quantified, using a capital-based discount rate "is not even a lower bound").

application at best. NHTSA therefore would be justified in focusing on consumption-based rates, with the application of a 7% rate treated like a lower-bound sensitivity analysis.

Separately, NHTSA is fully justified in taking a distinct approach to discounting climate effects in the Proposed Rule, and could further elaborate on the special legal, economic, and policy considerations underlying this choice. As NHTSA correctly points out, long-term uncertainty over the proper discount rate counsels for applying lower discount rates to longer-term impacts, and as the Working Group has stated, and the 2.5% discount rate represents a "certainty equivalent" long-term discount rate based on a starting 3% rate.[169] But long-term uncertainty is not the only reason (though it is a key reason) for applying lower discount rates to longer-term impacts like climate change (as opposed to other regulatory impacts of the Proposed Rule like fuel savings and energy security that will play out over the course of the next several decades). Other arguments in favor of lower consumption-based discount rates—based on ethics, declining economic growth, inapplicable market data, and other considerations—also apply much more strongly to climate effects than to other costs and benefits.

Consequently, as the National Academies of Sciences has recognized, some differences in the application of discount rates may be warranted "when only some categories [of costs and benefits] have an intergenerational component."[170] The National Academies has offered recommendations for how agencies can best apply different annualized discount rates to climate impacts versus other costs and benefits.[171] In particular, the National Academies suggests "combining other costs and benefits based on a [low] discount rate with the SC-CO2 estimate based on its [lowest] discount rate."[172] Combining other costs and benefits based on OMB's lowest default discount rate (3%) with climate impacts based on the Working Group's lowest discount rate (2.5%) is consistent with this recommendation. NHTSA can therefore rely on the National Academies' guidance to support its approach to discounting here.

Regulatory precedent further supports the usage of lower discount rates for long-term impacts such as climate change. In at least four instances, agencies have applied lower discount rates in the face of long time horizons. In 1987, EPA proposed regulations to protect the stratospheric ozone layer from chlorofluorocarbons, with anticipated reductions in skin cancer, cataracts, crop damage, and even sea-level rise.[173] Although OMB at the time recommended a 10% discount rate, EPA discounted benefits using a "central" estimate of 2%, with sensitivity analyses at 1% and 6%.[174] As EPA explained, the rule's long time horizon—benefits were projected over 89 years[175]—called for a "more refined selection."[176] EPA observed that some methodologies produced "relatively high rates" that "impl[y] a systematic bias against the welfare of future generations," yet "[i]t is not at all clear that such an ethical stance is appropriate."[177] EPA explained that environmental damages could slow economic growth over

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[169] *Id.* at 17.

[170] NAS 2017 Report, *supra* note 109, at 182.

[171] *Id.*

[172] *Id.*

[173] 52 Fed. Reg. 47,489, 47,494 (Dec. 14, 1987).

[174] *Id.* at 47,514.

[175] *See, e.g.*, *id.* at 47,499.

[176] EPA, Regulatory Impact Analysis: Protection of Stratospheric Ozone H-20 (Aug. 1, 1988), *available at* https://nepis.epa.gov/Exe/ZyPDF.cgi/9101PLVM.PDF?Dockey=9101PLVM.PDF.

[177] *Id.* at H-19.

longer time horizons,[178] and noted that ozone depletion could be "quasi-irreversible," with "catastrophic" ecosystem damages. Furthermore, the regulations would "not obviously displace private investments,"[179] and so a discount rate based purely on opportunity costs was not appropriate. Finally, EPA concluded the regulation's high insurance value from "avoiding both potentially projected damages and the possibility of large disruptions not encompassed in the standard estimation of discount factors" pushed the rates lower.[180] All these same arguments—uncertain economic growth, irreversible future damages, limited displacement of private investment, insurance premiums, and ethical considerations—remain potent arguments today for applying lower discount rates for intergenerational impacts.

In 1993, EPA completed additional regulations establishing labeling requirements for products manufactured with, containers of, and products containing specific ozone-depleting substances. Owing to the long time horizon of the environmental impacts—the agency monetized health and environmental benefits over a 75-year horizon—EPA once again applied a discount rate of 2% in its regulatory analysis.[181] In 2004, EPA amended its regulations on refrigerant recycling to further protect the stratospheric ozone layer from chlorofluorocarbons, and once again used a 2% discount rate in its analysis.[182] These numerous EPA rulemakings offer further precedent for the use of lower discount rates for regulatory impacts that extend over long time horizons. Notably, the 2004 regulation was completed after OMB's publication of Circular A-4, which recommended a default consumption-based discount rate of 3%.

Similarly, in 1999, the U.S. Department of Housing and Urban Development ("HUD") finalized rules for lead-based paint hazards in certain residences.[183] While OMB at that time recommended using only a 7% discount rate, HUD discounted the lifetime earnings benefits for young children who avoid lead exposure at both 3% and 7%. As HUD explained, a special "intergenerational discount rate" was applied because "lifetime earnings benefits will be realized by the children and grandchildren of the[] adult taxpayers" bearing the rule's costs.[184] HUD also discussed why the 7% discount rate may be less appropriate because the rule's costs, which would fall mostly on federally-assisted housing, would be funded not by private investments but by federal expenditures, and so would tend to increase federal borrowing rather than displace private capital.[185] Notably, HUD's analysis applied different annualized discount rates to different impacts depending on their nature and time horizon—demonstrating that NHTSA is justified here in taking a similar approach.

Moreover, because a high capital-based rate, like 7%, would effectively ignore the welfare of future generations (e.g., over the course of just 80 years, a 7% rate discounts away

[178] *Id.* at H-20.

[179] *Id*. ("rather they tend merely to redirect private capital formation").

[180] *Id.* More recent stratospheric ozone rules have used 3% and 7% rates, following *Circular A-4*. *E.g.*, 81 Fed. Reg. 82,272, 82,344 (Nov. 18, 2016).

[181] Protection of Stratospheric Ozone; Labeling, 58 Fed. Reg. 8136, 8162–63 (Feb. 11, 1993).

[182] Protection of Stratospheric Ozone; Refrigerant Recycling; Substitute Refrigerants, 69 Fed. Reg. 11946, 11975 (Mar. 12, 2004).

[183] 64 Fed. Reg. 50,140 (Sept. 15, 1999).

[184] *Id.* at 50,186.

[185] *Id.* at 50,187 (also considering a 4-5% discount rate, consistent with nominal costs of government borrowing).

99.5% of a future effect's value[186]) legal requirements to consider the welfare of future generations caution much more strongly against the application of a 7% rate to long-term climate effects than to other costs and benefits. Notably, NEPA broadly instructs agencies to interpret their laws to the fullest extent possible to advance the national environmental policies,[187] including to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."[188] Multiple Executive Orders, including Executive Order 13,563 and 13,990, also call for agencies to appropriately and accurately weigh the interests of future generations.[189]

Case law on the social cost of greenhouse gases also supports NHTSA's discounting approach. Specifically, in *Zero Zone v. Department of Energy*, the plaintiffs argued that the Department of Energy had arbitrarily considered hundreds of years of climate benefits while limiting its assessment of employment and other impacts to just a thirty-year time horizon. The court upheld the regulatory analysis, concluding that the difference in time horizons was justified because the rule "would have long-term effects on the environment but . . . would not have long-term effects on employment."[190] The choice of time horizons is related to the choice of discount rate: any cost or benefit occurring beyond the end of the analytical time horizon is effectively discounted at an infinitely high (or 100%) rate.[191] Analogizing from this precedent, a court may similarly defer to an agency's finding that the long time horizon of climate change justifies a lower discount rate than the rate applied to shorter-term costs and benefits. NHTSA should further explain the special economic, legal, and ethical considerations that justify selecting a different annual discount rate for climate effects than for other costs and benefits.

B. NHTSA Should Conduct Additional Sensitivity Analysis Around Lower Discount Rates for Climate Impacts

In its regulatory impact analysis for the Proposed Rule, NHTSA assesses climate benefits using discount rates of 2.5, 3, and 5 percent for the social cost of greenhouse gases. In its most recent technical support document, however, the Working Group suggested that agencies "conduct[] additional sensitivity analysis using discount rates below 2.5 percent."[192] And while NHTSA repeatedly references the fact that considering discount rates at "2 percent and lower" is "warranted,"[193] NHTSA's list of sensitivity analyses does not include a run using a 2% or lower discount rate for the social cost of greenhouse gases.[194] Because of the considerable evidence that the most appropriate discount rate should be below 2%, and in anticipation of potential

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[186] The discount factor is $\frac{1}{(1+r)^t}$; $\frac{1}{(1+0.07)^{80}} = 0.0045 = 0.45\%$.

[187] 42 U.S.C. § 4332(1).

[188] 42 U.S.C. § 4331(b)(1).

[189] Exec. Order No. 13,563 at 1(c) ("[U]se the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."); Exec. Order No. 13,990 at 5(b)(ii)(E) & (iii) ("adequately take account of…intergenerational equity," "to reflect the interests of future generations in avoiding threats posed by climate change").

[190] *Zero Zone, Inc.*, 832 F.3d at 679.

[191] *See* Arden Rowell, *Time in Cost-Benefit Analysis*, 4 U.C. IRVINE L. REV. 1215, 1237-38 (2014) (noting time inconsistencies in different regulatory analyses and advising agencies to identify a temporal break-even point by which a proposed policy will pay for itself).

[192] IWG, 2021 TSD, *supra* note 5, at 4.

[193] *E.g.*, Proposed RIA at 4 n.8; *id.* at 5 n.9; *id.* at 170 n.120.

[194] *Id*. at 223 tbl. 7-1.

future updates to the Working Group's recommendations, NHTSA should conduct additional sensitivity analysis around lower discount rates for the social cost of greenhouse gases, including discount rates of 2% or lower.

As the Working Group explained in its recent technical support document, there is considerable evidence from market data that the default estimate of the consumption-based discount rate should be revised down from 3% to 2%. In the context of long-term, intergenerational effects like climate damages, the case for a lower discount rate is even stronger, in light of ethical considerations and other factors.[195] Multiple expert elicitations show a growing consensus around a discount rate below 2%,[196] and factors like uncertainty, negative economic growth correlations, risk aversion, and the scarcity and non-substitutability of environmental goods all point strongly toward even lower discount rates.[197]

For this reason, among others, the Working Group acknowledged in its latest technical support document that its social cost valuations—presented at discount rates of 2.5%, 3%, and 5%—"likely underestimate societal damages from [greenhouse gas] emissions."[198] The Working Group will evaluate the discount rate (among other issues) as it performs a full assessment of its social cost valuations to reflect the latest scientific and economic research—a task that it has been ordered to complete by January 2022.[199] If the Working Group releases those revised estimates before NHTSA finalizes the Proposed Rule, then NHTSA should update its analysis to incorporate the Working Group's updated values. In the meantime, the Working Group has recommended that agencies apply additional sensitivity analysis around lower discount rates.[200]

To do so, NHTSA could look to the "value of carbon" estimates from the New York State Department of Environmental Conservation ("DEC"), which applied a 2% discount rate as its central value.[201] Pursuant to DEC's estimates, at a discount rate of 2% social cost valuations for year 2020 emissions equal $125 per ton of carbon dioxide, $2,782 per ton of methane, and

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[195] IWG, 2021 TSD, *supra* note 5, at 16–21 (surveying literature).

[196] Peter Howard & Derek Sylvan, *The Economic Climate: Establishing Expert Consensus on the Economics of Climate Change,* INST. POLICY INTEGRITY WORKING PAPER 33–34 (2015); M.A. Drupp, et al., *Discounting Disentangled: An Expert Survey on the Determinants of the Long-Term Social Discount Rate* (London School of Economics and Political Science Working Paper, May 2015) (finding consensus on social discount rates between 1-3%). Pindyck, in a survey of 534 experts on climate change, finds a mean discount rate of 2.9% in the climate change context and this rate drops to 2.6% when he omits individuals that lack confidence in their knowledge. Robert S. Pindyck, *The Social Cost of Carbon Revisited* (National Bureau of Economic Research, 2016). Unlike Howard and Sylvan (2015), Pindyck (2016) combines economists and natural scientists in his survey, though the mean constant discount rate drops to 2.7% when including only economists. Again, this further supports the finding that the appropriate discount rate is below 3%.

[197] *See, e.g.*, Howard & Schwartz, *supra* note 98, at 10 (reporting such research and concluding that "the best empirical estimate of the discount rate based on long-term interest rates in the current period is under 1%—and is likely to remain under 2% or less for the foreseeable future"); *See also* Drupp et al., Comments on Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990 (June 20, 2021).

[198] IWG, 2021 TSD, *supra* note 5, at 4.

[199] Exec. Order No. 13,990 § 5(b)(ii)(B), 86 Fed. Reg. 7037, 7040 (Jan. 20, 2021).

[200] IWG, 2021 TSD, *supra* note 5, at 4.

[201] N.Y. Dep't of Env't. Conserv., Establishing a Value of Carbon: Guidelines for Use by State Agencies 16–18 (2020), *available at* https://www.dec.ny.gov/docs/administration_pdf/vocguidrev.pdf.

$44,727 per ton of nitrous oxide.[202] DEC also recommended using a 1% discount rate for climate impacts, and provided annual social cost values for doing so.[203] Because these valuations are based off of the Working Group's methodology, and differ only through the discount rate, NHTSA can apply these valuations if it applies additional sensitivity analysis around lower discount rates.

C. NHTSA Should Ensure Analytical Consistency With the Treatment of Climate Benefits in EPA's Concurrent Fuel-Economy Rulemaking—Though Consistent Approaches Need Not Be Identical Approaches

While EPA and NHTSA both assess global climate benefits using discount rates of 2.5%, 3%, and 5% in their recently proposed vehicle rules,[204] there is a slight difference in the analyses between the two agencies. Many but not all of EPA's summary tables focus on the social cost of greenhouse gas values calculated at a 3% discount rate,[205] though EPA does caution against interpreting the 3% values as its "central" estimates.[206] By comparison, NHTSA tends to focus more on climate benefits calculated at a 2.5% discount rate in its summary tables, though again NHTSA does apply the Working Group's full range of values. These two approaches are consistent with each other and with the Working Group's guidance, which reminds agencies of their discretion to focus on lower discount rates.[207] Nevertheless, because the approaches are not identical, they could be misinterpreted in ways that could wrongly cast doubt on the social cost of greenhouse gas values. To reduce legal risk, EPA and NHTSA should strive for analytical consistency in the treatment of climate benefits as they finalize their regulations.

Although there are few cases addressing an agency's discount rate in a cost-benefit analysis, courts have usually been reluctant to second-guess an agency's discounting choice in the instances where it has been challenged. In one case, for example, the U.S. Court of Appeals for the District of Columbia Circuit deferred to an agency's discount rate selection as "first and foremost a policy choice," and explained that the agency was free to revisit its discount rates in future rulemakings "so long as it sets forth a reasonable justification for doing so."[208] This decision fits squarely within the judiciary's deferential approach to reviewing the more technical aspects of an agency's cost-benefit analysis.[209]

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[202] N.Y. Dep't of Env't. Conserv., Appendix: Value of Carbon (2020), https://www.dec.ny.gov/docs/administration_pdf/vocapprev.pdf.

[203] *Id*.

[204] NHTSA's proposed rule was published in the Federal Register earlier this month, with comments due October 26. Corporate Average Fuel Economy Standards for Model Years 2024–2026 Passenger Cars and Light Trucks, 86 Fed. Reg. 49,602 (Sept. 3, 2021).

[205] *Compare id.* at 43,743 tbl. 15 (showing the 3% values) *with id.* at 43,796, tbl. 56 (presenting all four Working Group estimates).

[206] *Id.* at 43,743 tbl. 15 note b ("[T]he Agency does not have a single central SC-GHG point estimate. We emphasize the importance and value of considering the benefits calculated using all four SC-GHG estimates and present them later in this preamble.").

[207] IWG, 2021 TSD, *supra* note 5, at 21.

[208] *State of Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 465 (D.C. Cir. 1989). *See also N. Cal. Power Agency v. FERC*, 37 F3d 1517, 1522–23 (D.C. Cir 1994) (deferring to agency's discount-rate selection).

[209] *See, e.g.*, *Am. Petroleum Inst. v. EPA*, 862 F.3d 50, 69 (D.C. Cir. 2017), *decision modified on reh'g*, 883 F.3d 918 (D.C. Cir. 2018) (explaining that an agency "is free to rely on theoretical or model-based approaches, as long as that reliance is reasonable in context" and there is "some indication of a reasonable concurrence between model and reality").

Given all of the evidence discussed above pointing to relatively low discount rates in intergenerational contexts, agency reliance on a 3% or 2.5% discount rate for the social cost of greenhouse gases—or even a lower discount rate consistent with the latest evidence—should easily meet the applicable standard of review. Agencies generally are given broad deference in selecting technical valuations, as noted above, and different agencies have sometimes used different inputs for key metrics such as the statistical value of life (i.e. the monetary value placed on mortality risks).[210] Consistent with this precedent, EPA and NHTSA should be able to provide a rational explanation for their reliance on different discount rates for the social cost of greenhouse gases.

But such a strategy does not come without risk. Though deference to technical valuations is broad, a court may invalidate a regulation if a key analytical input is insufficiently explained or inconsistent with evidence and practice. Should EPA and NHTSA apply different discount rates in their analyses, critics could point to such an alleged inconsistency in an attempt to misleadingly argue that the social cost of greenhouse gases is indeterminate or arbitrary. More problematically, critics could point to statements made by each agency to justify its preferred discount rate to argue that the other agency's choice is irrational. To the extent that EPA and NHTSA can agree on more consistent presentations and discussions about the discount rate, it may help minimize the risk of such misinterpretations. NHTSA should especially be careful not to use any language that could be taken out of context to misleadingly criticize EPA's approach.

But ultimately, consistency does not require identical approaches. Both agencies have considered the full range of values recommended by the Working Group, and the choice to focus in some summary tables on the values calculated either at 3% or 2.5%—or even at lower values, like 2%—can be fully justified.

IV. NHTSA Should Defend Against Common Criticisms of the Working Group's Methodology

While the Working Group developed its social cost valuations through a rigorous process that incorporated the best scientific and economic modeling available at the time, its assumptions have sometimes been criticized by opponents of climate regulation. Such objections lack legal merit, and do not supply bases for NHTSA to reject the Working Group's expert valuations. Nonetheless, in order to minimize legal risk, NHTSA should provide additional defense of the Working Group's process and modeling assumptions, and be prepared to respond to common criticisms of its work. This section offers a defense of the Working Group's process and methodology, and offers responses to common criticisms that have been offered by opponents of strong climate policy.

A. The Working Group's Methodology Is Rigorous, Transparent, and Based on a Range of Assumptions Reflecting the Best Available Data

Although the term "social cost of greenhouse gases" is often used synonymously with the valuations developed by the federal Working Group, economic research and modeling on the

[210] Cong. Research Serv., *How Agencies Monetize "Statistical Lives" Expected to Be Saved By Regulations* 36 (2010) ("The [values of a statistical life] that agencies used in their regulatory impact analyses were generally somewhat similar, with most agencies using central values ranging from about $5.0 million to $8.0 million (in 2009 dollars). Agencies sometimes did sensitivity analyses using VSLs as low as $3 million and as high as $10 million. One study suggested that DHS conduct sensitivity analyses using values as high as $12.6 million."). *See also id.* at 31 tbl. 3 (cataloguing VSL values applied by rule).

social cost of greenhouse gases predate federal efforts to monetize incremental climate damages. Several of the most celebrated economic models of climate damages—such as models by William Nordhaus[211] and Chris Hope[212] that have since been integrated into the federal government's damage valuations—were first released in the early 1990s.

Owing to the availability of these damage models, the U.S. Court of Appeals for the Ninth Circuit held in 2008 that the federal government—and NHTSA specifically—must monetize climate impacts when it conducts a cost-benefit analysis. In *Center for Biological Diversity v. National Highway Traffic Safety Administration*, the Ninth Circuit remanded a fuel economy rule to NHTSA for failing to monetize the benefits of carbon dioxide reductions in its regulatory analysis.[213] The Court recognized the presence of uncertainty in the valuation of climate damages, but explained that "the value of carbon emissions reduction is certainly not zero."[214] By failing to value the benefit of greenhouse gas emission reductions in its analysis, the Court continued, NHTSA effectively ignored the adverse impacts of greenhouse gas emissions and thus "put a thumb on the scale by undervaluing the benefits and overvaluing the costs of more stringent standards."[215]

Following this decision, federal agencies began applying different valuations of the social cost of greenhouse gases in their regulatory analyses.[216] To harmonize those damage valuations across agencies, the Obama administration convened an interagency working group comprised of members of twelve federal agencies and departments, including the Department of Transportation, the Council of Economic Advisors, Office of Management and Budget, the Department of Energy, and Environmental Protection Agency.[217] The Working Group released its first estimates of the social cost of carbon (i.e. carbon dioxide) in 2010,[218] which it updated in both 2013[219] and 2016[220] to incorporate more recent scientific and economic data. Following its

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[211] The earliest versions of Nordhaus's DICE model were published starting in 1992. *See* William Nordhaus, *An Optimal Transition Path for Controlling Greenhouse Gas Emissions*, 258 SCIENCE 1315 (1992).

[212] Chris Hope first released his PAGE model in 1991. *See* Memorandum by Dr Chris Hope, Judge Institute of Management, University of Cambridge, ¶1 (Jan. 14, 2005), https://publications.parliament.uk/pa/ld200506/ldselect/ldeconaf/12/5011805.htm (document describing the development and results of the PAGE model submitted to the Select Committee on Economic Affairs of the U.K. House of Lords).

[213] *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1198–1203 (9th Cir. 2008) (original opinion at 508 F.3d 508 (9th Cir. 2007)).

[214] *Id.* at 1200.

[215] *Id.* at 1198.

[216] IWG, 2010 TSD, *supra* note 95, at 3–4.

[217] *Id.* (cover page).

[218] *Id.*

[219] Interagency Working Group on the Social Cost of Carbon, *Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866* (2013), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/inforeg/technical-update-social-cost-of-carbon-for-regulator-impact-analysis.pdf.

[220] Interagency Working Group on the Social Cost of Greenhouse Gases, *Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866* (2016), https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/scc_tsd_final_clean_8_26_16.pdf [hereinafter "IWG, 2016 TSD"].

2013 update, the Working Group also solicited comments on its social cost estimates,[221] resulting in a 44-page document with detailed responses to the comments received.[222] The Working Group also released damage estimates for two other greenhouse gases—methane and nitrous oxide—in 2016.[223] These additional metrics used the same economic models, the same treatment of uncertainty, and the same methodological assumptions that the Working Group applied to the social cost of carbon, and underwent peer review.[224]

B. NHTSA Is Required to Value Climate Damages, and Doing So Provides Balance to Its Cost-Benefit Analysis

One objection to agency usage of the Working Group's estimates is that Congress, not the executive branch, should set policy with respect to climate change. But NHTSA has broad authority to assess climate impacts, and judicial precedent suggests that it must value climate-change impacts as part of its regulatory impact analysis. In fact, assessing climate damages as part of its regulatory impact analysis provides rationality and balance to NHTSA's approach—and does not, as critics have suggested, inappropriately skew the analysis.

1. NHTSA Must Monetize Climate Impacts as Part of Its Analysis

It is widely established that federal agencies may—and often must—consider effects on climate change when those effects flow from the agency's actions. As detailed above, this is well established in the case of NHTSA fuel-economy regulations. In particular, decisions from multiple federal appellate courts have recognized the importance of NHTSA considering environmental and climate impacts in setting fuel-economy standards, despite the lack of an explicit statutory directive to do so.[225]

Since NHTSA must account for climate impacts, the only relevant question is how it should do so. Monetizing climate impacts is not only the best available option,[226] but as noted above, has been required by courts as part of NHTSA's fuel-economy analysis. In *Center for Biological Diversity,* the Ninth Circuit held that NHTSA acted arbitrarily and capriciously by failing to monetize climate impacts when assessing the costs and benefits of various alternative fuel-economy standards.[227] And NHTSA monetized climate damages both in the SAFE Rule and in the fuel-economy regulations promulgated under the Obama administration.

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[221] Request for Comment, 78 Fed. Reg. 70,586 (Nov. 26, 2013).

[222] Response to Comments, *supra* note 112.

[223] Interagency Working Group on the Social Cost of Greenhouse Gases, *Addendum to Technical Support Document on Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866: Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide* (2016), https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/august_2016_sc_ch4_sc_n2o_addendum_final_8_26_16.pdf.

[224] *Id.* at 3.

[225] *See* notes 21–24 and accompanying text.

[226] Circular A-4, *supra* note 76, at 2 ("Where all benefits and costs can be quantified and expressed in monetary units, benefit-cost analysis provides decision makers with a clear indication of the most efficient alternative.").

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2. Monetizing Climate Benefits Does Not Skew the Analysis, but Rather Provides Balance Since NHTSA Also Monetizes Costs

Another objection to the use of the social cost of greenhouse gases from critics of climate action is that these valuations account only for the damages from climate change, but do not take account of the economic benefits from fossil-fuel production and usage, such as economic development and employment. But this argument is unpersuasive for two key reasons.

First, the economic benefits of fossil-fuel extraction are far more limited than its proponents suggest, since the broader benefits that society derives from power and electricity are attributable to energy production in general and are not unique to fossil fuels.[228] Accordingly, controls on fossil fuels will hasten a transition to a greener economy, and so have limited net economic impacts.[229] Second, while there are of course some economic impacts from reductions in fossil-fuel production and usage, those impacts should not be included in any calculation of climate damages, but rather considered separately by regulators on the costs side of the ledger in individual determinations.

In the Proposed Rule, NHTSA monetizes not only the expected benefits of the proposal—including, but not limited to, climate benefits—but also the expected compliance costs from industry as well as other costs of the rule such as safety costs, forgone consumer surplus, and even congestion and noise costs. NHTSA then compares quantified cost and benefit estimates in determining whether and how to regulate, as instructed by federal guidance and executive order.[230] Capturing climate benefits is thus essential to ensuring a balanced analysis. As the Ninth Circuit explained in *Center for Biology Diversity*, NHTSA's "failure to monetize the most significant benefit of more stringent [vehicle-emission] standards: reduction in carbon emissions"—while continuing to value estimated compliance costs—would "put a thumb on the scale by undervaluing the benefits and overvaluing the costs of more stringent standards."[231]

C. Common Criticisms of the Working Group's Methodology from Opponents of Climate Policy Lack Merit

NHTSA should also provide detailed responses to any objections lobbed against the Working Group's methodology and valuations during this comment period. The Working Group,

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[228] Renewable energy, like fossil fuels, generates revenue, supports jobs, and vitalizes local economies. *See, e.g.*, Katie Siegner et al., ROCKY MTN. INST., *Seeds of Opportunity: How Rural America Is Reaping Economic Development Benefits from the Growth of Renewables* 6–16 (2021), *available at* https://perma.cc/DWH9-D4L7.

[229] Environmental regulation typically has limited impacts on total employment or other macroeconomic indicators, but rather shifts production from one sector to another. *See* Inst. for Pol'y Integrity, *Does Environmental Regulation Kill or Create Jobs* (2017), *available at* https://policyintegrity.org/files/media/Jobs_and_Regulation_Factsheet.pdf. Meanwhile, the sharp decline in the cost renewable energy is already expected to crowd out the demand for gas-fuel electricity in the coming years and decades. *See, e.g.* Energy Info. Admin., *Annual Energy Outlook 2021 Narrative* 18 tbl. 11 (projecting doubling of renewables as a share of domestic energy consumption—from 21% to 42%—by 2050 under reference case, while share of coal and natural gas declines); Charles Teplin et al., ROCKY MTN. INST., *The Growing Market for Clean Energy Portfolios* 8 fig. ES-2 (2019), *available at* https://perma.cc/P5YJ-WARJ (showing precipitous decline in cost of clean energy to being cheaper than fossil fuels).

[230] Exec. Order No. 12,866 § 1(a), 58 Fed. Reg. 51,735 (Oct. 4, 1993) (directing that "in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits").

[231] *Ctr. for Biological Diversity*, 538 F.3d at 1198–99.

of course, has already responded to criticisms of its methodology that were offered during the public comment period that it held in 2013,[232] and NHTSA should draw from that document where relevant in responding to objections offered through this notice-and-comment process. But some objections are now being raised that were not offered during the 2013 comment period, while some of the responses that the Working Group provided can be supplemented with more recent information. Below, we provide brief responses to common objections that are now being presented by opponents of climate reforms.

1. The Social Cost Valuations Are Not Too Uncertain to Apply

While critics argue that there it too much uncertainty to rely on the Working Group's social cost valuations, this argument is incorrect on multiple levels. As a legal matter, the presence of some uncertainty in the social cost valuations should not preclude agencies from using the best numbers available. And as a factual matter, the Working Group rigorously considered uncertainty and accounted for it in numerous ways. If anything, the presence of continued uncertainty suggests that the social cost valuations should be higher than presently valued—not that climate damages should be ignored.

Federal courts have repeatedly recognized that agency analysis necessitates making predictive judgments under uncertain conditions, explaining that "[r]egulators by nature work under conditions of serious uncertainty" [233] and "are often called upon to confront difficult administrative problems armed with imperfect data."[234] As the Ninth Circuit has explained, "the proper response" to the problem of uncertain information is not for the agency to ignore the issue but rather "for the [agency] to do the best it can with the data it has."[235] Courts generally grant broad deference to agencies' analytical methodologies and predictive judgments so long as they are reasonable, and do not require agencies to act with complete certainty.[236]

Use of the Working Group's social cost estimates is precisely the type of reasonable analysis of uncertain information that courts endorse. The Working Group rigorously considered various sources of long-term uncertainty "through a combination of a multi-model ensemble, probabilistic analysis, and scenario analysis."[237] As the Working Group explained, the three integrated assessment models account for uncertainty themselves by spanning a range of economic and ecological outcomes.[238] Additionally, the use of three separate models—all developed by different experts spanning a range of views—accounts for uncertainty by integrating a diversity of viewpoints and structural and analytical considerations.[239]

In addition to the use of three distinct damage models with differing inputs and assumptions, the Working Group integrated various sources of uncertainty into its damage valuations. For instance, the Working Group applied an equilibrium climate sensitivity—that is,

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[232] Response to Comments, *supra* note 112.

[233] *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1221 (D.C. Cir. 2004).

[234] *Mont. Wilderness Ass'n v. McAllister*, 666 F.3d 549, 559 (9th Cir. 2011).

[235] *Id.*

[236] *See Wis. Pub. Power, Inc. v. FERC,* 493 F.3d 239, 260 (D.C.Cir.2007) ("It is well established that an agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review, so long as they are reasonable.").

[237] IWG, 2021 TSD, *supra* note 5, at 26.

[238] *See id.*

[239] *See id.*

an estimate of how much an increase in atmospheric greenhouse gas concentrations affects global temperatures—that reflects a broad distribution of possible outcomes.[240] The Working Group also applied five different socioeconomic and emissions trajectories from the published literature reflecting a range of possible outcomes for future population growth, global gross domestic product, and greenhouse gas emission baselines—all important inputs that affect long-term climate damage estimates.[241] The Working Group ran each integrated assessment model 10,000 times per scenario (and per greenhouse gas) for a total of 150,000 draws per greenhouse gas, and then averaged across those results to develop its recommended estimates.[242] In addition to reporting the average valuations, the Working Group published the results of each model run under each scenario.[243]

Moreover, experts broadly agree that the presence of uncertainty in the social cost valuations counsels for more stringent climate regulation, not less.[244] This is due to various factors including risk aversion, the informational value of delaying climate change impacts, and the possibility of irreversible climate tipping points that cause catastrophic damage.[245] In fact, as discussed above, uncertainty is a factor justifying lowering the discount rate, particularly in intergenerational settings.[246] Furthermore, current omission of key features of the climate problem such as catastrophic damages and certain cross-regional spillover effects further suggests that the true social cost values are likely higher than the Working Group's current estimates.[247]

2. The Working Group Did Not Bias Its Estimates by Ignoring Positive Impacts of Climate Change

Critics further claim that the Working Group's social cost values ignore important positive impacts of a warming climate. Examples that have been offered to support this argument include alleged agricultural benefits from higher temperatures and decreased wintertime mortality. But these arguments are legally and factually dubious, and miss the forest for the trees.

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[240] *Id.* at 13 tbl.1 (showing 5th-95th probability range of distributions in the chosen Roe & Baker model from 1.72°C from a doubling of atmospheric greenhouse gas concentrations to 7.14°C(.

[241] *Id.* at 15–17 & tbl.2.

[242] *Id.* at 28; *see also* IWG, 2021 TSD, *supra* note 5, at 26–27 (providing additional detail).

[243] IWG, 2010 TSD, *supra* note 95, at 26 tbl.3.

[244] *See, e.g.*, Alexander Golub et al., *Uncertainty in Integrated Assessment Models of Climate Change: Alternative Analytical Approaches*, 19 ENV'T MODELING & ASSESSMENT 99 (2014) ("The most important general policy implication from the literature is that despite a wide variety of analytical approaches addressing different types of climate change uncertainty, none of those studies supports the argument that no action against climate change should be taken until uncertainty is resolved. On the contrary, uncertainty despite its resolution in the future is often found to favor a stricter policy.").

[245] The undersigned organizations have filed comments in numerous regulatory proceedings highlighting the various forms of uncertainty that increase the social cost of greenhouse gases, and providing numerous references. *See, e.g.*, Environmental Defense Fund et al., *Improper Valuation of Climate Effects in the Proposed Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS*, Technical App'x: Uncertainty (Dec. 14, 2020), https://policyintegrity.org/documents/Joint_SCC_comments_EPA_revised_CSAPR_Ozone_NAAQS_2020.12.14.pdf.

[246] *See* Howard & Schwartz, *supra* note 98, at 13–25.

[247] *See* IWG, 2016 TSD, *supra* note 220, at 21 (recognizing that "these limitations suggest that the [social cost of greenhouse gases] estimates are likely conservative").

Mere omission of some impacts does not counsel for abandoning the social cost estimates, particularly since independent experts widely agree that those estimates likely undervalue true climate damages because they omit far more negative effects than positive ones. For instance, the Working Group has explained that several of the underlying economic models omit certain major damage categories such as catastrophic damages and certain cross-regional spillover effects.[248] These effects can be massive: One paper finds that the inclusion of tipping points doubles the social cost estimates, [249] with another paper concluding that the effect is even greater and thus the Working Group's existing values "may be significantly underestimating the needs for controlling climate change."[250] The current consensus of experts puts damages for a 3°C increase at roughly 5% to 10% of gross domestic product,[251] which is substantially higher than the damages estimated by the IAMs.[252] And as the Ninth Circuit has explained, the presence of some omitted damages does not provide a legal basis for NHTSA to ignore established methodologies to monetize climate damages, since while "there is a range of [plausible] values, the value of carbon emissions reduction is certainly not zero."[253]

In addition to its legal shortcomings, arguments about the impact of positive externalities are also factually suspect. For instance, while agricultural benefits have become a flashpoint in this debate, the IAMs in fact do account for the potential agricultural benefits of carbon dioxide fertilization from a warming planet.[254] And evidence suggests that, if anything, these models overvalue agricultural benefits from a warming planet—and thus undervalue the social cost of greenhouse gases.[255] One paper, for instance, concludes that estimates of net agricultural impacts produced an undervaluation of the social cost of carbon by more than 50%, explaining that "new damage functions reveal far more adverse agricultural impacts than currently represented" in the IAMs used by the Working Group.[256] And a comprehensive investigation of the impacts of

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[248] IWG, 2010 TSD, *supra* note 95, at 26, 32.

[249] Derek Lemoine & Christian P. Traeger, *Economics of Tipping the Climate Dominoes*. 6 NATURE CLIMATE CHANGE 514 (2016).

[250] Yongyang Cai et al., *Environmental Tipping Points Significantly Affect the Cost-Benefit Assessment of Climate Policies*, 112 PROCS. NAT'L ACADS. SCIS. 4606 (2015).

[251] *See, e.g.*, Peter Howard & Derek Sylvan, Inst. for Pol'y Integrity, *Gauging Economic Consensus on Climate Change* 25 (2021) (reporting mean estimate of 8.5% GPD loss and median estimate of 5% loss, based on elicitation of over 700 climate-policy experts).

[252] IWG, 2010 TSD, *supra* note 95, at 9 fig.1A (showing range of GDP loss below 5% for 3°C temperature increase).

[253] *Ctr. for Biological Diversity*, 38 F.3d at 1200.

[254] *See* Peter Howard, *Omitted Damages: What's Missing from the Social Cost of Carbon* 6 (2014), *available at* https://policyintegrity.org/files/publications/Omitted_Damages_Whats_Missing_From_the_Social_Cost_of_Carbon.pdf. *See also* Inst. for Pol'y Integrity, *A Lower Bound: Why the Social Cost of Carbon Does Not Capture Critical Climate Damages and What That Means for Policymakers* 5 (2019), *available at* https://policyintegrity.org/files/publications/Lower_Bound_Issue_Brief.pdf; *Climate Impacts Reflected in the SCC Estimates*, Cost of Carbon Project, https://costofcarbon.org/scc-climate-impacts. .

[255] *See, e.g.*, Frances C. Moore et al., *Economic Impacts of Climate Change on Agriculture: A Comparison of Process-Based and Statistical Yield Models*, 12 ENV'T RES. LTRS., 65008 ("[W]e find little evidence for differences in the yield response to warming. The magnitude of CO_2 fertilization is instead a much larger source of uncertainty. Based on this set of impact results, we find a very limited potential for on-farm adaptation to reduce yield impacts.").

[256] Frances C. Moore et al., *New Science of Climate Change Impacts on Agriculture Implies Higher Social Cost of Carbon*, 8 NATURE COMMUNS. 1607 (2017).

climate change on agriculture has rejected the hypothesis "that agricultural damages over the next century will be minimal and indeed that a few degrees Celsius of global warming would be beneficial for world agriculture," concluding that climate change "will have at least a modest negative impact on global agriculture in the aggregate."[257]

Other arguments focusing on omitted positive impacts are equally misguided. For example, while some critics of the Working Group's methodology misleadingly point out that one of the models, DICE, focuses on increased heat-related mortality and does not account for reductions in wintertime mortality, consideration of the many damages omitted from the IAMs (such as particulate matter from wildfires, deaths from flooding, Lyme and other tick-based diseases), including certain mortality effects, consistently point toward a higher social cost value.[258] One recent study, in fact, concludes that the IAMs, on net, undervalue mortality from climate change.[259] Focusing on the omission of reductions in wintertime mortality thus misses the forest for the trees, and does not supply a basis to disregard the Working Group's valuations.

3. *The Working Group Did Not Overstate the Pace of Climate Change*

Critics further allege that the chosen Equilibrium Climate Sensitivity ("ECS") distribution—that is, the amount of warming that is expected to result from a doubling of the atmospheric carbon dioxide concentration—is outdated and fails to account for recent evidence showing that sensitivity to be lower than previously believed. But these arguments rely on cherry-picked data and ignore the scientific consensus.

In 2016, the National Academies of Sciences dedicated an entire report to whether the Working Group should update the social cost metrics to reflect more recent science on the ECS. The National Academies decided that such an update was unnecessary, "recommend[ing] against a near-term change in the distributional form of the ECS" and explaining that any reasonable revisions on this front would "have a minimal impact on estimates of the [social cost of greenhouse gases]."[260]

On top of the National Academies' rejection of this argument, there is little support for the claim that the Working Group overstated the pace of climate change. The most recent estimate from the Intergovernmental Panel on Climate Change ("IPCC")—which reflects consensus estimates from the worldwide scientific community—projects an ECS range from 2.5°C to 4°C, with 3°C as a "best estimate."[261] This is consistent with the range applied by the Working Group—based off of Roe & Baker—which uses 3°C as its median and 3.5 °C as its

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[257] WILLIAM R. CLINE, GLOBAL WARMING AND AGRICULTURE: IMPACT ESTIMATES BY COUNTRY 1–2 (2007).

[258] *See, e.g.,* Howard, *supra* note 254. *See also* IWG, 2016 TSD, *supra* note 220, at 21.

[259] *See* Tamma A. Carleton et al., *Valuing the Global Mortality Consequences of Climate Change Accounting for Adaptation Costs and Benefits* (U. Chicago, Becker Friedman Institute for Economics Working Paper No. 2018-51) (Jul. 31, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3224365 (finding that new empirical estimates suggest that the increase in morality risk from climate change is valued at approximately 3.2% of global GDP in 2100).

[260] Nat'l Acad. Scis., Eng'g & Med., *Assessment of Approaches to Updating the Social Cost of Carbon: Phase 1 Report on a Near-Term Update* 34, 46 (2016), *available at* https://perma.cc/TJM6-XE65 [hereinafter "NAS 2016 Report"].

[261] IPCC, *AR6 Synthesis Report* SPM-14 (2021).

mean ECS value.[262] In evaluating the ECS, the Working Group assessed estimates from a wide range of experts and selected consensus values. In fact, as the Working Group acknowledged, some ECS estimate ranges go as high as 10º C, making its selected ECS distribution substantially lower than these high-end estimates and a reasonable middle range.[263]

Critics further argue that the ECS distribution applied by the Working Group inappropriately skews rightward, meaning that its mean ECS value exceeds the median value of 3º C that the IPCC has indicated. But that decision is a feature, not a bug. As the National Academies explained, the IPCC has found that there is a "positively skewed distributional form for [the ECS] parameter" similar to the ECS distribution applied by the Working Group.[264] In other words, the mean ECS value should be higher than the median ECS value, and the Working Group applied an appropriate distribution. Criticisms to the contrary a/re meritless.

4. *The Working Group Applied a Reasonable Range of Emission Baselines*

Critics further argue that the Working Group's valuations are an overestimate because they apply outdated emission scenarios that exaggerate the baseline level of atmospheric greenhouse gas levels. Using a higher baseline level of emissions raises the social cost estimates because the harm from an additional unit of emissions increases with the baseline atmospheric emissions level. However, the Working Group used a reasonable emissions baseline that reflects different possible mitigation scenarios.

While the Working Group assumed a baseline emissions range of 13–118 gigatons of carbon dioxide emitted per year by 2100,[265] recent projections from the Climate Action Tracker indicate that baseline emissions will reach between 14–175 gigatons of carbon dioxide by 2100 under a range of scenarios reflecting different levels of mitigation.[266] Thus, the baselines used by the Working Group potentially understate baseline emissions rather than overvalue them as opponents argue. In fact, several of the Working Group's supposedly "business-as-usual" scenarios are actually more consistent with baseline estimates reflecting policy projections.[267] Accordingly, the criticism that the Working Group overestimated future greenhouse gas concentrations in the atmosphere falls flat.

Moreover, this choice does not particularly affect the social cost valuations. In comparison to the Working Group's central social cost of carbon estimate in 2020 of $51 per ton, the average social cost of carbon under the Working Group's supposed business-as-usual emissions scenarios is $53 per ton and $41 per ton under the emissions scenario that is consistent with sustained and widespread mitigatory action.[268] While relying less on the Working Group's

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[262] IWG, 2010 TSD, *supra* note 95, at 13 tbl.1.

[263] *Id.* at 14 fig.2.

[264] NAS 2016 Report, *supra* note 260, at 25.

[265] IWG, 2010 TSD, *supra* note 95, at 16 tbl.2.

[266] Climate Action Tracker, *Global Emissions Time Series* (Dec. 1, 2020), *available at* https://perma.cc/B4X2-RAWA.

[267] *Compare id.* (projecting 35-48 gigatons of emissions in 2100 under "current policy projections" scenarios and 83-175 gigatons under business-as-usual scenario) *with* IWG, 2010 TSD, *supra* note 95, at 16 tbl.2 (incorporating supposedly business-as-usual scenarios of 42.7 and 60.1 gigatons in 2100).

[268] *See* Peter Howard et al., *Option Value and the Social Cost of Carbon: What Are We Waiting For?* (Inst. for Pol'y Integrity Working Paper No. 2020/1) at 16 tbl.1 (2020), *available at* https://policyintegrity.org/files/publications/Working_paper_06.22.20.pdf.

supposed business-as-usual scenarios would therefore modestly decrease the interim social cost valuations in a vacuum, more holistic updates to the metrics as recommended by the National Academies of Sciences would very likely increase the social cost valuations overall due to the omitted damages discussed above and recent evidence regarding intergenerational discount rates.[269] At best, therefore, this argument makes a mountain out of a molehill.

5. *The Working Group Applied Scientifically-Based Damage Models*

Critics further claim that the IAMs—the damage functions for translating climate impacts into economic losses—are flawed and arbitrary. In reality, however, the damage functions are based on reasonable assumptions made by a range of experts.[270] They have also withstood scientific scrutiny, and while opponents of climate reform frequently highlight criticism of the damage functions by a notable economist, they take this criticism out of context.

The Working Group selected three models of climate damages that were the most widely used and cited models in the economics literature linking physical climate impacts to economic damages[271]: the DICE, FUND, and PAGE models.[272] These models were developed by outside experts, published in peer-reviewed economic literature,[273] and were the product of extensive scholarship and expertise. One of the models, DICE, was developed by William Nordhaus, an economics professor and former provost of Yale university who won a Nobel Memorial Prize in Economic Sciences for developing the model. And PAGE developer, Chris Hope, was a lead author and review editor for the Third and Fourth Assessment Reports of the IPCC, which shared the Nobel Peace Prize in 2007 with former U.S. Vice President Al Gore.[274]

The three models reflect a wide diversity of methodological assumptions about a range of key parameters and inputs.[275] This reflects, in part, different judgments about the experts who developed the models. For instance, Richard Tol, who developed the FUND model, has stated that "[t]he impact of climate change is relatively small," and dismissed much of the research behind climate change as "scaremongering" rather than "sound science."[276] Unsurprisingly, his model produces the lowest damage estimates of the three models incorporated by the Working Group.[277] William Nordhaus, who developed the DICE model, is widely credited with popularizing the goal that global temperatures increase no more than 2° Celsius (or 3.6°

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[269] *See* IWG, 2021 TSD, *supra* note 5, at 4 (Working Group acknowledging that its current social cost valuations "likely underestimate societal damages from [greenhouse gas] emissions").

[270] Response to Comments, *supra* note 112, at 8 ("While the development of the DICE, FUND and PAGE models necessarily involved assumptions and judgments on the part of the modelers, the damage functions are not simply arbitrary representations of the modelers' opinions about climate damages.").

[271] Response to Comments, *supra* note 112, at 4 (stating the models "remain the most widely cited"), 8 (quoting the National Academies of Sciences for recognizing that the chosen models represent "the most widely used impact assessment models" available).

[272] IWG, 2010 TSD, *supra* note 95, at 5.

[273] Response to Comments, *supra* note *supra* note 112, at 4.

[274] *See* Chris Hope faculty bio page, University of Cambridge Judge Business School, https://www.jbs.cam.ac.uk/faculty-research/research-teaching-staff/chris-hope/ (last visited Sept. 24, 2021).

[275] *See* 2 IWG, 010 TSD, *supra* note 95, at 6 (discussing how "[t]he parameters and assumptions embedded in the three models vary widely").

[276] Richard S.J. Tol, *Why Worry About Climate Change?*, ESRI Research Bulletin 2009/1/1, at 3, 5 (2009).

[277] *See* IWG, 2010 TSD, *supra* note 95, at 50 tbl.A5 (reporting that FUND model has the lowest mean estimate of the three models at all discount rates, including a negative social cost of carbon estimate at a 5% discount rate).

Fahrenheit) below pre-industrial levels[278]—a goal now considered conservative by the global community.[279] His model produces higher damage estimates that are close to the Working Group's average damage valuations.[280]

Opponents of climate mitigation policy frequently point to criticisms from Robert S. Pindyck, a noted climate economist who has been critical of the Working Group's choice of damage functions. But as Professor Pindyck has himself stated, his "writings continue to be taken out of context by some to unfairly attack the Interagency Working Group's methodology and its interim estimates."[281] While Professor Pindyck has questioned the shape of the models' damage functions,[282] he has acknowledged that the damage functions reflect "common beliefs" about the effects of two or three degrees of warming.

And Pindyck states that uncertainty about the social cost estimates, including the damage functions, "does not imply that [their] value should be set to zero until the uncertainty is resolved."[283] In fact, he actually advocates for an even higher social cost value than that produced by the Working Group,[284] and has emphatically declared that "the federal government should continue to use the [Working Group's] interim estimates . . . as lower bound estimates."[285] In other words, the best critic of the Working Group's methodology that opponents could find *supports* continued use of the Working Group's estimates and considers them to be conservative underestimates of the true cost to society of greenhouse gas emissions.

V. NHTSA Should Apply the Social Cost Values in Its Environmental Impact Statement

Although NHTSA makes extensive use of the social cost of greenhouse gas values in its RIA and TSD, it hardly mentions these values in its draft Environmental Impact Statement for

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[278] The 2° C Limit on Global Warming, The Economist (Dec. 6, 2015), https://www.economist.com/the-economist-explains/2015/12/06/the-2degc-limit-on-global-warming.

[279] For instance, the Paris Agreement calls for governments to "hold[] the increase in the global average temperature to well below 2°C above pre-industrial levels and pursu[e] efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change." Paris Agreement to the United Nations Framework Convention on Climate Change, Art. 2(1)(a), Dec. 12, 2015, T.I.A.S. No. 16-1104.

[280] *Compare* IWG, 2010 TSD, *supra* note 95, at 50 tbl.A5 *with id.* at 1.

[281] Robert S. Pindyck, Comments on "Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990" at 1 (June 15, 2021), *available at* https://www.regulations.gov/comment/OMB-2021-0006-0012.

[282] Robert S. Pindyck, *Climate Change Policy: What do the Models Tell Us? (*N*at'l Bureau of Econ. Research, Working Paper No. 19244)* 16 (2013), *available at* https://perma.cc/G25M-MA7W.

[283] Robert S. Pindyck, Comments to Ms. Catherine Cook, Bureau of Land Management, on Proposed Rule and Regulatory Impact Analysis on Delay and Suspension of Certain Requirements for Waste Prevention and Resource Conservation 3 (Nov. 6, 2017), *available at* https://perma.cc/8MY5-58P5; *see also* Pindyck, *supra* note 282, at 16 (My criticism of IAMs should not be taken to imply that because we know so little, nothing should be done about climate change right now, and instead we should wait until we learn more. Quite the contrary.").

[284] Pindyck, *supra* note 281, at 1 ("My work instead strongly suggests that the estimates of the social cost of greenhouse gases should be higher than the February 2021 interim estimates[.]") In 2019, Pindyck's own estimate of the average social cost of carbon dioxide was between $80 to $100, with plausible values going up to $200. Robert S. Pindyck, *The Social Cost of Carbon Revisited*, 94 J. ENV'T ECON. & MGMT. 140, 140, 154–55 (2019). This is far higher than the Working Group's current central estimate of $51.

[285] Pindyck, *supra* note 281, at 1.

the Proposed Rule ("EIS"). The EIS directs readers to "consult the preamble to the proposed rule" for monetized estimates of climate damages,[286] and instead discusses the rule's climate benefits by modeling its physical impacts on surface temperature, sea-level rise, and ocean acidification,[287] and comparing the emission reductions from the rule to baselines such as U.S. emission targets and annual emissions from the vehicle sector.[288] NHTSA should supplement its analysis by incorporating the monetized climate-benefit estimates from the RIA into the EIS.

There is extensive agency precedent for using the social cost of greenhouse gases in environmental analyses conducted under NEPA. In addition to NHTSA's own use of the social cost of greenhouse gases in its 2012 environmental impact statement for the fuel-economy standards it was then promulgating,[289] numerous agencies have applied the social cost of greenhouse gases under NEPA including the Department of the Interior, U.S. Army Corps of Engineers, and U.S. Postal Service.[290] In Executive Order 13,990, President Biden recognized that the Working Group's social cost estimates are not only for regulatory impact analysis but may also be useful broadly in "decision-making, budgeting, and procurement."[291] Numerous federal courts have also endorsed agency usage of the social cost estimates under NEPA, holding that analyses omitting those valuations are deficient.[292] Earlier this year, for instance, the U.S. Court of Appeals for the District of Columbia Circuit held that an environmental impact statement conducted by the Federal Energy Regulatory Commission was insufficient after the Commission rejected the social cost of greenhouse gases methodology.[293] As the Court explained, applicable regulations on conducting NEPA analyses from the Council on Environmental Quality may in fact "obligate[]" agencies "to use the social cost of carbon protocol" in their environmental impact statements.[294]

Without the additional context of the social cost values, moreover, the methodologies that NHTSA applies in the EIS may inadvertently trivialize the Proposed Rule's climate impacts. For instance, presenting a project's physical impacts without using the social cost of greenhouse gases could misleadingly make an action's climate impacts appear small. Because climate change is a global phenomenon with individually subtle yet collectively colossal impacts, a

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[286] NHTSA, Draft Supplemental Environmental Impact Statement, Corporate Average Fuel Economy Standards: Model Years 2024–2026 at 5-28 (2021) ["Proposed Rule EIS"].

[287] *Id.* at 5-28 to 5-30.

[288] *Id.* at 5-38 to 5-41.

[289] NHTSA, Final Environmental Impact Statement, Corporate Average Fuel Economy Standards: Passenger Cars and Light Trucks Model Years 2017–2025 (2012) [hereinafter "2012 EIS"].

[290] For these and other examples of agency usage of the Working Group's social cost estimates under NEPA, see Federal Agencies' Use of the Social Costs of Greenhouse Gases in NEPA Analysis, THE COST OF CARBON POLLUTION, https://costofcarbon.org/scc-use-under-nepa.

[291] Exec. Order 13,990 § 5(b); *see also* IWG, 2021 TSD, *supra* note 5, at 12 nn.12–14 (highlighting application of Working Group's estimates under NEPA, as well as in federal procurement and grant-making).

[292] *Ctr. for Biological Diversity*, 538 F.3d at 1216–17 (rejecting analysis under NEPA when agency "quantifie[d] the expected amount of [carbon dioxide] emitted" but failed to "evaluate the incremental impact that these emissions will have on climate change or on the environment more generally," noting that this approach impermissibly failed to "discuss the *actual* environmental effects resulting from those emissions" or "provide the necessary contextual information about the cumulative and incremental environmental impacts" that NEPA requires); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1190 (D. Colo. 2014); *Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1096–99 (D. Mont. 2017).

[293] *Vecinos para el Bienestar de la Comunidad Costera v. Fed. Energy Regul. Comm'n*, 6 F.4th 1321, 1327–31 (D.C. Cir. 2021).

[294] *Id.* at 1329.

single project or regulation may not affect global temperatures or sea levels by more than a seemingly very small amount. Yet even seemingly small geophysical effects can have massive reverberations on a global scale. With the Proposed Rule, for instance, NHTSA reports that the regulation will reduce global temperatures by approximately 0.003°C.[295] While this may seem like a trivial impact, it actually translates into more than $30 billion in total climate benefit, as NHTSA's application of the social cost of greenhouse gases in its RIA reveals.[296]

NHTSA's reliance on percentage comparisons can have a similar minimizing effect, as percentage comparisons to geographic climate targets or inventories frequently make massive amounts of emissions from an individual project or action appear relatively small when misleadingly compared to a far larger baseline denominator. As one federal court recently recognized, "[t]he global nature of climate change and greenhouse-gas emissions means that any single … project likely will make up a negligible percent of state and nation-wide greenhouse gas emissions."[297] Yet once again, as the social cost metrics reveals, the climate benefits of the Proposed Rule are anything but negligible.

While the techniques that NHTSA employs in the EIS to assess climate benefits do provide some helpful information, the social cost of greenhouse gases is still highly useful to assess climate impacts in a manner that is salient and captures the proposal's actual impacts on human health and welfare. Accordingly, NHTSA should supplement its existing NEPA analysis by incorporating its monetized climate-benefit assessments into the EIS.

CONCLUSION

For the foregoing reasons, it is appropriate for NHTSA to continue to rely on the Working Group's valuations of the social cost of greenhouse gases in the Proposed Rule as conservative estimates. To bolster the legal justification for that reliance as it finalizes its regulation, NHTSA should provide additional explanation for its methodological choices and conduct additional sensitivity analysis around different social cost values.

Sincerely,

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[295] Proposed Rule EIS, *supra* note 286, at 5-45.
[296] RIA at 174 fig. 6-29.
[297] *WildEarth Guardians v. Bureau of Land Mgmt*., 457 F. Supp. 3d 880, 894 (D. Mont. 2020).

*No part of this document purports to represent the views, if any, of New York University School of Law.

Attachments:

1) Council of Econ. Advisers, *Discounting for Public Policy: Theory and Recent Evidence on the Merits of Updating the Discount Rate* (CEA Issue Brief, 2017)
2) Moritz Drupp, et al., *Discounting Disentangled: An Expert Survey on the Determinants of the Long-Term Social Discount Rate* (London School of Economics and Political Science Working Paper, May 2015)
3) Moritz Drupp et al., Comments on Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990 (June 20, 2021)
4) Trevor Houser & Kate Larsen, *Calculating the Climate Reciprocity Ratio for the U.S.*, Rhodium Group (Jan. 21, 2021)
5) Peter Howard, *Omitted Damages: What's Missing from the Social Cost of Carbon,* COST OF CARBON PROJECT REPORT (2014)
6) Peter Howard & Jason A. Schwartz, *About Time: Recalibrating the Discount Rate for the Social Cost of Greenhouse Gases* (2021)
7) Peter Howard & Jason Schwartz, *Foreign Action, Domestic Windfall* (2015)
8) Peter Howard & Jason Schwartz, *Think Global: International Reciprocity as Justification for a Global Social Cost of Carbon*, 42 COLUMBIA J. ENV'T. L. 203 (2017)
9) Peter Howard & Derek Sylvan, *Gauging Economic Consensus on Climate Change* (2021)
10) Interagency Working Group on the Social Cost of Greenhouse Gases, Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide – Interim Estimates Under Executive Order 13,990 (2021)
11) Matthew J. Kotchen, *Which Social Cost of Carbon? A Theoretical Perspective*, 5 J. ASSOC. ENV'T. & RES. ECON. 673 (2017)
12) Qingran Li & William A. Pizer, *Use of the Consumption Discount Rate for Public Policy over the Distant Future*, 107 J. ENV'T. ECON. & MGMT. 102,428 (2021)
13) National Academies of Sciences, *Assessment of Approaches to Updating the Social Cost of Carbon: Phase 1 Report on a Near-Term Update* (2016)
14) N.Y. Dep't of Env't. Conserv., Establishing a Value of Carbon: Guidelines for Use by State Agencies (2020)
15) Iliana Paul & Max Sarinsky, *Playing with Fire: Responding to Criticism of the Social Cost of Greenhouse Gases* (2021)
16) Robert S. Pindyck, Comments on "Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990" (June 15, 2021)
17) Richard L. Revesz et al., *Global Warming: Improve Economic Models of Climate Change*, 508 NATURE 173–175 (2014)
18) Richard L. Revesz & Matthew R. Shahabian, *Climate Change and Future Generations*, 84 S. CAL. L. REV. 1097 (2011)
19) Jason A. Schwartz, *Strategically Estimating Climate Pollution Costs in a Global Environment* (2021)